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MEMORANDUM July 13, 1970: Issues for manuscript review of Chapters 2,6,7,9, 21,25,28-31, 36-39.

MEMORANDUM August 28, 1970: Issues for manuscript review of Chapters 36-39, 3,8,12,15,16,19,20,22,32 C.C.P. 14,42,43,46-48.

*** Eight reels of tapes of meetings not listed above may be available, stored in the basement of the Law School.
*** Criminal Justice Library also has a copy of the above published minutes.

Outline: Review of Progress

Review of Progress

1. First Meeting, Oct. 23, 1965.

   a. Decided to undertake thorough revision using Model Penal Code as a basic guide.

   b. Set up organizational plan, along lines of other states used.

2. Reporters. 1st Meeting, Nov. 12, 1965.

   a. Assigned specific areas.

   b. Requested to suggest Advisory Committee appointments.

3. Advisory Committees.

   a. Appointments in January 1966.

   b. Most filled. Reporters will call upon their committee as they complete research and need initial policy suggestions.

4. Law Enforcement Advisory Committee.

   a. Will meet with the full committee.

   b. Need for the views of this group.

5. Director.

   a. We have obtained a substantial collection of materials from West Publishing Co. Sets of Texas Penal Codes for each reporter, and copies of codes of other states. Also, a Statute plant, to be used in making specific assignments of articles, and for the actual drafting.

   b. Have compiled suggestions received, and are continuing program of solicitation through the Texas Bar Journal.

6. Legislative Council.

   a. We have frequently consulted for advise on the technical problems of a complete revision. Example: filing system for assignment and disposition of each specific article.

   b. Council has provided valuable services in the way of secretarial assistance and some printing. They typed and printed our Texas Bibliography.

7. Research Assistance.

   a. James Brady. 1964 graduate of Law School. Was on Law Review. Began in February. Has compiled Texas Bibliography, researched the area of Libel and Slander, and is now assisting Fred Cohen on the General Provisions section. Works 1/2 time on salary of $225.00 per month.

   b. Student assistance. Each reporter is authorized to obtain a student to assist him for ten hours per week. Newell Blakely of Houston is only reporter who has used these assistants, but others are planning to do so in the immediate future.

II. Plans for Future

1. Reporters - Release from teaching duties for work during summer. Have already committed $3,600 to this for Fred Cohen and Joel Finer.

2. Aiming toward proposed drafts and meetings commencing in October.

3. Director will soon have compilation of assignment of each article to the appropriate location in the Model Penal Code organization.

III. Financial Situation

1. Bar Assistance: Assigned $1,500 to this project, then cut it to $1,000 upon the receipt of money from private foundations. Have requested at least $2,000 for the coming year.

2. Private Foundations. Have received $15,000, and need more help in this area.

November 8, 1966

MINUTES
OF THE TEXAS STATE BAR COMMITTEE
ON REVISION OF THE PENAL CODE
October 14, 1966

Present: Committee Members Dean Page Keeton, Judge John M. Barron, Judge Lloyd Davidson, Mr. Newton Gresham, Dr. Abner McCall, Judge Truman Roberts, Judge T. Gilbert Sharpe, Mr. Franklin L. Smith, Judge K. K. Woodley; Law Enforcement Advisory Committee Members Mr. Lewis Berry, Mr. M. W. Stevenson for Mr. Charles Batchelor, Mr. Beverly Laws for Mr. R. A. (Bob) Miles; Reporters Messrs. Fred Cohen, Joel Finer, Newell Blakely, Saul Baernstein, Judge Archie Brown and Judge A. A. Semaan, Albert Alschuler, and Paul Rothstein.

Others Present: Mr. James E. Barlow with Judge Brown and Semaan, Mrs. Ione Stumberg, research assistant, William Reid, project director and James B. Brady, research assistant.

The Texas State Bar Committee on Revision of the Penal Code met at 10:00 a.m. on Friday October 14, 1966, in room 143, University of Texas School of Law in Austin, Texas. Dean Page Keeton, chairman of the Committee presided.

The Committee first considered the report of Professor Fred Cohen of the University of Texas Law School, the reporter for the General Principles section.

Dean Keeton opened the meeting and noted Mr. Cohen's suggestion at page four of his report that a feasibility study be conducted to determine the cost of revising our probation system, improving our parole system, and the operation of strategically placed half-way houses, and at the same time determine what the cost would be if laws were adopted to keep more men in prison for longer terms. Dean Keeton reported to the Committee that The Texas Council on Administration of Justice, which is the Texas arm of the National Council on Crime and Delinquency, already have a proposal underway for a demonstration research project on adult probation. The Council intends to conduct the study in Travis County and surrounding rural counties. This study is already underway. Dean Keeton suggested that this Committee should urge that group to continue with this study, and then the Committee can use the information obtained from this project.

Mr. Cohen inquired what the Committee felt about the State contributing to the administration and financing of probation.

Following discussion of this point the Committee concluded that state-wide administration and financing of probation is needed.

The Committee also was in general agreement that a study of costs of increasing penalties or increasing probation facilities is desirable.

Judge Davidson expressed concern over departing from the stated purpose of the Committee, to revise the Penal Code. He believes that the Code of Criminal Procedure should be left alone.

Dean Keeton and others stated that overlaps with the Code of Criminal Procedure will be inevitable when we consider the sentencing structure, and that it will be necessary to consider probation.

The Committee agreed that the problem of adult probation should be taken into account in connection with the revision, and directed the reporter to proceed on the notion that the matter should be given consideration. Dean Keeton recommended that Mr. Cohen try to have some sort of report on sentencing by the December meeting.

Mr. Cohen mentioned another area of overlap that will be difficult to avoid, that of insanity procedure. He argued that with the present CCP approach the implementation kills the substance. He also noted a conflict on capacity, as to children, and that this will require a consideration of the Juvenile Code. Mr. Cohen stated that conflicts with these two bodies of law will be unavoidable.

Dean Keeton posed the issue of whether or not the Committee desires to take the general approach of the Model Penal Code regarding classification of crimes, such as felonies of the first, second, and third degree, rather than assigning a separate penalty to each offense. (See p. 5, Cohen report). After discussion the Committee agreed that a general classification system should be used. Dean Keeton requested Mr. Cohen to present a proposed classification system at the January meeting.

Mr. Cohen asked the Committee whether they desire a general attempt statute and a general solicitation statute. The Committee agreed that these are needed. Dean Keeton said that the Committee would proceed on the assumption that a general attempt and inchoate crime section similar to that in the Model Penal Code is needed.

Mr. Cohen noted his request at page 2 of his report that certain reassignments be made. He said that he would prefer to retain the sentencing provisions, but that the inchoate crimes section should be reassigned as the volume of provisions in the General Section would not permit him to give adequate consideration to this area. The Committee agreed that the change in assignment is necessary and Dean Keeton said that he would reassign the inchoate crimes section to another reporter.

Mr. Cohen noted that he expects to present a proposal on insanity at the next meeting. Judge Brown stated that there is a serious problem with our present law in that it does not take a mental defect into consideration, but only disease. Judge Roberts expressed the view that much of the problem revolves around the psychiatrists and that we should not turn the decision over to them.

Mr. Cohen asked if the Committee objected to a study of the need for change in procedure for determining responsibility. He stated that this would be necessary for any serious consideration of responsibility, and that CCP art. 46.02 is one of the worst pieces of legislation he had ever seen. Judge A. A. Semaan noted that a project is underway to draft a new procedure for presentation to the coming legislature. Judge John Onion is presently working on this draft. Dean Keeton requested Judge Semaan to please keep him informed on the progress of this project.

Mr. Finer noted that a serious problem in Texas is the absence of a procedure for commitment of dangerous persons who are found not guilty because they are insane.

Mr. Cohen presented his proposed Section 1.01, (p. 9, Cohen report).
<u>Short Title</u>. This Act shall be known and may be cited as the "Penal Code."

The Committee approved the section without discussion.

Mr. Cohen presented his proposed section 1.02 General Purposes. (P. 10, Cohen report.)

Sec. 1.02. General Purposes.

The general purposes of the provisions of this Code are:

1. To proscribe conduct and prevent situations which unjustifiably and inexcusably cause or threaten harm to individual or public interests which are deemed most capable of protection by the existence and the application of the penal law;

2. To consider [include?] actual and potential danger to community values and the degree and extent of harm in the definition of conduct to be proscribed;

3. To give fair warning of the nature of the conduct proscribed and of the disposition (sentence] authorized upon conviction;

4. To define adequately the act or omission and the accompanying mental state which constitute each offense;

5. To differentiate on reasonable grounds between serious and minor offenses and authorize dispositions [sentences] that are proportionate to the seriousness of offenses and flexible enough to permit recognition of differences in rehabilitation possibilities among individual offenders; and

6. To define offenses and create dispositional alternatives [sentences] that encourage voluntary compliance, the enlargement of perspectives and skills through education and discipline, the rehabilitation of personality or character and eventual reintegration of the offender into the community, and the prevention of socially destructive behavior through extended custody where the person is proved to meet the criteria at [the reference is to a sentencing section which may parallel M.P.C. § 7.03, Criteria for Sentence of Extended Term of Imprisonment, or The Model Sentencing Act § 5, Dangerous Offenders].

He stated that this section is designed to provide a general framework for the rest of the Code and should be a guide for interpretation and perhaps an expression of what you hope to accomplish. Mr. Cohen said that the section is a distillation of several codes, the MPC being most influential.

The Committee and reporters discussed the section at length. Judge Barron proposed that the section be made considerably shorter, and that it could be stated simply as "to suppress, reform, punish, differentiate and define." Judges Davidson and Roberts questioned the need for change of our present statement of purpose. Mr. Finer noted the omission of a purpose expressing the preference for freedom and suggested the following "to respect individual freedom of action in the area of personal morality so far as compatible with the public welfare." He stated that this would be a recognition that this is a factor to be taken into account in interpreting legislation. Mr. Finer further noted that there is no reference to personal culpability. We have deterrence, harm and rehabilitation, but factors such as extenuating or aggrevating circumstances are not taken into account.

The Committee agreed that the section needed further consideration, and generally agreed that it should be made more succinct. Dean Keeton requested that the reporters each draft a general purposes section to express their views on the subject, and invited the members of the Committee to submit suggestions.

Mr. Cohen presented the following proposal (See p. 15, Cohen report):

> Sec. 2.01 - The general rule that a penal statute is to be strictly construed does not apply to this Code. The provisions herein shall be interpreted to further the general purposes stated in [chapter 1] and the special purposes of the particular provision involved. The discretionary powers conferred by the Code shall be exercised in accordance with the criteria stated in the Code.

Mr. Cohen stated that the portion abolishing strict construction is a statement of existing law. The purpose of the part referring to the discretionary power of judges is to implement the general purposes. The Committee discussed these provisions at length.

Mr. Finer presented an alternative proposal to emphasize fair warning as a purpose of this section:

> "The provisions of the Code shall be construed according to their fair import and ordinary meaning. Where the language is susceptible of different constructions it shall be construed so as to carry out the special purposes of the provision involved, and the general purposes of the Code, as enumerated in Section 1.02. Provided, however, that interpretations based on determinations of legislative purpose should remain consistent with the requirement that potential offenders be given fair warning of proscribed conduct and shall respect the principle precluding judicial law-making in our representative government."

Mr. Cohen stated that he thought this alternative would be acceptable to him, as it states the provision in a more positive way.

Dean Keeton suggested that the construction section should include the notion that in the interpretation of the Code that strict construction shall be controlling when necessary to give fair warning to the accused. The Committee expressed general agreement with this suggestion.

Judge Davidson questioned allowing an appeal on the question of whether the trial court exercised his discretion in accordance with the general principles. He did not think this should be allowed.

Dean Keeton explained that this provision was written with respect to sentencing and suggested that if we have the provision at all that it should include the notion that the discretionary powers conferred by this Code regarding the sentencing provisions shall be exercised in accordance with the general purposes.

Mr. Cohen explained that his suggestion is an attempt to bring some uniformity of principle to the area of sentencing and further depends on provisions that would set out the standards for the granting of probation. If this statement is taken as purely hortatory, it is just a feeble effort to obtain some uniformity in sentencing. Mr. Cohen explained that this proposal anticipates a recommendation for the abolishment of jury sentencing.

Mr. Cohen posed the question: Should a judge articulate the rationale of his sentencing decision? Mr. Gresham and others said they thought that such a requirement might be

helpful. Dr. McCall thought that it would be of little help because a judge could easily give some reasons for whatever he did without expressing his true reasons.

Mr. Baernstein expressed the view that sentencing criteria should be elaborated regardless of appellate review, in order to assist the trial judge in carrying out his duty in sentencing.

Dean Keeton suggested that this problem is almost entirely concerned with sentencing and that the question cannot be dealt with at this point.

Mr. Cohen presented his proposals for Chapter 3, General Principles of Liability. (See p. 19, Cohen report.)

Sec. 3.01. Voluntary Act or Omission.

A person is not guilty of an offense unless his liability is based on conduct* which includes a voluntary act or omission to perform an act of which he is physically capable.

* Conduct will be defined in a general definition section as an act or omission and its accompanying mental state.

The Committee adopted this proposed section 3.01 without discussion.

Sec. 3.02. Voluntary Act: Possession as an Act.

(a) A voluntary act is a bodily movement performed consciously as a result of effort or determination.
(b) Possession is a voluntary act if the possessor knowingly procured or received the thing possessed, or was aware of his control thereof for a sufficient time to have been able to terminate his control.

The Committee discussed the provision, Mr. Cohen explained that he preferred to leave out the examples given in the MPC, and the Committee agreed to accept section 3.02 as presented.

12:15 p.m the Committee adjourned for lunch.

1:30 p.m. the meeting was called to order by Chairman Keeton.

Mr. Cohen not being present, Dean Keeton presented the following portion of Mr. Cohen's report:

Sec. 3.03. Liability for Omissions.

A person is not guilty of an offense if his liability is based solely on an omission unless the law defining the offense expressly so provides, or a duty to perform the act is imposed by some other law.

Dean Keeton suggested that a period could be placed after the word "provides" or perhaps simply state "or a duty to perform the act is imposed by some other law in This Code." This would prevent criminal liability where the duty is only imposed to assign a civil liability.

Mr. Finer stated that the section might not go far enough.

Dean Keeton recommended that the decision on this section be postponed and that each reporter concern himself with the specific duties within his own area and clearly specify crimes of omission where necessary.

Dean Keeton referred to Mr. Cohen's proposals at page 20 and 21 of the report concerning culpable mental states. He explained that the MPC uses four terms to describe the degrees of culpability: purposely, knowingly, recklessly and negligently. Mr. Cohen departed from the MPC by substituting "intentionally" for "purposely," as the courts are more familiar with the former term. Dean Keeton expressed his approval of the provisions, and pointed out that it would be a great simplification of Texas law which uses about sixty-seven different terms to describe the requisite mental state. (See appendix, Cohen report.)

The Committee discussed the proposal generally and was in general agreement on this simplification. The specific proposals for sections 3.04-.07 were not individually discussed or adopted but the Committee agreed upon this approach generally.

The chairman recognized Professor Newell Blakely of the University of Houston College of Law, reporter for the area of Offenses Against Property, to present his report.

Mr. Blakely presented the following section for discussion: (See page 36, Blakely report).

> Sec. 220.1(1) Arson. A person is guilty of arson, a felony of the second degree, if he starts a fire or causes an explosion with the purpose of:
>
> (a) destroying or damaging a building or occupied structure of another; or
>
> (b) destroying or damaging any property, whether his own or another's, to collect insurance for such loss.

Mr. Blakely explained that the underlying rationale for the offense of arson is that a person who burns property is threatening physical harm to another. While the term "house" could be used, it is not inclusive enough. It is now defined as a building with walls that is covered. Mr. Blakely proposed that the word "building" be used as a more inclusive term, and that the concept of "occupied structure" be added. (See page 37 for definition, Blakely report.)

The Committee agreed that the use of the more inclusive term is preferable.

Dean Keeton proposed that the mental element be expanded to include "knowingly." The Committee agreed that the wording should be changed to include "knowingly."

Dean Keeton questioned the need for the word "damaging" in Sec. 220.1(1)(a). Dr. McCall recommended that "damaging" be left in, in order to cover cases in which a person starts a fire to obtain sexual excitement but calls the fire department to put it out. It would be difficult to prove that he intended to destroy the building.

The Committee appeared to be in agreement with Dr. McCall's position and therefore left the provision as written by Mr. Blakely.

Mr. Berry raised the question of whether arson would include the burning of automobiles, as it does under a recent statute. Mr. Blakely said that under the proposed draft that it would not be arson unless the vehicle were adapted for overnight accommodation of persons. Mr. Blakely emphasized the rationale of arson being an offense which threatens harm to the person, and that destruction of an automobile would be covered under a general property destruction statute to be drafted at a later date.

Judge Brown pointed out that the reporter should be careful to avoid inconsistency between theft and destruction of property. If a person steals a car of a value of $50 it would be a felony, and the destruction of this same property by burning should be similarly dealt with. Judge Brown suggested that a value scale be used when drafting the malicious mischief provisions.

The Committee noted that the theft and consequent destruction of automobiles is a prevelant offense and should be carefully considered.

Judge Davidson questioned whether parts (a) and (b) would constitute two different offenses when a person burns his own house when occupied by another, and whether the State would have to elect between them. Mr. Blakely explained that he would hope that it would be construed as merely different modes of committing the same offense rather than being two separate ones.

Judge Semaan raised the question of whether the provision would cover a tenancy at will or sufferance. Others mentioned cases of a tramp being in the owner's building or a guest being in the home. Mr. Blakely said that he would study these questions further.

Mr. Alschuler asked what "place adopted for overnight accommodation" would cover. Would it cover a campsite in the forest? He also asked whether a grain field would be covered as a place of business. He suggested that the narrower Illinois approach might be preferable. There was discussion of these questions but the Committee made no decision on these points.

Mr. Blakely expressed the view that the concept of occupied structure is preferable to the Illinois statute because it is broader.

Judge Roberts inquired where grass range fires would be included. Mr. Blakely said they would be under criminal mischief.

Judge Brown made the general point that when anything is burned that there is a danger of harm to those responsible for putting it out. A burning automobile is extremely dangerous in this respect. How can this danger be covered? Mr. Blakely said that this would be included under Sec. 220.1(2), Reckless Burning.

Mr. Baernstein suggested that since the basic problem in arson is danger to life, the section might be worded "occupied place, occupied vehicle or occupied structure."

Dean Keeton objected to Mr. Baernstein's suggestion in that it would require a higher degree of proof than Mr. Blakely intended. If "occupied" is required you would have to prove that the actor knew it was occupied. The probabilities are strong enough that the prosecutor ought not to have to prove that the actor knew it was occupied. The Committee seemed to be in general agreement with Dean Keeton's position.

Mr. Alschuler stated that the comments point out that there can be threats to life other than those covered by building or occupied structure. You stated at page 43 that the alternative approach would be to say that arson would be any burning or exploding where threat of death or bodily injury could reasonably be foreseen. That would include all the principles and the threat that we want to cover. The comment rejects this on the basis that the probability is so high that it would seem pointless to require the prosecution to prove occupancy in every case. That is nonsense. You are not requiring proof of anything but that the threat could reasonably be foreseen.

Dean Keeton disagreed and expressed his opinion that he doesn't think the concept of reasonable foreseeability should be used in this instance. This would not be specific enough for criminal liability.

The Committee seemed to be in agreement with Dean Keeton on this point.

Dr. McCall raised the point that the burning of an oil tank or oil well would endanger far more human life than setting fire to most other structures that are covered. And any willful burning involves danger to human life because firemen will have to try to put it out.

Dean Keeton expressed reservations about going this far with arson. The Committee agreed that the arson provision should not try to cover all willful burning.

Mr. Alschuler raised a question as to the last sentence of 220.1(4), defining "occupied structure." This is intended to cover the hotel or apartment situation but is it concerned with property interest or physical occupancy? Suppose a person just happens to be in the hotel, and is not a paying guest.

Dean Keeton recommended that this definition should be studied to make sure that the important thing is not the property interest but the physical occupancy of the building. As long as another person is in there, it should be covered.

Mr. Blakely presented his proposed draft of section 220.1(2), Reckless Burning or Exploding. A person commits a felony of the third degree if:

(a) he purposely, but without intent to collect insurance, starts a fire or causes an explosion,

(i) on his own building or occupied structure, or
(ii) on his own property other than building or occupied structure, or
(iii) on another's property other than building or occupied structure,

(b) and thereby recklessly,

(i) places another person in danger of death or bodily injury, or
(ii) places a building or occupied structure of another in danger of damage or destruction.

Mr. Franklin Smith questioned the necessity of the phrase "but without intent to collect insurance" in (2)(a). Mr. Blakely conceded that the phrase is not necessary and the Committee agreed that it should be deleted.

Mr. Barlow stated that there is a serious problem in trying to prove an intent to collect insurance, as would be required in 220.1(1)(b). Proof that the property is insured should be sufficient. Mr. Barlow recommended that the section be written to only require that the property be insured in 220.1(1)(b), and that reference to insurance be deleted from 220.1(2)(a).

Dean Keeton questioned the necessity of making a burning a high crime simply because the property is insured and stated that he believes that the intent to collect should be required.

Mr. Blakely noted that this provision for insurance is a concession to present law.

Mr. Alschuler suggested that perhaps a value limitation might be assigned as to this insured property, for as presently written the section would cover the burning of a book worth five dollars if it is insured. He also recommended that the property involved be of the same kind as we are concerned with in Sec. 220.1(1)(a).

Judge Barron agreed that some assignment of value is needed, and suggested it cover arson, reckless burning and malicious mischief.

The Committee discussed whether an assignment of value is necessary, and it was noted that the Reckless Burning provision concerns either danger to the person or danger to a building or occupied structure and therefore concluded that a value assignment is not needed.

The Committee discussed the Reckless Burning session further, compared it with the MPC draft, and decided that the MPC section on Reckless Burning is preferable.

Mr. Blakely presented his proposed draft of Sec. 220.1(3),

> (3) Failure to Control or Report Dangerous Fire. A person who knows that a fire is endangering life or a substantial amount of property of another and fails to take reasonable measures to put out or control the fire, when he can do so without substantial risk to himself, or to give a prompt fire alarm, commits a misdemeanor if:
>
> (a) he knows that he is under an official, contractual, or other legal duty to prevent or combat the fire; or
> (b) the fire was started, albeit lawfully, by him or with his assent, or on property in his custody or control.

Mr. Blakely noted that this was taken verbatim from the MPC.

The Committee discussed the provision and questions were raised as to whether the requirement of knowledge refers to knowledge of the law or the facts; what legal duties or relationships would be covered by this section; whether the section would cover a promise to put out fires that do not amount to a contractual duty; whether the use of the terms "substantial amount of property" and "substantial risk" were too vague.

Dean Keeton recommended that instead of the use of "substantial" that a concept of "recklessness" be adopted. He suggested "a person who knows that a fire is endangering life and recklessly fails to take reasonable measures . . . ."

Mr. Finer raised the point as to whether there might be circumstances where a fire starts accidentally and then the person allows it to continue to burn, thus committing arson by omission.

Judge Barron moved to strike the whole provision and the Committee seemed to be in agreement on this motion unless some of the objections noted could be met.

Mr. Barlow suggested that we should have a general failure to report law that includes arson. The Committee asked Mr. Blakely to consider this. Dean Keeton recommended that this could be included within a provision making it an offense to fail to report any crime.

Mr. Blakely presented his proposed Sec. 220.2 Causing or Risking Catastrophe.

(1) Causing Catastrophe. A person who causes a catastrophe by explosion, fire, flood, avalanche, collapse of building, release of poison gas, radioactive materials, or by any other means with the potential of causing widespread injury or damage,

(a) commits a felony of the first degree if he does so purposely or knowingly and widespread death or bodily injury results,
(b) commits a felony of the second degree if he does so purposely or knowingly and widespread property damage results, or
(c) commits a felony of the third degree if he does so recklessly.

(2) Risking Catastrophe. A person is guilty of a misdemeanor if he purposely, knowingly, or recklessly creates a risk of catastrophe in the employment of explosives, fire or other dangerous means listed in subsection (1).

(3) Failure to Prevent Catastrophe. A person who knowingly or recklessly fails to take reasonable measures to prevent or mitigate a catastrophe commits a misdemeanor if:

(a) he knows that he is under an official, contractual or other legal duty to take such measures; or
(b) he did or assented to the act causing or threatening the catastrophe.

(4) Definition. A catastrophe is a calamity involving widespread injury to person or widespread damage to property or both.

Mr. Blakely explained that this concept comes from the MPC. He reworded the provision about causing a catastrophe upon the suggestion of his advisory committee. The ALI comments on this section said that it is patterned after European legislation.

Dean Keeton raised the question as to whether widespread death or destruction must actually occur or whether it is just intended. Mr. Blakely explained that it is written to require the harm to have occurred.

Judge Brown questioned the use of the term "widespread," and whether it would be sufficiently specific.

Mr. Barlow questioned the necessity of the provisions, and stated that the crimes of murder and negligent homicide should be sufficient to cover this area.

Mr. Rothstein pointed out that the provision would be useful to cover recklessly risking catastrophe, which would not come under an attempt statute.

After further discussion the Committee seemed to be of the opinion that there is no serious need for this provision, and that it should be deleted at least for the time being, but that it should be kept in mind. Dean Keeton stated that he believed that other provisions might adequately cover the area.

BUSINESS MEETING

In a critique of the meeting Dean Keeton said that it had been very profitable. He said that he believed that future meetings could be more successful if a meeting of reporters is held prior to the meetings to consider the proposals to be presented. He said that he planned to call such meetings in the future so the reporter making the presentation would have the benefit of the other reporters comments before the meeting with the full Committee.

Dean Keeton discussed the financial report with the Committee. [The financial report is enclosed.] He reported that in fiscal year 1965 the Bar set aside $1,500 for the Committee, and that a grant of $5,000 was made directly to the Bar by The Houston Endowment, Inc. for the penal code project. At the end of the fiscal year the balance in our account was $1,918.33. This amount was withdrawn at the close of the year and the Bar only appropriated $2,000 for fiscal year 1966.

Dean Keeton stated that he planned to meet with the State Bar Board of Directors the next day, Saturday, October 15, 1966, to discuss the possibility of increased financial support of the Committee's activities, and to at least recover the amount withdrawn at the close of last year.

[Note: As a result of this meeting the State Bar Board of Directors has appropriated an additional $3,500 for the Committee.]

Dean Keeton pointed out that we still need financial support for the project. Judge T. Gilbert Sharpe volunteered to look into the possibility of support by the Texas Bar Foundation.

William Reid reported on publicity for the project. He said that he has been working with Harvey Payne of the State Bar and several articles have been released concerning the meetings of the Committee, appointment of advisory committees, and receipt of grants from foundations. He plans to arrange for more publicity in the Bar Journal and possible other professional journals. Mr. Reid also reported that he planned to distribute a fact sheet or a speech outline to each person connected with the project so that they will be prepared to speak to their local bar and civic groups concerning the project.

4:45 p.m. the meeting adjourned.

Note: A grant of $5,000 was received from The Brown Foundation, Inc. of Houston, (Brown & Root) on November 1, 1966. This brings the total of grants received to $25.000.

MINUTES
OF THE TEXAS STATE BAR COMMITTEE
ON REVISION OF THE PENAL CODE
June 30, 1966

Present: Dean Page Keeton, Judge T. Gilbert Sharpe, Mr. Robert Lee Bobbitt, Mr. Jim Nugent, Judge Truman Roberts, Mr. Travis D. Shelton, and Mr. Terry Townsend. Mr. Crawford Reeder, Reporter, and Mr. William G Reid, Director, also attended.

The Texas State Bar Committee on the Revision of the Penal Code met at 4:00 p.m. on Thursday, June 30, 1966, at the Gunter Hotel in San Antonio, during the Annual State Bar Convention. Dean Page Keeton, chairman of the Committee, presided.

Dean Keeton opened the meeting by saying that the meeting was called in order to review the progress of the past year, to plan future meetings, and to consider the possibilities of obtaining further financial assistance in the project.

Dean Keeton reported that he had just delivered a brief address concerning the revision project to the luncheon meeting of the Criminal Law and Procedure Section of the State Bar. His report was well received by that group.

The director, William G Reid, gave a report reviewing the progress of the Committee. [For a thorough general review see Dean Keeton's committee report, 29 Tex.B.J. 508 (June 1966). Only those items not covered by that report will be included in these minutes.]

Reid reported that Professor Newell Blakely has been the most active of the reporters, as evidenced by his use of student assistance funds, contact with his advisory committee, and other communications. The other reporters are planning to devote much of their time in the summer to the project. Mssrs. Cohen and Finer will be working full time during the second session of summer school on their areas. Mr. Maloney has indicated that he will be utilizing student assistants this summer to assist him in the compilation of materials which he has prepared.

Judge Truman Roberts suggested that the reporters should be careful to indicate the various views of their advisory committees when presenting drafts, and that several solutions should be presented where appropriate. The members of the committee concurred in this suggestion.

The advisory committees are almost completed. At present, no prosecutor is assigned on Mr. Maloney's Advisory Committee. Mr. Leon Douglas was originally requested to fill this position, but declined. However, he did indicate he would like to maintain unofficial contact with their progress.

Mr. Finer's committee also lacks a prosecutor. Judge Truman Roberts and Judge T. Gilbert Sharpe recommended Mr. J. Taylor Brite, District Attorney of Floresville to fill this position. Mr. Crawford Reeder reported that he would soon have a prosecutor on his committee from the San Antonio District Attorney's

Office, and that Mr. Fred Semaan had agreed to be the defense attorney on the committee.

Reid reported that the members of the Law Enforcement Advisory Committee were enthusiastic in their acceptances and are looking forward to participating in the discussion of the revision. Dean Keeton expressed the hope that our relationship with this important group in law enforcement would help to avoid the problems encountered when the committee revising the Code of Criminal Procedure failed to establish such communications.

The director reported that the tangible results of his work were the compilation of suggestions distributed to the Committee, the bibliography on the Texas Penal Code, and the file system that has been established indicating the disposition of each article to be revised. Currently a compilation is being made from these files which will indicate where each article fits into the Model Penal Code organization. In addition, a great deal of material has been donated by West Publishing Company for the use of the reporters. Each reporter has a set of Vernon's Annotated Penal Code, and copies of the Codes of Illinois, Minnesota, New York, and Pennsylvania (proposed). West also prepared a statute plant, which consists of each article of the Texas Penal Code on separate file cards for case of revision. The plant is now being used by the director for the specific assignment project.

A continuing solicitation of suggestions will be conducted. A series of pleas in the Texas Bar Journal have been submitted requesting suggestions. The first of these appeared in the June issue, 29 Tex.B.J. 463 (1966).

The Texas Legislative Council Staff has been most cooperative, and the Executive Director, Mr. Robert E. Johnson, in addition to the assignment of a consultant, has agreed to provide secretarial services and other technical assistance on an "as available" basis, upon the committee's request. This service has been utilized, as the Legislative Council typed and printed the Texas Bibliography.

The Committee has obtained the services of Mr. James Brady as a research assistant. Mr. Brady graduated from the University of Texas Law School in 1964, and was on the Law Review. He has previously worked for Mr. Cohen as a research assistant. Brady is presently working toward his Ph.D. in philosophy at the University of Texas. He works half-time on a salary of 225.00 dollars per month. He has been assigned to projects that are of value to all reporters in order to avoid duplication of effort. For example, Mr. Brady compiled the Texas Bibliography. He has conducted research in the area of Libel and Slander, an area which Dean Keeton assigned to himself. Brady is now assisting Fred Cohen on the General Provisions section.

Each reporter is authorized to obtain a student assistant to assist him for ten hours a week, at two dollars an hour. Newell Blakely of Houston is the only reporter who has used this assistance, but others are planning to do so in the immediate future.

Dean Keeton discussed the plans for the immediate future. He reported to the Committee that he planned to utilize some of the funds available to release Fred Cohen and Joel Finer from their teaching duties this summer. They will devote at least six weeks full-time effort to the preparation of drafts for their areas. The amount committed to this is 3,600 dollars. Dean Keeton also reported that Professor Blakely has made a similar arrangement through the University of Houston, whereby he will receive compensation from the school, but is free to devote his time to the project. The committee expressed approval of these plans.

Dean Keeton recommended that the Committee should commence regular meetings in October, and that meetings should be held at least once each month. After discussion, the members agreed that a firm schedule of meetings is needed for advance planning. It was agreed that meetings would be held on the second Friday in each month, beginning in October. The dates are as follows: October 14, 1966, November 11, December 9, January 13, 1967, February 10, and March 10. Dean Keeton noted that the Texas-Arkansas football game is scheduled to be played in Austin on Saturday, October 15, 1966.

The members agreed that the meetings should be held in Austin, as that city is centrally located, and it is most convenient for the majority of committee members and reporters. Dean Keeton recommended that the meetings be scheduled for one day, from 10:00 A.M. until 5:00 P.M. at the University of Texas Law School, Room 143. All those present agreed.

Mr. Townsend recommended that the materials to be considered at each meeting should be mailed well in advance for study by the members. The members concurred, and agreed that the distribution of materials should precede the meeting by at least one week.

Dean Keeton reported that financial support is still needed for expenses such as staff salaries, operational costs, travel expenses of members to the regular meetings, and the expenses of public hearings throughout the State after a proposed draft has been prepared. Dean Keeton noted that following the receipt of 15,000 dollars from private foundations, the State Bar withdrew 500 dollars of the 1,500 dollars originally allocated to this committee. Dean Keeton stated that Mr. William E. Pool, Executive Director of the State Bar, explained that this action was necessary in order to meet more immediate obligations of the Bar. Dean Keeton reported to the committee that he has submitted a request to the Bar for at least 2,000 dollars for the expenses of this committee for the coming year, which would represent the same amount allocated during the past year, and a recovery of this 500 dollars.

The committee discussed possible sources of funds and it was suggested that the following foundations be contacted: The Sams Foundation in Brownsville, the Cooper Foundation in Waco, and the Lee and Beula Moore Foundation in El Paso.

Mr. Terry Townsend volunteered to secure a list of foundations in the State in order that a general solicitation might be made.

Mssrs. Jim Nugent and Terry Townsend indicated that the Legislature might be willing to contribute toward the project by an appropriation in the coming session. They recommended that about 25,000 dollars should be requested, to be

divided equally over the biennium between the 1967 and 1969 sessions. The committee agreed that this possible source should be pursued.

General Discussion

On the topic of the use of the Model Penal Code, Judge Truman Roberts expressed doubts concerning much of the language, which he feels is too remote from Texas jurisprudence. Dean Keeton emphasized that the Model Code is designed as a guide to revision and that the drafters of the Model Code have repeatedly warned that it is not designed to be adopted in a wholesale manner. Judge T. Gilbert Sharpe stated his view that the organizational structure of the Model Penal Code is very good, and the Committee concurred on this point.

Judge Roberts expressed his view that from the suggestions received and his own experience that the Texas Laws on murder were in serious need of revision. He stated that he understood that the Colorado draft in this area was very good, and that it should be consulted. William Reid reported that a copy of the Colorado draft had been recently received and that a copy would be made available to Mr. Maloney, the reporter for that section.

There being no further business, the meeting adjourned.

Enclosures:

Financial Report
Suggestions Received
Advisory Committees

SUMMARY OF MINUTES

The Committee on Revision of the Penal Code met at the University of Texas Law School on Friday, January 13, 1967 from 10:00 a.m. until 1:00 p.m.

The committee considered the proposals of Mr. Frank Maloney on Assault, Aggravated Assault, Threats, Criminal Coersion, Kidnapping and False Imprisonment.

The following proposed drafts were approved:

Definitions:

(1) "Person" means a human being who has been born and is alive.
(2) "Bodily injury" means physical pain, illness or any impairment of physical condition.
(3) "Serious bodily injury" means bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.
(4) "Deadly weapon" means any firearm, or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is capable of producing death or serious bodily injury.

Simple Assault: A person is guilty of assault if he

(1) purposely, knowingly or recklessly causes bodily injury to the person of another; or
(2) purposely or knowingly causes fear or apprehension in another of imminent bodily injury; or
(3) purposely or knowingly causes physical contact with the person of another that is reasonably regarded as offensive or provocative;
(4) No verbal provocation justifies an assault but such may be considered in sentencing the offender.
(5) Simple assault is a misdemeanor.

Aggravated Assault: A person is guilty of Aggravated Assault if

(1) He purposely, knowingly or recklessly causes serious bodily injury to the person of another; or
(2) With a deadly weapon he purposely, knowingly or recklessly causes bodily injury to the person of another; or
(3) When committing a simple assault he

(a) is disguised or masked in such a manner as purposely to conceal his identity; or
(b) knows the person assaulted to be a public officer or a public official, and commits the assault because of lawful action taken by him, or who was in the lawful discharge of his duties at the time.

(4) Aggravated assault is a felony of the third degree.

Terroristic threats:

(1) A person is guilty of terroristic threat if he threatens to commit any crime of violence against any person or property:

(a) With the purpose of terrorizing another, or in reckless disregard of the risk of causing such terror; or

(b) With the purpose of causing evacuation of a building, place of assembly, or facility of public transportation, or in reckless disregard of causing such evacuation.

(2) Grading. Terroristic threat is a felony of the third degree unless the threat is made for the purpose of terrorizing or in reckless disregard of the risk of terrorizing only one person, in which cases the offense is a misdemeanor.

Criminal coersion:

(1) A person is guilty of criminal coersion if, with purpose unlawfully to restrict another's freedom of action to his detriment, he threatens to:

(a) Commit any criminal offense.

(2) Grading. Criminal coersion is a misdemeanor unless the threat is to commit a felony or the actor's purpose is to induce felonious conduct, in which cases the offense is a felony of the third degree.

Kidnapping:

A person is guilty of the offense of kidnapping if by means of force, or threats of imminent force, or by deception, he purposely or knowingly detains, confines, or removes from one place to another any person against his will for any of the following purposes:

(a) To hold for ransom or reward, or as a shield or hostage; or
(b) To facilitate commission of any felony or flight thereafter; or
(c) To inflict bodily injury on or to terrorize the victim or another; or
(d) To interfere with the performance of any governmental or political function.

Confinement or removal of any incompetent person or of any person under the age of 16 is against his will, within the meaning of this section, if such confinement or removal is without the consent of a custodial parent, guardian or other person responsible for the supervision of said person's general welfare.

Kidnapping is a felony of the first degree unless the actor voluntarily releases the victim alive and in a safe place prior to trial, in which case it is a felony of the second degree.

False Imprisonment (felony). A person commits a felony of the third degree if by means of force, or threats of imminent force, or by deception, he purposely or knowingly detains, confines, or removes from one place to another any person against his will, and if:

(a) The restraint is under circumstances exposing such person to a risk of serious bodily injury or death; or
(b) The restraint is for the purpose of holding the person in involuntary servitude;
(c) He is disguised or masked in such a manner as to conceal his identity.

Confinement or removal of any incompetent person or of any person under the age of 16 is against his will, within the meaning of this section, if such confinement or removal is without the consent of a custodial parent, guardian or other person responsible for the supervision of said person's general welfare.

False Imprisonment (misdemeanor). A person commits a misdemeanor if by any means he purposely or knowingly detains, confines, or removes from one place to another any person against his will.

Confinement or removal of any incompetent person or of any person under the age of 10 is against his will, within the meaning of this section, if such confinement or removal is without the consent of a custodial parent, guardian or other person responsible for the supervision of said person's general welfare.

OTHER BUSINESS

The committee approved a motion to recommend to the Board of Directors that action be taken to have the current legislature abolish jury sentencing except in capital cases.

The project director reported on the progress of the sentencing and corrections study.

The committee decided to hold its next meeting on Friday, February 24, 1967, at the University of Texas Law School.

NOTE: The attached minutes give a detailed report on the discussion of the adopted provisions, the issues raised, and indicate what changes were made by the committee in the reporter's drafts. A study of the complete minutes would be valuable for an understanding of what was accomplished, and why these provisions were adopted.

January 24, 1967

MINUTES
OF THE TEXAS STATE BAR COMMITTEE
ON REVISION OF THE PENAL CODE
Friday, January 13, 1967

Present: Committee Members Page Keeton, Chairman; Sen. Charles Herring, Vice-Chairman, Judge John Barron; Hon. Galloway Calhoun; Mr. George W. Gray, III; Mr. Newton Gresham; Judge Truman Roberts; and Judge K. K. Woodley.
Law Enforcement Advisory Committee Mr. Lewis Berry; Mr. C. G. Conner; Mr. Beverly Laws for Bob Miles; Mr. M. W. Stevenson for Charles Batchelor. Also, Mr. K. R. Herbert, police representative on Mr. Maloney's advisory committee.
Reporters Mr. Albert Alschuler; Mr. Newell Blakely; Judge Archie Brown and James Barlow; Mr. Frank Maloney; Mr. Paul Rothstein.
Staff Mrs. Ione Stumberg, research assistant; Bill Reid, project director; James Brady, research assistant.

The Texas State Bar Committee on Revision of the Penal Code met at 10:00 a.m. on Friday, January 13, 1967, in room 143, University of Texas School of Law in Austin, Texas. Dean Page Keeton, chairman, presided.

The first order of business was consideration of the report of Mr. Frank Maloney, reporter for the Offenses Against the Person section. Mr. Maloney presented drafts for the following offenses: Assault, Aggravated Assault, Terroristic Threats, Criminal Coersion, Kidnapping, Felony False Imprisonment and Misdemeanor False Imprisonment.

(Note: In order to clearly reflect the action taken by the Committee on these drafts, these minutes will present Mr. Maloney's draft with additions by the Committee italicized, and deletions in parenthesis in capitals. Thus: new material added by committee, and (PORTIONS DELETED BY COMMITTEE).

Mr. Maloney noted in his preliminary remarks that he drafted his provisions with the understanding that the committee had agreed that certain general principles and provisions will be included in the revision, even though they have not yet been drafted. These are:

(1) That there will be a general attempt statute in the revision;
(2) That crimes will be divided into felonies of the first, second, and third degrees, misdemeanors and petty misdemeanors, and that the ranges of penalties set out in the Model Penal Code (MPC) will probably be followed;
(3) That the MPC definitions of the degrees of culpability have been accepted in principle, these being purposely, knowingly, recklessly and negligently. (Mr. Maloney noted that he had no occasion to use the concept of "negligence" in his drafts.)

Mr. Maloney presented the following definitions, and noted that they will also be applicable to the homicide section, which has not yet been drafted.

Definitions:

(1) "Person" means a human being who has been born and is alive.
(2) "Bodily injury" means physical pain, illness or any impairment of physical condition.

(3) "Serious bodily injury" means bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

(4) "Deadly weapon" means any firearm, or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is capable of producing death or serious bodily injury.

The committee discussed each of these provisions.

(2) Bodily injury. Mr. Maloney explained that "impairment of physical condition" would include injuries not covered by "serious bodily injury," and might include a cut or some other change in the body. He said he believed that this would include illness, both physical and mental.

(3) Serious bodily injury. The term "protracted" was questioned, and the possibility of using the word "permanent" was considered, but finally rejected because this would require too high a degree of injury and proof of injury. Mr. Maloney explained that "protracted" certainly means more than "temporary," and would require proof of injury which lasts for a substantial period of time.

(4) Deadly weapon. Mr. Maloney explained that this definition includes materials or substances, which might be lye or other poisonous substance. An automobile would also be included if the manner of its use was such as to produce death or serious bodily injury. Other things which might be included are the hands and feet of a karate expert, or prize fighter.

A question was raised as to whether the exclusion of the specific term "motor vehicle" might be construed to mean that the legislature intended to leave it out? Mr. Maloney thought not, and thought that a more serious ejusdem generis problem arises when you begin specifying each instrument, and the court then decides that if it is not specified it is not included.

Mr. Conner mentioned that if the Uniform Vehicle Code, which includes specific provisions for negligent homicide with a motor vehicle, and aggravated assault with a motor vehicle, is ever adopted in Texas, it would partially overlap with Mr. Maloney's draft.

Dean Keeton stated that in his view one of the major purposes of the revision is to get away from specific statutes and cover offenses in general provisions, and avoid separate crimes concerning a particular device.

Mr. Maloney stated that he has restricted his proposal to one definition, the deadly weapon, in order to do away with the present confusion in Texas law between deadly, dangerous, and prohibited weapons. He does not recommend a separate concept of "dangerous weapon" at all.

Dean Keeton said that he contemplated that when the revision is being prepared for submission to the legislature that it will include comments on what the committee was trying to cover, and that perhaps the legislature could adopt these comments in some way in order to indicate its intent in passing each provision. The committee members generally expressed approval of this proposal.

Mr. Gresham noted that the definition of "dangerous weapon" seems ambiguous, and suggested that the term "actor" or "accused" be inserted to make it clear that "the manner it is used or is intended to be used" refers to the person accused, so that it will not be interpreted to mean as it is normally used or normally intended to be used.

Mr. Calhoun said that this was an attempt to distinguish between deadly weapons "per se" and those dangerous only when improperly used.

Mr. Maloney stated that this is the problem in present Texas law he was attempting to avoid. He objected to Mr. Gresham's suggestion because it would raise problems when a co-principal is involved.

The committee laid Mr. Gresham's suggested change aside for future consideration, and tentatively adopted Mr. Maloney's draft.

Mr. Maloney presented his draft on simple assault.

Simple Assault: A person is guilty of assault if he

(1) purposely, knowingly or recklessly causes bodily injury to the person of another; or
(2) purposely or knowingly causes fear or apprehension in another of imminent bodily injury; or
(3) purposely or knowingly causes physical contact with the person of another that is reasonably regarded as offensive or provocative;
(4) No verbal provocation justifies an assault but such may be considered in sentencing the offender.
(5) Simple assault is a misdemeanor.

Mr. Maloney pointed out that he recommends that this be a misdemeanor, and under the Model Penal Code penalties this could involve a sentence of up to one year imprisonment. This would be handled in county court.

Also, he noted that in his drafts the basic distinction between simple and aggravated assault is the type of injury which one receives, with some specific exceptions for aggravated assault. He explained that he is recommending that several of the aggravated assault categories be reduced to simple assault, in view of the increased penalty available for simple assault, and in view of the fact that aggravated assault will be a felony of the third degree, punishable by up to five years in prison. He also recommends that the penalty section provide an alternative of a fine only, to provide sentencing flexibility in each of these categories.

Mr. Maloney pointed out that the important definitions to consider in this section are "purposely," "knowingly," and "recklessly."

Judge Brown noted that our present statute on assault with a motor vehicle includes the concept of negligence, and asked whether Mr. Maloney contemplated that this type assault should be covered in another section.

Mr. Maloney stated that he felt that the present interpretation of negligence in "aggravated assault with a motor vehicle" cases had gone beyond the traditional concept of negligence and that as a practical matter the MPC definition of recklessness will suffice for prosecution of these cases. He said that he believes the courts

actually require more than simple tort negligence in these cases and require "gross negligence." In such cases, "recklessness" will be available.

Mr. Gresham asked whether the draft eliminates any type of liability based on ordinary negligence. Mr. Maloney replied that that was his intention.

Mr. Maloney explained that the assault provision requires an act, and that under the general provisions an omission will not suffice unless it is specified. He stated that words would be included in "act," and that the case of directing a blind man to walk over a cliff would be covered. However, without some duty on the part of the actor, a person could remain quiet and watch the same man walk over the same cliff and not be held criminally liable.

It was noted that the general attempt statute will apply to each of these drafts, and that if the person takes a substantial step toward accomplishing his purpose, such as shooting at someone, but fails to produce the effect he intended to produce, then he may be prosecuted for an attempt and the penalty will be the same as for the completed offense.

Mr. Maloney pointed out that the present Texas law of assault speaks in terms of "attempt" and requires this to be "coupled with the ability to commit." His aim in the drafts was to reduce their length and to reduce confusion. By using a general attempt statute, and considering the general provisions concerning the requirement of culpability which involve some capability to commit an offense, the Texas law will not be changed very much. For example, if a person points a toy pistol at another, and his purpose is to produce fear or apprehension, this is covered by the subsection (2) of the proposed draft, and is a simple assault.

Mr. Maloney explained that the draft actually broadens present Texas law as to fear or apprehension, because the only area now covered is where a person is using "a dangerous weapon or the semblance thereof" to produce alarm. As drafted, any means used to produce apprehension of imminent bodily injury will be covered.

Subsection (3) of simple assault, concerning offensive or provocative touching was discussed. Examples discussed included a man placing his hand on a woman's hip or leg. Mr. Maloney observed that "reckless" is not used in parts (2) or (3), and that in (3), an actual touch (or genuine attempt) is required. He pointed out that it was his intention to exclude causing apprehension of offensive contact, and distinguished this from (2), where it is an assault to cause apprehension of bodily injury.

Mr. Maloney noted that there was some overlap between his area and that of Mr. Alschuler, who has Offenses Against Public Order and Decency. Mr. Maloney suggested that perhaps the committee would want to include an offense in that other area to cover the molesting situation, where a person does not make physical contact but embarasses the victim in some other way. Examples are using vile language, or propositioning a woman on the street, or making suggestive motions.

Dean Keeton said that this sort of lewd behavior could best be dealt with in Mr. Alschuler's area, where most of the offenses are petty misdemeanors. He said that at the reporters meeting, it had been agreed that this sort of behavior is less serious.

The committee discussed the use of "reckless" as the lowest degree of culpability in Mr. Maloney's drafts, and he explained that "reckless" is very similar to what we now call "gross negligence." Dean Keeton added that he calls it conscious indifference or just plain "cussedness."

Mr. Maloney presented his draft on aggravated assault to the committee. The draft reads as follows, with changes indicated:

Aggravated Assault: A person is guilty of Aggravated Assault if

(1) He purposely, knowingly or recklessly causes serious bodily injury to the person of another; or
(2) With a deadly weapon he purposely, knowingly or recklessly causes bodily injury to the person of another; or
(3) When committing a simple assault he

(a) is disguised or masked in such a manner as purposely to conceal his identity; or
(b) knows the person assaulted to be a public officer or a public official, and commits the assault because of lawful action taken by him, or who was in the lawful discharge of his duties at the time.

(4) Aggravated assault is a felony of the third degree.

Mr. Maloney made preliminary remarks on his draft of aggravated assault. As a felony of the third degree, this is a very serious offense, punishable by up to five years imprisonment. In subsection (1) the difference between simple and aggravated assault is the seriousness of the injury received. Aggravated assault applies in cases of "serious bodily injury" as defined in the definitions above. In subsection (2), the aggravating circumstance is the use of a "deadly weapon" to cause bodily injury." Notice that this does not require serious bodily injury. Subsection (3) provides for two special aggravating circumstances which will raise simple assault to aggravated. These are: (a) assaulting while masked, and (b) assaulting a public officer.

Mr. Maloney explained that the reason for 3(a), masked persons, is primarily a police consideration. Persons who commit an offense while masked know that the police will have greater difficulty in apprehending them. Dean Keeton added that he believed it is worse for a man to commit an assault while he is concealing his identity. He pointed out that the Illinois and some other recent revisions have included such provisions, and that there are Texas statutes covering it now.

Mr. Gresham suggested that the statute should specify that the person must be masked for the purpose of concealing his identity. He posed the situation where two men get into a fight at a masked ball. Here the person is masked, but not for the purpose of committing an assault without being identified.

Mr. Maloney stated that he thought that the wording "in such a manner as to conceal his identity" was sufficient, and that he objected to requiring the state to prove intent to be masked or disguised. He said that he thought that the fact of being masked or disguised should create some type of presumption that he in fact intended to be disguised.

The committee generally agreed that the statute should be made clearer in order to insure that the person must be masked or disguised for the purpose of concealing his identity. The change agreed upon is as follows: insert the word " purposely" in subsection 3(a), after the word "as" and before the words "to conceal."

Mr. Calhoun suggested that in subsection 3, it should be specified that it refers to a simple assault committed in connection with these aggravating circumstances. The

committee agreed that this change should be made: insert the word "simple" so that subsection (3) will read: "When committing a simple assault he (a) . . . ."

The committee discussed subsection (3)(b), concerning assaults on public officers, at length. Mr. Maloney stated that he is opposed to this provision because it is subject to abuse. He said that he knew of instances where a police officer would use more force than necessary in making an arrest, and in order to protect himself from civil liability would file charges of aggravated assault against the person arrested. He stated that he believed that this problem could be better handled in the general principles area in justification of the use of lawful force, or in Judge Brown's area of offenses against the government. He believes that it would be better to protect officials in some other area of the code, rather than making it an aggravated assault. Mr. Maloney explained that at the reporters meeting it had been agreed that the provision should be inserted, and that if necessary to have it at all, that it should not be limited to police officers but include all public officers. He explained that Texas cases had interpreted this term to include at least justices of the peace. In response to a question, he said that he thought that "public officer" would also include such persons as health inspectors, fire inspectors, tax assessors, and similar officers. It would also include judges and legislators.

Mr. Berry suggested that the term "public official" might be used, but Mr. Barlow objected that this would exclude the main group in need of protection, the police. Dean Keeton recommended that both terms be used for the sake of clarity.

Judge Barron posed the situation in which a judge is assaulted, not while in the actual performance of his duties, but because of a decision which he has made. The committee discussed this problem and generally agreed that an assault growing out of an official's or officer's performance of his duty should be covered.

Dean Keeton proposed that the subsection be reworded as follows:

"(3) knows the person assaulted to be a public officer or a public official, and commits the assault on such officer or official because of lawful action taken by him, or who was in the lawful discharge of the duties of his office at the time."

The committee approved of these changes with the understanding that they may be reworded as necessary.

Mr. Barlow questioned whether the requirement that the officer or official be in the lawful performance of his duties is desirable, because police often have to make arrests, but it is later determined that there was not "probable cause."

Dean Keeton stated that the policeman would be protected by the simple assault statute in any case, and if the policeman is out of bounds this should suffice. Otherwise, the area would be wide open to abuse.

The question of whether the statute should apply to off-duty policemen "moonlighting" at jobs like bouncer or guard was discussed. The conclusion was that such persons are not entitled to greater protection than any other citizen on a private job.

Mr. Maloney presented his draft on terroristic threats:

Terroristic threats

(1) A person is guilty of terroristic threat if he threatens to commit any crime of violence against any person or property:

(a) With the purpose of terrorizing another, or in reckless disregard of the risk of causing such terror;or
(b) With the purpose of causing evacuation of a building, place of assembly, or facility of public transportation, or in reckless disregard of causing such evacuation.

(2) Grading. Terroristic threat is a felony of the third degree unless the threat is made for the purpose of terrorizing or in reckless disregard of the risk of terrorizing only one person, in which cases the offense is a misdemeanor.

Mr. Maloney explained that while this statute would enlarge the scope of present Texas law, we now have several limited threat statutes, and some on intimidation. These present statutes are set out in the statutory appendix to his report, page 15. The primary purpose of the statute is to prevent alarm, and will cover such things as bomb threats. It is designed to prevent serious alarm for personal safety, the safety of others, and for property. It should be considered with the draft for criminal coersion, as these are related offenses. The gravity of the offense of terroristic threats is related both to the seriousness of the threat and the disturbing character of the psychological result intended or risked. The threat may be oral, written, by anonymous phone call, or by any other method. Note that benign purpose is not an affirmative defense to this particular statute, while it is in the proposed draft of criminal coersion. The terroristic threat statute as drafted is a felony of the third degree. This may not be an acceptable grade for this offense. Note that the person is guilty if he has either of the two purposes set out--terrorizing, or to cause evacuation. Mr. Maloney explained that the terrorizing portion is partially present law, Penal Code art. 1268, but it primarily from MPC art. 211.3.

Mr. Calhoun inquired whether all assaults with a deadly weapon would be covered by this draft. Dean Keeton replied that he thought it probably would be covered.

Mr. Maloney stated that he would assume that both simple and aggravated assault would be lesser includable offenses under terroristic threats.

Mr. Gresham inquired whether it would be advisable to define the word "terrorizing." Mr. Maloney responded that this had been discussed at the reporters meeting, and it had been agreed not to define it. None of the recent codes have attempted to define the word.

Mr. Barlow objected to the breadth of the draft, and to making it a felony. He explained that most threat cases arise out of domestic quarrels, and while some statute is definitely needed, he believes that it should be handled as a misdemeanor in a county court, not the district court. He observed that the present peace bond system is archaic and ineffective.

Dean Keeton observed that while threats in the family situation might be considered a less serious offense, that he believes that a bomb threat is a very serious offense.

Mr. Barlow suggested that perhaps there could be separate categories for threats--those to individuals, and those to a large number of people.

Mr. Rothstein suggested that the draft could require that the threat be made against two or more people.

In response to a question, Mr. Maloney stated that he believed that "a facility of public transportation" would include not only a depot or airport, but the airplane, train or bus.

Judge Brown observed that the part dealing with bomb threats and such was the most important, and had reservations about the portion dealing with threats to a single person. He pointed out that threatening bodily injury is presently a misdemeanor in Texas, but is seldom used.

Dean Keeton suggested that the draft be modified to provide that if the threat is made to a single person it is a misdemeanor, but if two or more persons are terrorized it is a felony.

Mr. Calhoun suggested that if the part (1) were deleted it would be covered under the assault statutes. Dean Keeton thought that the provision was needed to cover certain cases which would not be assaults.

Judge Barron raised the question as to whether a conditional threat would be covered under this statute. This was briefly discussed, and Mr. Maloney suggested that this would be covered under criminal coersion.

Mr. Blakely inquired whether the draft covered the situation where a man does not actually make a threat, but merely calls up and states that there is a bomb in a building. Dean Keeton replied that he believed that that case would be covered in the disorderly conduct area, under the provision on false reports. (MPC art. 250.3.)

The committee voted on and approved the proposition that part one be made a misdemeanor if the threat is restricted to one person, and that the offense is a felony if the threat is made against two or more people, or is made to evacuate a building.

Mr. Maloney presented his draft on criminal coersion:

Criminal coersion.

(1) A person is guilty of criminal coersion if, with purpose unlawfully to restrict another's freedom of action to his detriment, he threatens to: (WHEN FOR THE PURPOSE OF CAUSING ANOTHER TO PERFORM AN ACT OR TO OMIT THE PERFORMANCE OF AN ACT, HE THREATENS, BY MEANS REASONABLY LIKELY TO SUCCEED, TO:)

(a) Commit any criminal offense. (OR

(b) ACCUSE ANYONE OF A CRIMINAL OFFENSE; OR

(c) EXPOSE ANY SECRET THAT WOULD SUBJECT HIM TO HATRED, CONTEMPT OR RIDICULE OR TO IMPAIR HIS CREDIT OR BUSINESS REPUTE; OR

(d) TAKE OR WITHHOLD ACTION AS AN OFFICIAL, OR CAUSE AN OFFICIAL TO TAKE OR WITHHOLD ACTION.

IT IS AN AFFIRMATIVE DEFENSE TO PROSECUTION BASED ON PARAGRAPHS (b), (c), and (d) THAT THE ACTOR BELIEVED THE ACCUSATION OR SECRET TO BE TRUE OR THE PROPOSED OFFICIAL ACTION JUSTIFIED AND THAT HIS PURPOSE WAS LIMITED TO COMPELLING THE OTHER TO BEHAVE IN A LAWFUL AND APPROPRIATE MANNER AND IN A WAY REASONABLY RELATED TO THE CIRCUMSTANCES WHICH WERE THE SUBJECT OF THE ACCUSATION, EXPOSURE OR PROPOSED OFFICIAL ACTION, AS BY DESISTING FROM FURTHER MISBEHAVIOR, MAKING GOOD A WRONG DONE, REFRAINING FROM TAKING ANY ACTION OR RESPONSIBILITY FOR WHICH THE ACTOR BELIEVES THE OTHER DISQUALIFIED.)

(2) Grading. Criminal coersion is a misdemeanor unless the threat is to commit a felony or the actor's purpose is to induce felonious conduct, in which cases the offense is a felony of the third degree.

Mr. Gresham objected to subsection (1)(c) of the draft, concerning exposure of secrets. He said that he thought this would expose a great number of people to prosecution, even though they could use the affirmative defense. He posed the case of a banker dealing with a creditor who says that if a loan is not repaid that he will let it be known that the creditor was a deadbeat in another city, (assuming that this was true). Here the banker would be liable to prosecution and would have the burden of proceeding on his defense.

Mr. Maloney replied that this case would be no different from any other criminal case where a person has an affirmative defense.

Mr. Gresham stated that he thought it would expose many persons to possible prosecution who ought not to be so exposed.

Judge Brown noted that a person has fairly substantial civil remedies available in cases of damage to credit or business reputation, and that we might not need a criminal provision.

It was agreed that subsection (1)(c) is the most questionable in the draft.

Judge Roberts noted that subsection (1)(b) was similarly subject to abuse. He gave the case of a person who receives a "hot check" and threatens to have the maker prosecuted if it is not paid. Others noted that this was a regular procedure in district attorneys' offices in "hot check" and child support cases.

Judge Brown expressed the opinion that part 1(b) is objectionable in that it would leave many people open to prosecution, and they might be put to the time and expense of defending themselves.

Mr. Conner pointed out that the MPC wording might take care of some of the objections, since it states "a person is guilty of criminal coersion if, with purpose unlawfully to restrict another's freedom of action to his detriment, he threatens . . ."

Dean Keeton suggested that the MPC wording of the first portion adopted instead of Mr. Maloney's draft. The committee agreed that in any case, the MPC wording should be used.

Mr. Barlow proposed that the entire criminal coersion statute be eliminated. He stated that many businesses and public officials have to make threats every day.

Mr. Maloney argued that these are lawful threats and would be protected by the affirmative defense.

Mr. Alschuler argued that the criminal coersion statute is essentially a blackmail statute, and that there is a need for this sort of provision. He stated that he did not think the objections about possible abusive prosecution were substantial, and that anyone is subject to being charged with any offense, and he has to defend himself. In practice, offenses are not prosecuted unless the district attorney believes he has a good case.

Mr. Gresham suggested that there seemed to be substantial agreement among the members of the committee that the coersion draft should be limited to part (1)(a), and that the rest of it should be eliminated. He stated that he feels that there is no necessity to move into this field with a penal statute which is subject to the possible abuses reflected inthe discussion.

The committee voted and agreed to limit criminal coersion to part (1)(a), and eliminate the rest.

It was mentioned that Mr. Alschuler's point about blackmail might be adequately covered in the extortion provisions to be drafted by Mr. Blakely. It was also noted that the problems concerning official coersion and attempting to induce official misconduct should be dealt with by Judge Brown in the area of Offenses Against the Government.

Mr. Maloney presented his proposed draft on kidnapping:

Kidnapping

A person is guilty of the offense of kidnapping if by means of force, or threats of imminent force, or by deception, he purposely or knowingly detains, confines, or removes from one place to another any person against his will for any of the following purposes:

(a) To hold for ransom or reward, or as a shield or hostage; or
(b) To facilitate commission of any felony or flight thereafter; or
(c) To inflict bodily injury on or to terrorize the victim or another; or
(d) To interfere with the performance of any governmental or political function.

Confinement or removal of any incompetent person or of any person under the age of 16 (18) is against his will, within the meaning of this section, if such confinement or removal is without the consent of a custodial parent, guardian or other person responsible for the supervision of said person's general welfare.

Kidnapping is a felony of the first degree unless the actor voluntarily releases the victim alive and in a safe place prior to trial, in which case it is a felony of the second degree.

Mr. Maloney pointed out that this statute includes present Texas law, articles 1177 and 1178, and adds some new provisions. Part (a) is present Texas law concerning ransom or reward, and the portion concerning "as a shield or hostage" is added from the MPC. Parts (b), (c) and (d) are new, and are recommended by Mr. Maloney.

Mr. Maloney noted that part (d), relating to kidnapping to interfere with a political function is designed to cover the case where a candidate is seized in order to interfere with the election, and such cases. The portion referring to governmental functions will primarily be tied in with the interference with child custody problem.

Mr. Maloney called attention to the provision providing that in cases of a child or incompetent, the consent may only be given by a custodial parent or guardian. He said that he had used the age of 18 for statutory consistency, since courts can place custody of a child in a parent until the child is 18. He stated that this may be unrealistic.

Mr. Maloney stated that at the reporters meeting a question was raised about his use of the term "one place to another" rather than the MPC's more detailed provision about removal for a substantial distance or substantial time. He explained that the objection to his draft was that it was so broad that it would cover the case where during the commission of an armed robbery a person is locked in the back room of his own establishment, and thus be moved from "one place to another." Mr. Maloney believes that the case would be covered by his language, but that prosecution for kidnapping in such a case is unlikely. He also explained that he assumes that Texas law will continue to be that a person will only be charged and convicted of one offense, and that the doctrines of autre fois acquit and autre fois convict will be applicable. He asked for the committee's opinion. There was no discussion of this issue, as the committee began discussing another point, and there was no decision on the question posed by Mr. Maloney--whether to use this or the MPC language.

Judge Woodley suggested that the word "detained" be retained since it has been judicially defined. Mr. Maloney noted that if the change were made, it should be included in the false imprisonment statutes for consistency.

After discussion, the committee voted and agreed that the word "detained" should be inserted in the kidnapping and false imprisonment drafts.

Mr. Gresham questioned the use of the age 18 in the portion of the statute which requires the parents' consent. He stated that 18 is too old.

Mr. Maloney stated that he had used 18 for consistency, but agreed that it might be too high. He observed that the various age limits in Texas penal law are very inconsistent, and that the crimes of contributing to the delinquency of a minor, exposure, kidnapping, and rape, indicate no rational pattern.

Mr. Barlow inquired whether the statute would cover a 17 year old girl who ran off to get married. Mr. Maloney thought so, if she left without her parents' consent. Judge Brown mentioned that this would be abduction under present Texas law.

Judge Roberts pointed out that the statute would cover the parent of a child who goes to Gatesville and takes the child away with him. He thought that dealing with this as a second degree felony made it too serious.

Mr. Barlow pointed out that in child custody cases that the offense should be a felony in order that the parent taking the child may be extradited from another state.

The committee voted on the age of consent to be used in the kidnapping and felony false imprisonment statutes, and agreed upon the age of 16. However, the committee also agreed that some special provision should be made to handle the child custody

problem and the age gap left by lowering the age to 16 in kidnapping.

The committee agreed that the Bar Committee on Revision of the Family Code should be consulted in an effort to reach some agreement on proper ages to be used in the penal provisions affecting children, and work with them on the child custody problem in general.

Mr. Maloney called attention to the grading of kidnapping. It is a first degree felony unless the victim is released alive in a safe place, in which case it is a second degree felony. He posed the issue as to whether this should also require that the person be released alive and without injury. At the reporters meeting, it had been suggested that such a provision might impede the recovery of the victim alive. The argument was that if the victim were injured, even accidentally, there would be no inducement to return him alive.

Judge Brown noted that the major concern of the FBI in kidnapping cases is to encourage the return of the victim and that it would be better to have him alive and injured than not at all.

Mr. Maloney observed that if the victim were returned with serious injury this would be covered by aggravated assault, and if death ensued, it would be murder.

The committee voted not to include a requirement that the victim be released without serious bodily injury.

Mr. Maloney presented his draft on felony false imprisonment:

False Imprisonment (felony). A person commits a felony of the third degree if by means of force, or threats of imminent force, or by deception, he purposely or knowingly detains, confines, or removes from one place to another any person against his will, and if:

(a) The restraint is under circumstances exposing such person to a risk of serious bodily injury or death; or
(b) The restraint is for the purpose of holding the person in involuntary servitude; (Minnesota and Model Penal Code); or
(c) He is disguised or masked in such a manner as to conceal his identity.

Confinement or removal of any incompetent person or of any person under the age of 16 (18) is against his will, within the meaning of this section, if such confinement or removal is without the consent of a custodial parent, guardian or other person responsible for the supervision of said person's general welfare.

The only question raised about this draft was whether part (b) is necessary. Mr. Gresham objected to the inclusion of any provision that is not designed to take care of a serious problem. The issue was discussed and the committee agreed to leave the provision as drafted.

Judge Brown raised a general question about the area of false imprisonment, whether police who ask a boy to come down to the police station with them to talk about an offense or problem must obtain the consent of the parent, or be liable for a charge of false imprisonment.

Dean Keeton suggested that this issue could best be handled in the area of justification. When drafting that section it can be provided that officers are justified in taking certain action.

Mr. Calhoun suggested that the word "unlawfully" might be needed in the false imprisonment statutes. Mr. Maloney explained that the reporters have agreed to avoid the use of that term because it is so vague, and that the various justifications such as self defense and lawful arrest should be covered in the general principles section on justification.

Mr. Maloney presented his draft on misdemeanor false imprisonment:

False Imprisonment (misdemeanor). A person commits a misdemeanor if by any means he purposely or knowingly detains, confines, or removes from one place to another any person against his will.

Confinement or removal of any incompetent person or of any person under the age of 10 (18) is against his will, within the meaning of this section, if such confinement or removal is without the consent of a custodial parent, guardian or other person responsible for the supervision of said person's general welfare.

Judge Woodley questioned the necessity for the consent of parents provision in this draft. He suggested that a child of 12 or 14 should be able to consent to go somewhere with another person without the express consent of his parents.

Judge Brown agreed and gave an example where a scoutmaster had taken some boys on a camping trip and was supposed to bring them back at a certain time. The boys wanted to stay longer, the scoutmaster agreed, and the parents became very upset. While the scoutmaster has not acted wisely, Judge Brown doubted that a criminal action would be appropriate.

After further discussion the committee agreed that the age should be lowered. Some members suggested 13, others 10, and some would eliminate the consent requirement. The majority voted to lower the age to 10 in the misdemeanor false imprisonment draft.

This concluded the discussion of Mr. Maloney's proposals, and the committee approved the drafts as amended.

OTHER BUSINESS

Judge Woodley proposed that the committee take action to persuade the present legislature to abolish jury sentencing except in capital cases. Mr. Berry noted that the Texas Law Enforcement Legislative Council has recommended this change to the legislature.

The committee discussed Judge Woodley's recommendation, and voted to recommend to the Board of Directors and the Bar Committee on Revision of the Code of Criminal Procedure that action be taken to recommend to the 60th Legislature in its present session that jury sentencing be abolished except in capital cases.

Dean Keeton said that he would take a poll of all members of the committee by mail before taking further action, in order to give everyone an opportunity to express his views.

(Note: On January 18, 1967, Dean Keeton forwarded the committee's recommendation to Mr. W. O. Shafer, President of the State Bar, and requested that the proposal be presented to the Board of Directors at its meeting in Laredo on Friday, January 20, 1967. Copies were sent to Mr. Fred Erisman, Chairman of the Committee

on Revision of the Code of Criminal Procedure.)

Mr. Reid made a progress report on the sentencing and corrections study. A grant of $2,500 was obtained from the Hogg Foundation in late November, Mr. Ray Williams, former director, Division of Parole Supervision, Texas Board of Pardon and Paroles, was employed as a research consultant on December 1, and has gathered data on institutions, probation and parole in Texas. An opinion survey of all district judges is being conducted to determine their views on what type sentencing structure they would prefer, their estimate of the value of probation services and other matters.

Mr. Williams is preparing a preliminary report and will meet with the Advisory Committee on Corrections within the next month to discuss the recommendations of that advisory committee.

The committee noted that the American Bar Association meeting will be held in Houston on February 10, 1967, and this would interfere with the regular schedule of committee meetings on the second Friday of each month. The committee agreed that the next meeting should be held on Friday, February 24, 1967.

The meeting adjourned at 1:00 p.m.

SUMMARY OF MINUTES

The Committee on Revision of the Penal Code met at The University of Texas School of Law on Friday, June 16, 1967, at 10 a.m.

The committee considered Dean Keeton's proposed draft on rape, and the following drafts were approved:

Section 101. Rape.

1. A male who has sexual intercourse with a female not his wife, without that person's consent, commits rape. The intercourse is without the female's consent under any of the following circumstances:

(a) he compels her to submit or participate by force that overcomes such earnest resistance as might be reasonably expected under the circumstances, or

(b) he compels her to submit or participate by any threat that would prevent resistance by a woman of ordinary resolution, or

(c) she has not given express or implied consent and he knows she is unconscious or physically unable to resist, or

(d) he knows that as a result of mental disease or defect she is at the time of the sexual intercourse incapable of appraising the nature of her conduct, or

(e) he knows she is unaware that a sexual act is being committed, or

(f) he knows that she submits or participates because she erroneously believes that he is her husband, or

(g) he has impaired her power to appraise or control her conduct by administering without her knowledge drugs, alcohol, or similar substance with intent of preventing resistance.

2. Rape is a felony of the second degree.

Section 102. Aggravated Rape.

1. A male who has sexual intercourse with a female not his wife, without that person's consent as defined in Section 101, commits aggravated rape if:

(a) he causes serious bodily injury to anyone in the course thereof; or

(b) he compels submission by express or implied threat of death, serious bodily injury, extreme pain, or kidnapping to be imminently inflicted on anyone.

2. Aggravated rape is a felony of the first degree.

The committee next considered Fred Cohen's report on sentencing, and approved the following drafts:

Section 1.04. Classes of Crimes.

(1) Crimes are classified as felonies, gross misdemeanors, simple misdemeanors, or petty misdemeanors.

(2) A crime is a felony if it is so designated by law or if persons convicted thereof may be sentenced to death or to the custody of the Texas Department of Corrections.

(3) Felonies are classified according to the relative seriousness of the crime, for the purpose of sentence, into four degrees, as follows:

(a) felonies of the first degree;

(b) felonies of the second degree;

(c) felonies of the third degree; and

(d) felonies of the fourth degree.

A crime declared to be a felony without specification of degree is of the fourth degree.

(4) A crime is a gross misdemeanor if it is so designated by law or if persons convicted thereof may be imprisoned in the county jail for a term not to exceed one year.

(5) A crime is a simple misdemeanor if it is so designated by law or if persons convicted thereof may be imprisoned in the county jail for a term not to exceed three months.

(6) A crime is a petty misdemeanor if it is so designated by law or if persons convicted thereof may be fined not in excess of $200 or, in addition to such fine, the law authorizes a forfeiture or similar penalty.

(7) Conviction of a petty misdemeanor shall not give rise to any disability or legal disadvantage imposed upon conviction of crime.

Section 6.01. Conformity with Classification and Sentence; Future Legislation.

From and after the effective date of this code all penal laws that may be enacted shall be classified for the purpose of sentence in accordance with this code.

Section 6.02. Sentence in Accordance with Code; Authorized Dispositions.

(1) No person convicted of a crime specified in this code shall be sentenced otherwise than in accordance with this article.

(a) Notwithstanding any other provision of law, a felony defined by any statute of this state other than this code which exceeds in any way the sentence authorized herein for felonies of the fourth degree shall constitute for the purpose of sentence a felony of the fourth degree. All persons convicted under such a statute shall be deemed convicted of a felony of the fourth degree and sentenced in accordance with this code.

(b) Misdemeanors defined by any statute of this state, or by any ordinance, other than this code shall be classified as gross misdemeanors, simple misdemeanors, or petty misdemeanors according to the jail term or fine that now may be imposed.

Unless expressly stated in this code no existing misdemeanor penalty shall be increased by virtue of the adoption of this code.

(2) The court may suspend the imposition of sentence on a person convicted of a crime and order that application be made for civil commitment in accordance with Section 6.13, or may sentence him as follows:

(a) to pay a fine as authorized by Section 6.03 or Section 6.04; or

(b) to be placed on probation; or

(c) to imprisonment for a term authorized by this code or by a statute of this state found outside this code; or

(d) to fine and probation or fine and imprisonment or to imprisonment in the county jail not to exceed 30 days and probation.

[(3) The court shall sentence a person who has been convicted of [murder] [murder in the first degree] to death or imprisonment in accordance with Section 210.6.]

NOTE: Subsection (3) is inserted to call it to the attention of the reporter dealing with offenses carrying the death penalty. This subsection will have to be redrafted to conform with those provisions.

(4) This article does not deprive any court or agency of any authority conferred by law to decree a forfeiture of property, suspend or cancel a license, remove a person from office, or impose any other civil penalty.

NOTE: Subsection (4) may be redrafted if it is necessary in order that it will refer to Section 1.04(7).

Section 6.04. Fines for Misdemeanors.

(1) Gross misdemeanor. A sentence to pay a fine for a gross misdemeanor shall be a sentence to pay an amount, fixed by the court, not to exceed $1,000.

(2) Simple misdemeanor. A sentence to pay a fine for a simple misdemeanor shall be a sentence to pay an amount, fixed by the court, not to exceed $500.

(3) Petty misdemeanor. A sentence to pay a fine for a petty misdemeanor shall be a sentence to pay an amount, fixed by the court, not to exceed $200.

(4) In the case of a misdemeanor defined outside of this code, if the amount of the fine is expressly specified in the law or ordinance that defines the offense, the amount of the fine shall be fixed in accordance with that law or ordinance.

(5) Alternative sentence. If a person has gained money or property through the commission of any gross misdemeanor or any simple misdemeanor then upon conviction thereof the court, in lieu of imposing the fine authorized under Subsection (1) or (2) above, may sentence the defendant to pay an amount, fixed by the court, not to exceed double the amount of the defendant's gain from the commission of the crime.

(6) The criteria found in Section 7.01 shall apply to the computation and imposition of any fine to be imposed under this section.

Section 6.08. Sentence of Imprisonment for Misdemeanors.

(1) Gross misdemeanor. A person who has been convicted of a gross misdemeanor may be sentenced to imprisonment in the county jail for a term not to exceed one year.

(2) Simple misdemeanor. A person who has been convicted of a simple misdemeanor may be sentenced to imprisonment in the county jail for a term not to exceed three months.

[Section 6.03. Fine for Felony.

(1) The court may impose a fine for any felony if the defendant has gained money or property through the commission of the crime.

(2) A sentence to pay a fine for a felony shall be a sentence to pay an amount, fixed by the court, not to exceed double the amount of the defendant's gain from the commission of the crime.

(3) The criteria found in Section 7.01 shall apply to the computation and imposition of any such fine.]

NOTE: The committee conditionally approved the felony fine section with the understanding that there would be further consideration of the issues of appellate review of sentences, time limitation on having to pay the fine, and restitution.

Section 7.01. Criteria for Imposing Fines.

(1) As used in Sections 6.03 and 6.04 the term "gain" means the amount of money or the value of property derived from the commission of the crime, less the amount of money or value of property returned to the victim of the crime or seized by or surrendered to lawful authority prior to the time sentence is imposed.

When the court imposes a fine the court shall make a finding as to the amount of the defendant's gain from the crime. If the record does not contain sufficient evidence to support such a finding the court may conduct a hearing upon the issue.

(2) In determining the amount and method of payment of a fine, the court shall consider:

(a) the ability of the defendant to pay the amount of the fine;

(b) the ability of the defendant to pay the fine by the method sought to be imposed;

(c) the hardship likely to be imposed on the defendant's dependents by the amount and method of payment of the fine; and

(d) the impact the fine will have on the defendant's ability to make restitution or reparation to the victim of the crime.

Section 6.06. Sentence of Imprisonment for Felony; Ordinary Term.

A person who has been convicted of a felony may be sentenced by the court to imprisonment as follows:

(1) In the case of a felony of the first degree, for a term the minimum of which shall be fixed at not less than 1 year nor more than 10 years, and the maximum at not more than 30 years or at life imprisonment.

(2) In the case of a felony of the second degree, for a term the minimum of which shall be fixed at not less than 1 year nor more than 5 years, and the maximum at not more than 15 years.

(3) In the case of a felony of the third degree, for a term the minimum of which shall be fixed at not less than 1 year nor more than 3 years, and the maximum at not more than 10 years.

(4) In the case of a felony of the fourth degree, for a term the minimum of which shall be fixed at not less than one year nor more than two years, and the maximum at not more than five years.

No sentence shall be imposed under this section whereby the minimum is longer than one-half the maximum, or, when the maximum is life imprisonment, longer than 10 years.

Section 6.07. Sentence of Imprisonment for Felony; Extended Term.

The court may sentence a defendant convicted of a felony, other than a felony in the first degree, to an extended term of 30 years if the court determines that the defendant is a dangerous offender. In order to so determine, the court must find that the defendant is 18 years of age or over and that his past conduct has been characterized by a pattern of repetitive or compulsive behaviour involving the threat or imposition of physical harm to others or that he is suffering from a serious personality disorder and thus is reasonably likely to inflict serious bodily harm on others in the foreseeable future and such extended term is necessary to protect the public, and it further finds, as provided in Section 7.03, that the following grounds exist:

(1) The defendant presently stands convicted of a felony in which he inflicted or attempted to inflict serious bodily harm on others; or

(2) The defendant presently stands convicted of a felony which created a substantial risk to the life or personal safety of others and has been previously convicted of one or more felonies not related to the present crime as a single episode; or

[(3) The defendant presently stands convicted of a felony involving extortion, bribery of a public official, compulsory prostitution, selling or knowingly and unlawfully transporting narcotics to facilitate their sale, or the use or attempt to use physical violence, committed as part of a continuing criminal conspiracy.

The requirement that the court determine whether or not the defendant is reasonably likely to inflict serious bodily harm on others in the foreseeable future shall not apply to this section.]

NOTE: The committee deferred the decision on inclusion of Subsection (3) until after the conspiracy section is drafted.

[Section 7.03. Procedure for Sentence of Extended Term of Imprisonment.

(1) No defendant shall be sentenced to an extended term of imprisonment under Section 6.07 unless:

(a) Within seven days of the announcement of the verdict of guilty the prosecuting attorney, at his own instance with the permission of the court or at the direction of the court, serves written notice on the defendant or his attorney that the court may sentence the defendant as a dangerous offender and setting forth the grounds therefor.

(b) A summary hearing is held, at a time fixed in said notice but not less than 15 days after its service, at which evidence for and against the imposition of an extended term of imprisonment shall be received and at which the defendant is entitled to be heard and represented by counsel.

(c) The court has available and considers the presentence report and diagnostic evaluation described in Section 7.04.

(d) The court makes findings in conformity with Section 6.07 and incorporates such findings in the record.]

NOTE: The committee tentatively adopted the provision with the understanding that it would be redrafted to provide pre-trial notice to the defendant in all cases where the prosecuting attorney knows in advance that the dangerous offender provisions may be invoked against him.

Section 7.04. Presentence Investigation and Diagnostic Reports; Extended Term of Imprisonment.

(1) No defendant shall be sentenced to an extended term of imprisonment under Section 6.07 unless a written report by a probation officer is presented to and considered by the court.

Any such report shall be open to inspection by the prosecuting attorney and the defendant's attorney prior to sentence and on request of either of them a summary hearing in chambers shall be held on any matter brought in issue, but confidential sources of information shall not be disclosed unless the court otherwise directs.

(2) No defendant shall be sentenced to an extended term of imprisonment under Section 6.07 unless at least two physicians, one of whom shall be a psychiatrist, licensed to practice medicine in this state or employed by an agency of the state or the federal government, submit a report to the court, based on complete and thorough examinations, describing in detail the nature and extent of any psychiatric disorder that may exist, the type of treatment prescribed, the availability of such treatment, an opinion concerning whether or not the defendant is likely to inflict serious bodily harm on others in the foreseeable future and the circumstances under which this might occur, and any other matters deemed relevant by the court or the examining physicians.

For the purpose of obtaining such examination the court may remand the defendant for a period not to exceed 90 days to the custody of the superintendent of the nearest facility operated by the Texas Department of Mental Health and Mental Retardation which has appropriate resources to conduct such examination and prepare such report.

MINUTES

OF THE TEXAS STATE BAR COMMITTEE

ON REVISION OF THE PENAL CODE

FRIDAY, JUNE 16, 1967

Present: Committee Members Page Keeton, Chairman; Judge John M. Barron; Judge Lloyd Davidson; Judge Ed B. Duggan; George W. Gray; Newton Gresham; Judge George Kelton; Judge T. Gilbert Sharpe.

Law Enforcement Advisory Committee G. C. Conner.

Advisory Committee on Corrections Dr. George Killinger; James F. Berger.

Reporters Fred Cohen; Frank Maloney; Albert Alschuler; Judge Archie Brown; Judge Semaan.

Staff Bill Reid.

The Texas State Bar Committee on Revision of the Penal Code met on June 16, 1967, at The University of Texas School of Law in Austin, Texas, in the Alumni Lounge at 10 a.m.

The committee considered Dean Keeton's proposed draft on the rape provisions, which he drafted in order to reflect the committee's recommendations for changes made at the last meeting on April 28-29.

Dean Keeton presented the following draft:

(NOTE: In order to reflect the action taken by the committee on the drafts, the minutes will present additions by the committee underlined and deletions in parentheses in capitals.)

Section 101. Rape.

1. A male who has sexual intercourse (OR DEVIATE SEXUAL INTERCOURSE) with a female not his wife, without that person's consent, commits rape. The intercourse is without the female's consent under any of the following circumstances:

(a) he compels her to submit or participate by force that overcomes such earnest resistance as might be reasonably expected under the circumstances, or

(b) he compels her to submit or participate by any threat that would prevent resistance by a woman of ordinary resolution, or

(c) she has not given express or implied consent and he knows she is unconscious or physically unable to resist, or

(d) he knows that as a result of mental disease or defect she is at the time of the sexual intercourse (PRESENTLY) incapable of appraising the nature of her conduct, or

(e) he knows she is unaware that a sexual act is being committed, or

(f) he knows that she submits or participates because she erroneously believes that he is her husband, or

(g) he has (SUBSTANTIALLY) impaired her power to appraise or control her conduct by administering without her knowledge drugs, alcohol, or similar substance with intent (FOR THE PURPOSE) of preventing resistance.

(h) (SHE IS IN LEGAL CUSTODY OR INVOLUNTARILY DETAINED IN A HOSPITAL OR OTHER INSTITUTION AND THE ACTOR HAS SUPERVISORY OR DISCIPLINARY AUTHORITY OVER HER.)

2. Rape is a felony of the second degree (EXCEPT WHERE COMMITTED UNDER CIRCUMSTANCES SET FORTH IN (h), IN WHICH EVENT IT IS A FELONY OF THE THIRD DEGREE).

Section 102. Aggravated Rape.

1. A male who has sexual intercourse (OR DEVIATE SEXUAL INTERCOURSE) with a female not his wife, without that person's consent as defined in Section 101, commits aggravated rape if:

(a) he (INTENTIONALLY, KNOWINGLY OR RECKLESSLY INFLICTED) causes serious bodily injury to anyone in the course thereof; or

(b) he compels submission by express or implied threat of death, serious bodily injury, extreme pain, or kidnapping to be imminently inflicted on anyone.

2. Aggravated rape is a felony of the first degree.

Dean Keeton explained that he had combined the two sections of Mr. Finer's draft dealing with rape and gross sexual imposition. He stated that, in view of the felony categories and the discretion given the judge, he thought it would be a much simpler statute, and much easier for the prosecution to use in drawing indictments if there is only an offense called rape with a combination of the features of Mr. Finer's draft.

Dean Keeton noted in Subdivision (b) of Section 101 that he had made no distinction between threats of bodily injury and other threats, explaining that the judge can take the seriousness of the threat into account in sentencing.

Mr. Malony suggested that Subdivision (d) be amended by inserting "at the time of the sexual intercourse" in place of the word "presently". The committee approved the amendment.

In the discussion of Subdivision (g) the opinion was offered that "substantially" should not modify "impaired". Another suggestion was made that there be such impairment that it renders her incapable of appraising or controlling her conduct. The committee voted on these alternatives and decided to delete the word "substantially".

Judge Davidson asked to go on record as being opposed to any change in the present statute.

Dean Keeton noted that Subdivision (h) was made a lesser offense since it involves the least misconduct. There is no threat, no force, no fraud, no unconsciousness, but only a coercive situation. Some of the committee members stated that they had grave doubts about the subdivision being included at all. Mr. Gresham stated that he believed the danger of collusive and unjustified prosecution in these circumstances outweighs the consideration of preventing people from taking advantage of their positions in stitutions. Mr. Conner stated that generally he thought it was a good provision because there would be serious evidentiary problems for the woman involved and that people in supervisory or disciplinary positions should have some penal sanction applied to them when they take advantage of their situation. Judge Sharpe noted that the provision essentially served notice to people in positions of authority in institutions that they cannot have any relations with the inmates.

Dean Keeton asked the committee how many wanted to delete Subdivision (h). The committee voted to delete the provision and to delete the reference to Subdivision (h) from the penalty section.

Dean Keeton presented his draft on aggravated rape. There was discussion as to whether the state should be required to prove that the actor "intentionally, knowingly or recklessly inflicted serious bodily injury". The committee decided that a person who commits rape should assume liability for the infliction of injury without the state having to prove that he intended to inflict the injury.

The committee was also concerned with the situation where the victim does not suffer serious bodily injury, but serious mental or emotional problems result from the rape. The committee did not want to redefine "serious bodily injury" in the general definitions section to include mental injury, but adopted Dean Keeton's draft on aggravated rape with the understanding that a redraft of Section 102(1)(a) including some mention of mental injury would be submitted for consideration at a later meeting.

As a result of some discussion as to how the prosecutor was to decide whether to charge rape or aggravated rape, Dean Keeton said that the general section of the code would clearly state that a charge of the more serious offense would include the lesser offenses.

Several committee members were concerned about the rape of children. Dean Keeton explained that these drafts do not cover sex offenses against children and that provisions for children are being drafted. However, Dean Keeton said that when the committee considers the drafts dealing with children they should determine whether or not having intercourse with any small child should be aggravated rape.

Dean Keeton then raised the issue of deviate sexual intercourse. He said that the rape section could be drafted to cover all sexual assaults by force, as "a person who has sexual intercourse or deviate sexual intercourse with another person without that person's consent commits rape". The major objection to this approach was that it would be difficult to sell the legislature and the public a definition of rape which includes assault by one woman on another woman or by a man on another man. The general feeling of the committee was that to maintain the traditional approach to rape there should be a separate section dealing with deviate sexual intercourse. The committee agreed to eliminate the references to deviate sexual intercourse from the rape provisions and to have a separate draft on deviate sexual intercourse framed to parallel the rape provisions, but include male, female, and any combination.

The committee approved Dean Keeton's draft as amended and recessed at 12:05 p.m. for lunch.

The meeting resumed at 1:00 p.m. The topic of discussion was Fred Cohen's report on sentencing.

Mr. Cohen presented the following drafts:

(NOTE: Drafts not considered by the committee are omitted.)

Section 1.04. Classes of Crimes.

(1) Crimes are classified as felonies, gross misdemeanors, simple misdemeanors, or petty misdemeanors.

(2) A crime is a felony if it is so designated by law or if persons convicted thereof may be sentenced to death or to the custody of the Texas Department of Corrections.

(3) Felonies are classified according to the relative seriousness of the crime, for the purpose of sentence, into four degrees, as follows:

(a) felonies of the first degree;

(b) felonies of the second degree;

(c) felonies of the third degree; and

(d) felonies of the fourth degree.

A crime declared to be a felony without specification of degree is of the fourth degree.

(4) A crime is a gross misdemeanor if it is so designated by law or if persons convicted thereof may be imprisoned in the county jail for a term not to exceed one year.

(5) A crime is a simple misdemeanor if it is so designated by law or if persons convicted thereof may be imprisoned in the county jail for a term not to exceed three months.

(6) A crime is a petty misdemeanor if it is so designated by law or if persons convicted thereof may be fined not in excess of $200 or, in addition to such fine, the law authorizes a forfeiture or similar penalty.

(7) Conviction of a petty misdemeanor shall not give rise to any disability or legal disadvantage imposed by law upon conviction of a crime.

Mr. Cohen noted that the classes of crime section is basic and that the point of the section is to set up sufficient

categories to allow a reasonable reflection of seriousness and to relate the classification of crimes to the sentencing provisions. He explained that historically when over 200 felonies were subject to capital punishment there was little or no discrimination in sentencing. The practice has changed and there are now more alternatives available to the judge. With more discrimination in sentencing, more categories are needed to allow various levels of discretion. The proposed classifications will alter the traditional Texas legislative practice of attaching a specific penalty to each crime. The structure will avoid the lack of consistency in our present penalty system by allowing the legislature to decide in what general category an offense belongs, instead of merely deciding on 39 years or 26 years or any number of years that they pick out of the air.

Judge Barron asked why there were four categories of felonies rather than three as in the Model Penal Code (M.P.C.). Mr. Cohen replied that he thought four degrees were necessary to create the number of choices that will be needed when the various offenses are classified. He said that the committee might find that three degrees were sufficient and then the fourth could be eliminated. He pointed out that the number of degrees also relates to the allocation of authority between the legislature and the judge. Essentially, the legislature retains more control, and the judge is given less authority, by breaking the classes into four degrees.

Mr. Cohen explained his substitution of the petty misdemeanor category for the M.P.C. violation category was necessary because of Texas constitutional jurisdictional restrictions. The provision restates the jurisdiction of the justice courts and at the same time avoids questions of jury requirements, counsel requirements, etc., which would arise with a "civil" violation category, as proposed in the M.P.C.

Mr. Conner asked if Subsection (7) would impair any administrative action. Mr. Cohen said that it was not intended to, but that language might be needed to clarify this because many administrative actions depend on court action.

Mr. Cohen presented Article 6, Section 6.01, of his draft.

<u>Section 6.01. Conformity with Classification and Sentence; Future Legislation.</u>

From and after the effective date of this code all <u>penal</u>

laws (CRIMES) that may be enacted shall be classified for the purpose of sentence in accordance with this code.

Mr. Cohen pointed out that obviously the provision is purely hortatory, but it is intended as a strong expression on the part of the legislature that adopts the code that the code's basic scheme should be followed in the future.

Judge Barron noted that crimes are not enacted and that the wording should be changed. Various suggestions were made for change, and Mr. Cohen suggested "all penal laws that may be enacted". The committee agreed that this was satisfactory and could be changed by later drafting to make it clear that any law that the legislature passes which carries a penal sanction shall be in conformity with the sentencing structure of the penal code.

Mr. Cohen presented his Section 6.02.

Section 6.02. Sentence in Accordance with Code; Authorized Dispositions.

(1) No person convicted of a crime specified in this code shall be sentenced otherwise than in accordance with this article.

(a) Notwithstanding any other provision of law, a felony defined by any statute of this state other than this code which exceeds in any way the sentence authorized herein for felonies of the fourth degree shall constitute for the purpose of sentence a felony of the fourth degree. All persons convicted under such a statute shall be deemed convicted of a felony of the fourth degree and sentenced in accordance with this code.

(b) Misdemeanors defined by any statute of this state, or by any ordinance, other than this code shall be classified as gross misdemeanors, simple misdemeanors, or petty misdemeanors according to the jail term or fine that now may be imposed.

Unless expressly stated in this code no existing misdemeanor penalty shall be increased by virtue of the adoption of this code.

(2) The court may suspend the imposition of sentence on a person convicted of a crime and order that application be made for civil commitment in accordance with Section 6.13, or may sentence him as follows:

(a) to pay a fine as authorized by Section 6.03 or Section 6.04; or

(b) to be placed on probation; or

(c) to imprisonment for a term authorized by this code (ARTICLE) or by a statute of this state found outside this code; or

(d) to fine and probation or fine and imprisonment or to imprisonment in the county jail not to exceed 30 days and probation.

[(3) The court shall sentence a person who has been convicted of [murder] [murder in the first degree] to death or imprisonment in accordance with Section 210.6.]

NOTE: Subsection (3) is inserted to call it to the attention of the reporter dealing with offenses carrying the death penalty. This subsection will have to be redrafted to conform with those provisions.

(4) This article does not deprive any (THE) court or agency of any authority conferred by law to decree a forfiture of property, suspend or cancel a license, remove a person from office, or impose any other civil penalty. (SUCH A JUDGMENT OR ORDER MAY BE INCLUDED IN THE SENTENCE.)

NOTE: Subsection (4) may be redrafted if it is necessary in order that it will refer to Section 1.04(7).

Mr. Cohen explained the rationale for Section 6.02(1)(a). He said that it seemed to him a step in the direction of consistency and rationality in the penal law to make an offense serious enough to be defined a felony but for reasons of history or accident located outside the penal code not exceed in seriousness the least serious felony which the penal code adopts. In other words, if the crime is serious enough it ought to be brought into the code, or at least the legislature should consider whether or not they want to leave such high penalties outside the penal code.

Mr. Cohen explained that 6.02(1)(b) does not change the law, but is simply a clarification device to assist the courts in determining the intent of the legislature in passing the code.

Judge Brown noted that 6.02(2)(d) will give the court the authority to do something they cannot do now: sentence a person to jail time and to probation. He thought it was a good provision because a judge might use some jail time to impress a person with the seriousness of the offense and then probate the rest of the sentence.

Mr. Cohen explained that 6.02(3) should be placed in brackets with a note to the reporter for the offenses against the person to make sure this section is complete when he is dealing with his own provisions in the homicide section. Mr. Gresham noted that Subsection (3) would prohibit giving a person probation if he had been convicted of murder. Mr. Cohen agreed and said that was the M.P.C. approach and he included it for completeness and as a note for the reporter dealing with this topic.

Mr. Cohen said that Subsection (4) was included to make it clear that the courts still have all the powers they had before. Judge Sharpe recommended deletion of the last sentence. Dean Keeton said he didn't see any need for the last sentence. Dean Keeton proposed that the provision be amended to make sure that it does not refer only to the sentencing court but to any court by making it read, "This article does not deprive any court or agency of any authority conferred by law to decree a forfiture, etc.", and then delete the last sentence. The committee concurred in the amendment.

The committee went on to consider the misdemeanor penalties.*

Section 6.04. Fines for Misdemeanors.

(1) Gross misdemeanor. A sentence to pay a fine for a gross misdemeanor shall be a sentence to pay an amount, fixed by the court, not to exceed $1,000.

(2) Simple misdemeanor. A sentence to pay a fine for a simple misdemeanor shall be a sentence to pay an amount, fixed by the court, not to exceed $500.

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*See chart on page 20.

(3) Petty misdemeanor. A sentence to pay a fine for a petty misdemeanor shall be a sentence to pay an amount, fixed by the court, not to exceed $200.

(4) In the case of a misdemeanor defined outside of this code, if the amount of the fine is expressly specified in the law or ordinance that defines the offense, the amount of the fine shall be fixed in accordance with that law or ordinance.

(5) Alternative sentence. If a person has gained money or property through the commission of any gross misdemeanor or any simple misdemeanor then upon conviction thereof the court, in lieu of imposing the fine authorized under Subsection (1) or (2) above, may sentence the defendant to pay an amount, fixed by the court, not to exceed double the amount of the defendant's gain from the commission of the crime.

(6) The criteria found in Section 7.01 shall apply to the computation and imposition of any fine to be imposed under this section.

Mr. Cohen explained that the maximum fine for petty misdemeanors is the constitutional limit for the justice of the peace courts, but that the maximums for simple and gross misdemeanors are arbitrary figures, although scaled to reflect the seriousness of the categories. He said that Subsection (4) was included to avoid wholesale confusion when the code goes into effect and to make it clear that there is no intent to change laws not included in the penal code which have a misdemeanor penalty attached.

Mr. Cohen explained that Subsection (5) follows the principle of the felony fine provision and applies to misdemeanor cases involving loss of property.

Mr. Cohen presented Section 6.08.

Section 6.08. Sentence of Imprisonment for Misdemeanors.

(1) Gross Misdemeanor. A person who has been convicted of a gross misdemeanor may be sentenced to imprisonment in the county jail for a term not to exceed one year.

(2) Simple Misdemeanor. A person who has been convicted of a simple misdemeanor may be sentenced to imprisonment in the county jail for a term not to exceed three months.

The committee approved these sections as read.

MISDEMEANORS

CLASS	JAIL			FINE			ALTERNATIVE FINE
	Min.		Max.	Min.		Max.	
Gross	0	--	1 year	$0	--	$1,000	Not to exceed
Simple	0	--	3 months	$0	--	$ 500	double amount
Petty		None		$0	--	$ 200	gained

Mr. Cohen presented Section 6.03.

[Section 6.03. Fine for Felony.

(1) The court may impose a fine for any felony if the defendant has gained money or property through the commission of the crime.

(2) A sentence to pay a fine for a felony shall be a sentence to pay an amount, fixed by the court, not to exceed double the amount of the defendant's gain from the commission of the crime.

(3) The criteria found in Section 7.01 shall apply to the computation and imposition of any such fine.]

Mr. Cohen noted that the felony fine section was adapted from the New York approach, which in turn modified the M.P.C. provisions. He explained the section assumes fines have a deterrent effect for some offenses related to pecuniary gain.

Judge Brown raised the issue of the defendant who cannot pay. He asked if the person will be required to lay out the fine at $5 per day, or to serve his full time without parole. Mr. Cohen said that there has to be a maximum time which a person can be required to lay out a fine. Judge Brown said it could be set up like the federal system where a large fine can be assessed subject to execution only. The committee noted that the fine was in addition to a penitentiary sentence, and one committee member stated that the fine and laying out the fine should apply only to the fine and should not relate to the penitientiary sentence. Dean Keeton said he agreed with that position.

Mr. Gresham felt that two restrictions were necessary to avoid abuse of the fining power: (1) a limit on the term of imprisonment served for failure to pay the fine, and (2) appellate review of sentencing including the amount of the fine. Judge Brown said that the committee should seriously consider giving the court of criminal appeals the authority to remit rather than reverse to save retrial of the case.

The committee generally agreed that some time limitation should be included. Dean Keeton said he felt very strongly

that, if the felony fine is included, there should at least be appellate review of the fine if not of general sentencing.

Mr. Gray proposed including a provision requiring restitution before the state gets any amount of fine. One committee member recommended an insertion such as, "The court may require the fine to be paid to the injured party." Mr. Maloney stated that he understood Section 6.02 to mean that there can be no restitution without probation, and pointed out that a fine in addition to imprisonment would not help the victim.

From the committee's discussion, Mr. Cohen said he would like to make a note in Section 6.02 to make the fine remittable at any time if the defendant prefers to make restitution rather than pay the fine.

The committee left the section on felony fine with the understanding that there would be further consideration of the issues of appellate review, time limitations on having to pay the fine, and restitution.

Mr. Conner raised another issue involving felony fines. He pointed out that the provision could eliminate the fine provided for felony DWI since no gain to the defendant is involved in those cases. Dean Keeton said that the DWI statutes were not assigned to the penal code, but to the traffic code. He said that the legislative council would be informed of the problem.

The committee decided to proceed immediately to Section 7.01 which deals with the criteria for imposing fines.

Section 7.01. Criteria for Imposing Fines.

(1) As used in Sections 6.03 and 6.04 the term "gain" means the amount of money or the value of property derived from the commission of the crime, less the amount of money or value of property returned to the victim of the crime or seized by or surrendered to lawful authority prior to the time sentence is imposed.

When the court imposes a fine the court shall make a finding as to the amount of the defendant's gain from the crime. If the record does not contain sufficient evidence to support such a finding the court may conduct a hearing upon the issue.

(2) In determining the amount and method of payment of a fine, the court shall consider:

(a) the ability of the defendant to pay the amount of the fine;

(b) the ability of the defendant to pay the fine by the method sought to be imposed;

(c) the hardship likely to be imposed on the defendant's dependents by the amount and method of payment of the fine; and

(d) the impact the fine will have on the defendant's ability to make restitution or reparation to the victim of the crime.

One of the committee members raised the issue of what is meant by defendant's gain. The committee member posed the hypothetical example of a person stealing a $1,000 diamond and selling it for $200. Mr. Cohen explained that we have the same problem now of determining value, for example, in a theft case. The courts use current market value.

Mr. Cohen noted that the judge is required to take into account the possibility of restitution, and that Subsection (1) is designed to discourage a defendant from sitting out a fine by defining his gain in terms of the amount received less the amount returned. He said that the impetus to restitution is clearly contemplated by the draft, but that it can be spelled out even more clearly if the committee believes it necessary.

Mr. Gresham said that all the things set out in Section 7.01 seemed to him to be reviewable by the court of criminal appeals as matters of fact.

Mr. Cohen presented his draft of Section 6.06.*

Section 6.06. Sentence of Imprisonment for Felony; Ordinary Terms.

A person who has been convicted of a felony may be sentenced by the court to imprisonment as follows:

(1) In the case of a felony of the first degree, for a term the minimum of which shall be fixed at not less than

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*See Chart on page 28.

1 year nor more than 10 years, and the maximum at not more than 30 (TWENTY) years or at life imprisonment.

(2) In the case of a felony of the second degree, for a term the minimum of which shall be fixed at not less than 1 year nor more than 5 years, and the maximum at not more than 15 years.

(3) In the case of a felony of the third degree, for a term the minimum of which shall be fixed at not less than 1 year nor more than 3 years, and the maximum at not more than 10 years.

(4) In the case of a felony of the fourth degree, for a term the minimum of which shall be fixed at not less than one year nor more than two years, and the maximum at not more than five years.

No sentence shall be imposed under this section whereby the minimum is longer than one-half the maximum, or, when the maximum is life imprisonment, longer than 10 years.

Dean Keeton read a letter from Judge Roberts in which he discussed the penalty for a first degree felony. Judge Roberts stated that the minimum seemed reasonable, but that the maximum of 20 years and a jump to life seemed unreasonable. He felt that there should be a higher maximum so that the judge does not have a choice just between 20 years or life.

Judge Duggan expressed the opinion that an extremely large number of life sentences would result under this provision because judges would often choose life because they did not think that 20 years was enough. He suggested raising the maximum to 30 years or life imprisonment. The committee voted to make this change.

Judge Kelton questioned the need for a minimum sentence since under our present correctional system it would be meaningless.

Mr. Cohen explained that the purpose of the minimum sentence is to provide a parole eligibility date. He said that the structure is meaningless only if parole eligibility continues to be based on the maximum term. The sliding minimum sentence allows the judge discretion to reflect the moral decision and the sense of the community as to the seriousness of the crime. Then, after the defendant has served the minimum time set by the judge, the parole board's discretion

begins to function. The maximum is really a control on the penal institutions. The question is: What can the judge at the time of sentencing sensibly reflect based on the information he has available? The M.P.C.'s answer is that the judge can reflect the community morals, but he is limited in his ability to predict the course of the defendant's rehabilitation. Mr. Cohen explained that the notion of a "not-less-than-one" sentence throughout the draft is based on penological experience that it takes at least one year for an institution to find out anything about the man in order to classify him.

Dean Keeton asked if the good-time laws would apply to the minimum. Mr. Cohen said that the committee would have to decide, but that for incentive purposes he felt that there ought to be a greatly reduced good-time provision operating on the minimum for parole eligibility and on the maximum for purposes of discharge.

Judge Kelton asked, under this system, when a man sentenced to a two-year minimum and an eight-year maximum would be eligible for parole. Mr. Cohen said, taking the federal good-time law of 6 days per month as an example, the man would be eligible for parole in 2 years less 144 days. If the parole board did not grant him probation, he would stay in eight years less the six days a month of good time he earned.

Dr. Killinger said that what is really needed is a reasonable good-time law which allows for 6, 7, or 8 days to be earned per month instead of the present Texas law which allows up to 50 days a month to be earned. He pointed out that only a small number of prisoners are paroled in Texas, but many get out on complete discharges because of the liberal good-time laws.

Dr. Killinger compared the Texas system with the federal system. He said if a judge in the District of Columbia sentences a man to two to nine years, the man must serve the two years and nothing can subtract from those two calendar years. The man is not eligible for parole until after he serves the minimum. Thereafter, it is up to the treatment facilities to determine when the man is eligible for conditional release. At the federal level good time ranges from 6 days a month to 10 days a month for life sentences, but does not apply until the person is eligible for parole. Eligibility for parole is considered enough incentive up until that time.

Dr. Killinger explained that in Texas good time is given as an incentive for good behaviour in prison because the prisoners do not get pay or anything else to make them conform. He pointed out that parole eligibility was based on one-third or one-fourth of the maximum less good time and that discharge was based on the maximum less good time.

Mr. Alschuler pointed out that the one-third or one-fourth of the maximum sentence would be eliminated by the proposed section. He noted that the M.P.C. proposes six days per month reduction in sentence for good time, and that this is applied to the minimum to determine the eligibility for parole, and to the maximum to determine the date of discharge.

Mr. Cohen said the significance of the good-time law in Texas is the way it operates on the maximum sentence to provide a discharge date at which time the man must be discharged regardless of his readiness to be thrust upon society. He said our problem is that we are discharging people without supervision, whereas, in order to protect the community, we should let them out on parole and under supervision to make sure that they are really rehabilitated. Mr. Gresham added that the fundamental problem is that too many people are being sent to prison, and that we are not being selective enough about those who are retained in prison.

Dean Keeton said that to make the proposed system operate there will have to be a change in the good-time law so that there will be a meaningful minimum sentence. Judge Brown stated that the people of this state are critical of the whole criminal process because our minimum sentences are now meaningless. He added that by this system we would be defining a minimum sentence to mean something and to be a useful part of the system.

Dean Keeton asked Dr. Killinger how he would advise handling parole eligibility under the proposed system where a man was sentenced to a minimum of 4 and a maximum of 10 years. Dr. Killinger replied that he believed that the man should not be eligible for parole for four calendar years, but that he would keep the minimums down. Dr. Killinger noted that the Texas Department of Corrections will be in serious trouble if the parole boards do not parole more than 40 percent of the people as they are doing now. For comparison he noted that in Washington people are paroled at the rate of 90 percent.

Mr. Cohen stated that he felt that Dr. Beto's objection would be that judges will sentence people to the highest minimum possible and that the department does not have the

facilities to keep them all in prison. Dean Keeton stated that the judges should not give high minimums except in extraordinary cases. He said he liked the proposed system and he was not concerned at this point that the judges will impose extremely long minimum sentences. He pointed out that institutes on sentencing could be held for judges, and that some good-time benefits were going to be provided on the minimum. Dean Keeton asked Dr. Killinger to send the committee any information he has on cutting down the good-time provisions.

Judge Brown noted that one thing had not been clearly stated, and that is that the whole proposal for a sentencing structure is predicated on the hope that we will have judge-sentencing based on an impartial presentence investigation.

Dean Keeton asked Mr. Berger if he would like to comment on the question in general. Mr. Berger said in Texas, when the judge sentences he has no information on the person except what the district attorney brings in on a "rap sheet", and what the defense attorney says. The judge gets two extremes without any impartial factual investigation on the individual. Then, if the man is sentenced to prison, the prison authorities get a commitment order and a very brief statement of facts concerning his offense. The institution tries to build a history by interviewing the man. When he reaches parole eligibility, the parole board tries to have a one-shot interview at the diagnostic center by the parole officer. So many times all the parole board has to aid its decision is the statement of facts, the prison data sheet on sentencing, and one interview by the parole officer.

Mr. Cohen said he would prefer a system like the federal practice where the judge can commit the person to a diagnostic facility for 60 to 90 days; then the man comes back with a full report on him and the judge sentences him. Dean Keeton said the legislature is not going to spend the money necessary to provide such a system.

Dean Keeton asked if the committee was ready to adopt the felony sentencing provision. The committee approved the drafts as amended.

The discussion proceeded to Section 6.07.

FELONY, ORDINARY TERMS

FELONY DEGREE	MINIMUM			MAXIMUM	FINE
	not less than		not more than	not more than	
First	1	--	10	30, or life	Not more
Second	1	--	5	15	than double
Third	1	--	3	10	amount gained
Fourth	1	--	2	5	

NO MINIMUM MAY EXCEED ONE-HALF OF MAXIMUM.

IF MAXIMUM IS LIFE, MINIMUM MAY NOT EXCEED 10 YEARS.

Section 6.07. Sentence of Imprisonment for Felony; Extended Term.

The court may sentence a defendant convicted of a felony, other than a felony in the first degree, to an extended term of 30 years if the court determines that the defendant is a dangerous offender. In order to so determine, the court must find that the defendant is 18 years of age or over and that his past conduct has been characterized by a pattern of repetitive or complusive behaviour involving the threat or imposition of physical harm to others or that he is suffering from a serious personality disorder and thus is reasonably likely to inflict serious bodily harm on others in the foreseeable future and such extended term is necessary to protect the public, and it further finds, as provided in Section 7.03, that the following grounds exist:

(1) The defendant presently stands convicted of a felony in which he inflicted or attempted to inflict serious bodily harm on others; or

(2) The defendant presently stands convicted of a felony which created a substantial risk to the life or personal safety of others and has been previously convicted of one or more felonies not related to the present crime as a single episode; or

[(3) The defendant presently stands convicted of a felony involving extortion, bribery of a public official, compulsory prostitution, selling or knowingly and unlawfully transporting narcotics to facilitate their sale, or the use or attempt to use physical violence, committed as part of a continuing criminal conspiracy.

The requirement that the court determine whether or not the defendant is reasonably likely to inflict serious bodily harm on others in the foreseeable future shall not apply to this section.]

NOTE: Decision on inclusion of Subsection (3) is deferred until after the conspiracy section is drafted.

Mr. Cohen explained that the purpose of this section is to provide an extended term for dangerous offenders. He also

noted that the section will completely replace our present enhancement laws. He explained Subsection (3) is intended to isolate the person involved in organized crime, but that at the reporters' meeting it was decided to defer decision on this until the conspiracy provisions are drafted. Dean Keeton said that instead of discussing the problem now, the committee should consider it when the conspiracy provisions are taken up.

Judge Brown said that the real problem in recidivism is the thief and that the provision as drafted does not cover him. Mr. Cohen said that while we know from studies that the standard recidivist is the alcoholic check writer and the minor sex offender (exhibitionist), the question here is whether this person should be thrown in jail for 30 years. Dean Keeton stated that some of these people should be committed for hospital treatment or dealt with in some way other than an extended prison term.

Mr. Cohen presented drafts on the sections dealing with the procedures involved in extended-term sentences.

[Section 7.03. Procedure for Sentence of Extended Term of Imprisonment.

(1) No defendant shall be sentenced to an extended term of imprisonment under Section 6.07 unless:

(a) Within seven days (FORTY-EIGHT HOURS) of the announcement of the verdict of guilty the prosecuting attorney, at his own instance with the permission of the court or at the direction of the court, serves written notice on the defendant or his attorney that the court may sentence the defendant as a dangerous offender and setting forth the grounds therefor.

(b) A summary hearing is held, at a time fixed in said notice but not less than 15 (FIVE) days after its service, at which evidence for and against the imposition of an extended term of imprisonment shall be received and at which the defendant is entitled to be heard and represented by counsel.

(c) The court has available and considers the presentence report and diagnostic evaluation described in Section 7.04.

September 29, 1967

SUMMARY OF MINUTES

The Committee on Revision of the Penal Code met at the University of Texas Law School on Friday, April 28, 1967 from 10:00 a.m. until 5:00 p.m. and on Saturday, April 29, 1967 from 9:00 a.m. until 12:00 noon.

The committee first considered the report of Judge Archie Brown, Judge A. A. Semaan, and Mr. James Barlow on Offenses Against Public Administration.

The following proposed drafts were approved subject to redraft for consistency:

Definitions:

(1) "Public officer" means:

(a) An executive or administrative officer of the state or of a county, municipality, or any other subdivision or agency of government created or authorized by the constitution or statutes of this state.
(b) A member of the legislature or of a governing board of a county, municipality, or any other subdivision or agency of government created or authorized by the constitution or statutes of this state.
(c) A judicial officer, which shall include any justice or judge of any appellate or trial court, any other justice, judge, justice of the peace or magistrate, referee, or any other person appointed by a judge or court to hear or determine any cause or controversy or a portion thereof, or any clerk, commissioner, either elected or appointed by the court, or any attorney at law.
(d) A hearing officer, which shall include any person authorized by law or private agreement to hear or determine a cause or controversy and who is not a judicial officer. Hearing officer includes a juror or grand juror, or any person authorized to take a deposition in a civil or criminal case, but is not confined by definition to these classes of persons alone.
(e) A peace officer in this State.
(f) Any other person exercising the functions of a public officer whether de jure or de facto.

(2) A "public employee" is a person employed by or acting for the State or by or for a county, municipality, or any other subdivision or agency of government created or authorized by the constitution or statutes of this State who is not a "public officer."

(3) A person who has been elected, nominated by any political party, appointed or otherwise designated as a public officer or public employee is deemed such officer or employee although he has not yet qualified therefor or entered upon the duties thereof.

(4) "Harm" means loss, disadvantage or injury, or anything reasonably so regarded by the person affected, including loss, disadvantage or injury to any other person or entity in whose welfare he is interested.

(5) "Benefit" means gain or advantage in the form of money, property, commercial interests or anything else the primary significance of which is economic gain or advantage, including benefit to any other person or entity

in whose welfare he is interested but not an advantage promised generally to a group or class of voters as a consequence of public measures which a candidate engages to support or oppose.

Bribery: Whoever does any of the following commits bribery, a felony of the _____ degree.

(1) Offers, gives, or promises to give, directly or indirectly to any public officer or employee any benefit to which he is not legally entitled with intent to influence such public officer or employee with respect to the exercise of his powers or the performance of his duties as such public officer or employee; or

(2) Being a public officer or employee, requests, receives or agrees to receive, directly or indirectly, any benefit with the intent to create the understanding that such public officer or employee will be influenced with respect to the exercise of his powers or the performance of his duties as such public officer or employee.

(3) Offers, gives, or promises to give, directly or indirectly, any such benefit to a witness or one who is about to become a witness in a proceeding before a judicial or hearing officer, with intent to influence his testimony or to influence him to absent himself from the proceedings; or

(4) Any benefit as consideration for a violation of a known legal duty as a public officer or employee.

(5) Being a witness or a prospective witness, requests, receives or agrees to receive, directly or indirectly, any benefit with the intent to create an understanding that his testimony will be influenced, or that he will absent himself from the proceeding; or

(6) Accepts directly or indirectly a benefit upon an agreement or understanding, express or implied, that he will refrain from giving information to a lawfully constituted authority that may lead to the prosecution of a crime or purported crime, or that he will abstain from, discontinue, or delay prosecution therefor.

Threats and other improper influence: A person commits an offense if he

(a) threatens harm to any public officer or public employee with intent to influence his decision, opinion, recommendation, vote or other exercise of discretion as a public officer or public employee; or
(b) threatens harm to any public officer or public employee with intent to influence the exercise of any power or the performance of any duty as a public officer or public employee in a judicial or administrative proceeding; or
(c) threatens harm to any public officer or public employee with intent to influence him to violate his known legal duty; or
(d) privately addresses to any public officer or public employee who has or will have an official discretion in a judicial or administrative proceeding any representation, entreaty, argument or other communication with intent to influence the outcome on the basis of considerations other than those authorized by law; or
(e) by the use of any other means with intent to induce a witness or one who is about to become a witness to withhold his testimony or to absent himself from the proceeding.

Grading. An offense under this section is a misdemeanor unless the threat if carried out would be a felony or the threat is made with intent to influence a judicial or administrative proceeding, in which case the offense is a felony of the _____ degree

Compensation for past official behavior: A person commits an offense if he solicits, accepts or agrees to accept any benefit as compensation for having, as public officer or public employee, given a decision, opinion, recommendation or vote favorable to another, or for having otherwise exercised a discretion in favor of another, or for having violated his known legal duty in his capacity as a public officer or public employee. A person commits an offense if he offers, confers or agrees to confer compensation to a public officer or public employee or to a former public officer or public employee, acceptance of which is prohibited by this section.

Gifts:

(1) Regulatory and law enforcement officials. No public official or public employee in any department or agency exercising regulatory functions, or conducting inspections or investigations, or carrying on civil or criminal litigation on behalf of the government, or having custody of prisoners, shall, with intent or apparent intent of being influenced in the exercise of his powers or duties, solicit, accept or agree to accept any benefit from a person known to be subject to such regulation, inspection, investigation or custody, or against whom such litigation is known to be pending or contemplated.

(2) Officials concerned with government contracts and pecuniary transactions. No public official or public employee having any discretionary function to perform in connection with contracts, purchases, payments, claims or other pecuniary transactions of the government shall, with intent or apparent intent of being influenced in the exercise of his powers or duties, solicit, accept or agree to accept any benefit from any person known to be interested in or likely to become interested in any such contract, purchase, payment, claim or transaction.

(3) Judicial and administrative officials. No public official or public employee having judicial or administrative authority and no public official or public employee employed by or in a court or other tribunal having such authority, or participating in the enforcement of its decisions, shall, with intent or apparent intent of being influenced in the exercise of his powers or duties, solicit, accept or agree to accept any benefit from a person known to be interested in or likely to become interested in any matter before such public official or public employee, or a tribunal with which he is associated.

(4) Legislative officials. No legislator or public employee employed by the legislature or by any committee or agency thereof shall, with intent or apparent intent of being influenced in the exercise of his powers or duties, solicit, accept, or agree to accept any benefit from any person known to be interested in a bill, transaction or proceeding, pending or contemplated before the legislature or any committee or agency thereof.

(5) Exceptions. This Section shall not apply to:

(a) fees prescribed by law to be received by a public officer or public employee, or any other benefit for which the recipient gives legitimate consideration or to which he is otherwise legally entitled; or

(b) gifts or other benefits conferred on account of kinship or other personal, professional or business relationship independent of the official status of the receiver; or

(c) trivial benefits incidental to personal, professional or business contacts and involving no substantial risk of undermining official impartiality; or
(d) contributions to a political campaign of an elective public officer made pursuant to the election laws and when such public officer is a candidate for nomination or election, or renomination or re-election to a public office.

(6) Offering Benefits Prohibited. No person shall knowingly confer, or offer or agree to confer, any benefit prohibited by the foregoing subsections.

Grade of offense. An offense under this Section is a _____.

Perjury. Definitions:

(1) the definitions given in Section 240.0 apply; and
(2) "statement" means any representation of fact; and
(3) "official proceeding" means any trial, hearing, or proceeding which may be heard before any judicial, legislative or administrative official authorized to take statements under oath, including any judge, magistrate, commissioner, referee, hearing officer or other person taking testimony, deposition, or bond in conjunction with any such trial, hearing, or proceeding.

Offense defined: "Whoever, with intent to deceive, shall make a false statement, with knowledge of its meaning, about something past or present under oath or equivalent affirmation, or who swears or affirms the truth of a false statement previously made, with knowledge of its meaning, when such statement is material shall be guilty of perjury."

Grading: If such sworn or affirmed falsification is made during an official proceeding, the offense shall be first degree perjury, a felony of the _____ degree.

If such sworn or affirmed falsification is made under any other circumstances, the offense shall be second degree perjury, a felony of the _____ degree.

Second degree perjury shall be lesser and included offense of first degree perjury.

Materiality: A falsification is material, regardless of the admissibility of the statement under rules of evidence, if it has a substantial evidentiary bearing on any issue in the proceeding. It is no defense that the declarant mistakenly believed the falsification to be immaterial. Whether a falsification is material in a given factual situation is a question of law.

Retraction: Except as provided in subdivision (6), it shall be a defense to any prosecution for any sworn or affirmed testimony given during an official proceeding if declarant retracts his falsification before the completion of his testimony at such official proceeding, and before it becomes manifest that the falsification would be exposed, and before such falsification materially affected such official proceeding.

Irregularities no defense: It is not a defense to prosecution under this section that the oath or affirmation was administered or taken in an irregular manner or that there was some irregularity in the appointment or qualification of the

person who administered such oath or affirmation. A document purporting to be made under oath or affirmation at any time when the actor presents it as being so verified shall be deemed to have been duly sworn or affirmed.

Inconsistent statements: An indictment or information for perjury alleging that the offender, under oath, has made statements both of which could not be true, material to the issue or point in question, in the same or different official proceedings, where such oath or affirmation is required, need not specify which statement is false. At the trial, the prosecution need not establish which statement is false.

Corroboration: No person shall be convicted of an offense under this Section where proof of falsification rests solely upon testimony of one witness. This rule shall not apply to prosecutions for inconsistent statements.

Subornation: Whoever shall purposely induce another to commit the offense of perjury shall be guilty of the offense of subornation of perjury. The offense of subornation of perjury shall be a felony of the same degree as the perjury actually induced.

NOTE: The committee agreed that subornation will be left in unless the general solicitation statute, which is yet to be drafted, makes it unnecessary.

The committee next discussed the proposals of Mr. Joel Finer on sex offenses. The committee adopted the following definitions:

Section 100.

(a) For the purpose of Sections 101 and 102, sexual intercourse has its ordinary meaning and occurs upon any penetration of the female sex organ by the male sex organ.
(b) For the purpose of Sections 101-104 deviate sexual intercourse means any act involving the sex organ of one person and the mouth or anus of the other for the purpose of arousing or gratifying the sexual desires of any person.

NOTE: The committee agreed on the criminality of the acts covered by Mr. Finer's remaining drafts, but postponed approval until the sections could be redrafted in a form more acceptable to the majority of the members. See the minutes of the June 16 meeting.

The committee considered Dean Page Keeton's draft of the general attempt statute.

The following proposed drafts were approved:

Criminal attempt:

(1) Definition of attempt. A person is guilty of an attempt to commit a crime, if, acting with the kind of culpability otherwise required for the commission of the crime, he:

(a) intentionally engaged in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or

(b) when causing a particular result is an element of the crime, acts with the intention of causing and with the belief that it will cause such result without further conduct on his part; or
(c) acts with the intention of completing a course of conduct which would constitute the crime, under the circumstances as he believes them to be, and his conduct constitutes a substantial step toward the commission of the crime.

(2) Conduct must be strongly corroborative of intention. Conduct shall not be held to constitute an attempt unless the actor's course of conduct is strongly corroborative of his intent to commit the crime.

(3) Conduct designed to aid another in commission of a crime. A person who engaged in conduct designed to aid another to commit a crime which would establish his complicity under Section 2.06 if the crime were committed by such other person, is guilty of an attempt to commit the crime, although the crime is not committed or attempted by such other person.

NOTE: The committee agreed to delete this provision temporarily and to deal with the problem under the conspiracy provisions to be drafted later.

(4) Renunciation of criminal purpose. When the actor's conduct would otherwise constitute an attempt under Subsection (1) (b) or (1) (c) of this Section, it is an affirmative defense that he abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose. The establishment of such defense does not, however, affect the liability of an accomplice who did not join in such abandonment or prevention.

Within the meaning of this Article, renunciation of criminal purpose is not voluntary if it is motivated, in whole or in part, by circumstances, not present or apparent at the inception of the actor's course of conduct, which increase the probability of detection or apprehension or which make more difficult the accomplishment of the criminal purpose. Renunciation is not complete if it is motivated by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim.

NOTE: The committee generally approved the draft on renunciation as written, but postponed decision on its inclusion.

The committee considered the proposals of Mr. Fred Cohen on the application of the general provisions of the code. The following drafts were approved:

<u>All offenses defined by statute</u>: <u>application of General Provisions of the Code</u>.

(1) No conduct constitutes a crime unless it is a crime under this Code or another statute of this state.

(2) The General Provisions (Part I) of this Code are applicable to all crimes defined by other statutes, unless the Code otherwise provides.

The committee next considered the recommendations of Mr. Fred Cohen on time limitations and agreed that they should be retained in the Code of Criminal Procedure.

The committee considered the recommendations of Mr. Saul W. Baernstein on seduction and abduction and agreed that both offenses should be eliminated from the code.

The meeting adjourned at 12:00 noon.

September 29, 1967

MINUTES
OF THE TEXAS STATE BAR COMMITTEE
ON REVISION OF THE PENAL CODE
APRIL 28, 29, 1967

Present: Committee Members Page Keeton, Chairman; Judge John Barron; Judge Lloyd Davidson; George W. Gray; Judge George Kelton; Judge Truman Roberts; Judge T. Gilbert Sharpe.
Law Enforcement Advisory Committee G. C. Conner; Beverly Laws for Bob Miles; M. W. Stevenson for Charles Batchelor.
Reporters Saul Baernstein; Newell Blakely; Judge Archie Brown; Fred Cohen; Joel Finer; Frank Maloney.
Staff Bill Reid; Mrs. Ione Stumberg.

The Texas State Bar Committee on Revision of the Penal Code met at 10:00 a.m. on Friday, April 28, 1967, in the Alumni Lounge, University of Texas School of Law in Austin, Texas. Dean Page Keeton, chairman, presided.

The first order of business was consideration of the report of Judge Archie Brown, Judge A. A. Semaan, and Mr. James E. Barlow, reporters for the Offenses Against Public Administration section. Drafts were presented for the offenses of Bribery and Corrupt Influence, and Perjury and Other Falsification in Official Matters.

(Note: In order to clearly reflect the action taken by the committee on the drafts, the minutes will present additions by the committee italicized, and deletions in parentheses in capitals.)

Judge Brown presented the following definitions:

Definitions:

(1) "Public officer" means:

(a) An executive or administrative officer of the state or of a county, municipality, or any other subdivision or agency of government created (SET UP) or authorized by the constitution or statutes of this state.

(b) A member of the legislature or of a governing board of a county, municipality, or any other subdivision or agency of government created (SET UP) or authorized by the constitution or statutes of this state.

(c) A judicial officer, which shall include any justice or judge or any appellate or trial court, any other justice, judge, justice of the peace or magistrate, referee, or any other person appointed by a judge or court to hear or determine any cause or controversy or a portion thereof, or any clerk, commissioner, either elected or appointed by the court, or any attorney at law.

(d) A hearing officer, which shall include any person authorized by law or private agreement to hear or determine a cause

or controversy and who is not a judicial officer. Hearing officer includes a juror or grand juror, or any person authorized to take a deposition in a civil or criminal case, but is not confined by definition to these classes of persons alone.

(e) (F) A peace officer in this State.

(f) (E) Any other person exercising the functions of a public officer whether de jure or de facto.

(2) A "public employee" is a person employed by or acting for the State or by or for a county, municipality, or any other subdivision or agency of government created (SET UP) or authorized by the constitution or statutes of this State who is not a "public officer".

(3) A person who has been elected, nominated by any political party, appointed or otherwise designated as a public officer or public employee is deemed such officer or employee although he has not yet qualified therefor or entered upon the duties thereof.

(4) "Harm" means loss, disadvantage, or injury, or anything reasonably so regarded by the person affected, including loss, disadvantage or injury to any other person or entity in whose welfare he is interested.

(5) "Benefit" means gain or advantage in the form of money, property, commercial interests or anything else the primary significance of which is economic gain or anything regarded by the beneficiary as gain or advantage, including benefit to any other person or entity in whose welfare he is interested, but not an advantage promised generally to a group or class of voters as a consequence of public measures which a candidate engages to support or oppose.

Judge Brown emphasized that the reporters wanted a broad definition of the term "public officer" in order to avoid the present Texas legislative practice of drafting a new law on bribery each time a new board is created. He also noted that they did not use the Model Penal Code definition of "public servant" because they believed that there may be some need to distinguish between public officials and public employees in either the offense that is committed or the penalty attached, with the federal understanding that a public employee is probably not as culpable as a public officer in most of the offenses.

Mr. Gray questioned the use of the term "set up" in subsections 1(a), 1(b) and (2) and proposed to substitute "created" for "set up". The committee concurred.

Fred Cohen raised the question of limiting the term "any attorney at law" to attorneys authorized to practice in the state. Judge Brown

felt that an attorney acting as an attorney who wasn't authorized to do so would be doubly culpable. Dean Keeton stated that the statute is probably written so that a person cannot be guilty of an offense unless he was practicing as an attorney in this state at the time of commission of the offense.

Dean Keeton proposed reversing the order of subsections 1(e) and 1(f) so that the most general category would be at the end. Judge Davidson suggested in the new (f) spelling out "whether de jure or de facto". The committee concurred in both changes.

The committee tentatively adopted the definitions sections as corrected.

Judge Brown presented the draft of the substantive offense of bribery.

Bribery

Whoever does any of the following commits bribery, a felony of the _____degree.

(1) Offers, gives, or promises to give, directly or indirectly to any public officer or employee any benefit to which he is not legally entitled with intent (PURPOSE) to influence such public officer or employee with respect to the exercise of his powers or the performance of his (POWERS OR) duties as such public officer or employee; or

(2) Being a public officer or employee, requests, receives or agrees to receive, directly or indirectly, any benefit with the intent (PURPOSE) to create the understanding that such public officer or employee will be influenced with respect to the exercise of his powers or the performance of his (POWERS OR) duties as such public officer or employee.

(3) Offers, gives, or promises to give, directly or indirectly, any such benefit to a witness or one who is about to become a witness in a proceeding before a judicial or hearing officer, with intent (PURPOSE) to influence his testimony or to influence him to absent himself from the proceedings; or

(4) Any benefit as consideration for a violation of a known legal duty as a public officer or employee.

(5) Being a witness or a prospective witness, requests, receives or agrees to receive, directly or indirectly, any benefit with intent (PURPOSE) to create an understanding that his testimony will be influenced, or that he will absent himself from the proceeding; or

(6) Accepts directly or indirectly a benefit upon an agreement or understanding, express or implied, that he will refrain from giving information to a lawfully constituted authority that may lead

to prosecution of a crime or purported crime, or that he will abstain from, discontinue, or delay prosecution therefore.

(7) (IT IS NO DEFENSE TO BRIBERY THAT THE PUBLIC OFFICER OR EMPLOYEE DID NOT HAVE THE POWER OR AUTHORITY TO DO OR REFRAIN FROM DOING THE ACT OR OMISSION PROPOSED OR REQUESTED.)

The issue was posed in subsections (1) and (2) as to whether the wording was broad enough to include failure to perform a duty. The committee agreed to change the wording to include "exercise of his powers" as well as "performance of his duties".

Judge Brown presented subsection (7). Judge Davidson questioned the need for this provision. The committee agreed that the persons involved in such a transaction, even though the public official does not have the authority to do the thing requested, should be held liable. The committee decided to delete (7) as an element of bribery and to deal with the problem in either the general attempt statute or a special statute relating to attempted bribery.

Judge Davidson questioned the use of the term "purpose" throughout the proposed statutes. He said that the term "intent" has always been used. After discussion of the use of the term "intent" or "purpose", Dean Keeton made a pronouncement that the committee will now use the general term "intent" in all instances where "purpose" had been used in previous drafts to define mental element. Dean Keeton said that he was succumbing to the overwhelming majority of the committee. The word "intent" will be defined exactly as "Purpose" was defined in the general section.

Judge Brown presented the draft on Threats and Other Improper Influence in Official and Political Matters.

Threats

(1) Offenses Defined. A person commits an offense if he:

(a) threatens harm to any public officer with intent (PURPOSE) to influence his decision, opinion, recommendation, vote or other exercise of discretion as a public officer or public employee; or

(b) threatens harm to any public officer or public employee with intent (PURPOSE) to influence his decision, opinion, recommendation, vote or other exercise of discretion as a public officer or public employee in a judicial or administrative proceeding; or

(c) threatens harm to any public officer or public employee with intent (PURPOSE) to influence him to violate his known legal duty; or

(d) privately addresses to any public officer or public employee who has or will have an official discretion in a judicial or administrative proceeding any representation, entreaty, argument or other communication with intent (PURPOSE) to influence the outcome on the basis of considerations other than those authorized by law; or

(e) by the use of any other means with intent (PURPOSE) to induce a witness or one who is about to become a witness to withhold his testimony or to absent himself from the proceeding.

(IT IS NO DEFENSE TO PROSECUTION UNDER THIS SECTION THAT A PERSON WHO WAS SOUGHT TO BE INFLUENCED WAS NOT QUALIFIED TO ACT IN THE DESIRED WAY, WHETHER BECAUSE HE HAD NOT YET ASSUMED OFFICE, OR LACKED JURISDICTION, OR FOR ANY OTHER REASON.)

(2) Grading. An offense under this section is a misdemeanor unless the threat if carried out would be a felony or the threat is made with intent (PURPOSE) to influence a judicial or administrative proceeding, in which case the offense is a felony of the _____ degree.

Fred Cohen pointed out in subsection (1)(b) that Judge Brown is inconsistent in his terminology used to describe the action being influenced. In this section "to influence his decision, opinion, recommendation, vote or other exercise of discretion" is used. In the bribery statute "the exercise of any power or the performance of any duty" was used. Judge Brown said that he thought we should be consistent and either use the bribery terminology here or use this terminology in the bribery statute.

There was no further objection to the statute until the language following subsection (1)(e) stating "it is no defense to prosecution under this section that a person who was sought to be influenced was not qualified to act in the required way, etc.". The committee tentatively approved the substance of the draft as modified by deleting the part following (e). This will be covered either in the general attempt statute or by a particular attempt statute in this area, as was the similar provision (7) in the bribery statute.

Judge Brown presented Compensation for Past Official Behavior.

Compensation

A person commits an offense (A MISDEMEANOR) if he solicits, accepts or agrees to accept any benefit as compensation for having, as a public officer or public employee, given a decision, opinion, recommendation or vote favorable to another, or for having otherwise exercised a discretion in favor of another, or for having violated his known legal duty in his capacity as a public officer or public employee. A person commits an offense (A MISDEMEANOR) if he offers, confers or agrees to confer compensation to a public officer or public

or to a former public officer or public employee, acceptance of which is prohibited by this section.

There was some discussion as to why the reporter had stated that a person commits a misdemeanor, and Judge Brown conceded that he did not intend to grade the offense. The committee adopted the section as amended by the insertion of "an offense" instead of "a misdemeanor".

Judge Brown presented the section of Gifts to Public Officials or Public Employees by Persons Subject to Their Jurisdiction.

Gifts

(1) Regulatory and Law Enforcement Officials. No public official or public employee in any department or agency exercising regulatory functions, or conducting inspections or investigations, or carrying on civil or criminal litigation on behalf of the government, or having custody of prisoners, shall, with intent or apparent intent of being influenced in the exercise of his powers or duties, solicit, accept or agree to accept any (PECUNIARY) benefit from any person known to be subject to such regulation, inspection, investigation or custody, or against whom such litigation is known to be pending or contemplated

(2) Officials Concerned with Government Contracts and Pecuniary Transactions. No public official or public employee having any discretionary function to perform in connection with contracts, purchases, payments, claims or other pecuniary transactions of the government shall, with intent or apparent intent of being influenced in the exercise of his powers or duties, solicit, accept or agree to accept any (PENCUNIARY) benefit from any person known to be interested in or likely to become interested in any such contract, purchase, payment, claim or transaction.

(3) Judicial and Administrative Officials. No public official or public employee having judicial or administrative authority and no public official or public employee employed by or in a court or other tribunal having such authority, or participating in the enforcement of its decisions, shall, with intent or apparent intent of being influenced in the exercise of his powers or duties, solicit, accept or agree to accept any (PECUNIARY) benefit from any person known to be interested in or likely to become interested in any matter before such public official or public employee, or a tribunal with which he is associated.

(4) Legislative Officials. No legislator or public employee employed by the legislature or by any committee or agency thereof shall, with intent or apparent intent of being influenced in the exercise of his powers or duties, solicit, accept or agree to accept any benefit from any person known to be interested in a bill, transaction or proceeding, pending or contemplated before the legislature or any committee or agency thereof.

(5) Exceptions. This section shall not apply to:

(a) fees prescribed by law to be received by a public officer or public employee (SERVANT), of any other benefit for which the recipient gives legitimate consideration or to which he is otherwise legally entitled; or

(b) gifts or other benefits conferred on account of kinship or other personal, professional or business relationship independent of the official status of the receiver; or

(c) trivial benefits incidental to personal, professional, or business contacts and involving no substantial risk of undermining official impartiality; or

(d) (LAWFUL) contributions to a political campaign of an elective public officer made pursuant to the election laws and when such public officer is a candidate (RUNNING) for nomination or election, or renomination or re-election to a public office.

(6) Offering Benefits Prohibited. No person shall knowingly confer, or offer or agree to confer any benefit prohibited by the foregoing subsections.

(7) Grade of Offense. An offense under this section is a _____ (MISDEMEANOR).

Judge Brown noted an error. The word "pecuniary" is to be deleted from the phrase "accept any pecuniary benefit" since the definition of benefit has been broadened to include pecuniary benefit. The committee agreed to this change.

Judge Davidson recommended that in subsection (4) where the reference is to "benefit from any person known to be interested in a bill" that the words "known to be" should not be included. Dean Keeton argued that the phrase "known to be" should be left in because a legislator might not realize that a person is interested in a bill and might accept a gift from a friend. The committee discussed the provision at length, and came to the conclusion that the provision was not correctly drafted and that the required intent on the part of the legislator should be emphasized. Dean Keeton proposed the following modification of subsection (4): "No legislator or public employee employed by the legislature or by any committee or agency thereof shall, for the purpose or apparent purpose of being influenced in the exercise of his powers or duties, solicit, accept, or agree to accept benefits from any person. . ." The committee approved the substance of the redraft of subsection (4) and as to the entire section, subsections (1)-(4), agreed those four sections should be redrafted using the same terminology and structure as in the amendment proposed by Dean Keeton. [The legislative council staff is preparing a redraft.]

In subsection (5)(a), the exceptions, the committee agreed to change "public servant" to "public officer or public employee" to maintain consistency in the draft. In subsection (5)(a) Judge Davidson suggested changing "running for" to "is a candidate for". The committee concurred in the change.

Judge Kelton raised the question as to what a "lawful contribution" is in subsection (5)(d). Judge Brown said the term was intended to cover those contributions permitted under the election code, but that the reporters did not want to tie the penal law too closely to the present provisions of the election code in case it is changed. Dean Keeton proposed that the intention of the committee be explained in a notation. Judge Brown said that the term "lawful contribution" was probably too broad. The decision was to make the section read "contributions to the political campaign of an elective public officer made pursuant to the election laws and when such public officer is a candidate for . . ., etc.".

Subsection (7) was initially designated a misdemeanor but Judge Brown prefers to leave it strictly to the committee to decide the grading of the offense at a later date.

Judge Brown presented his section on Compensating Public Officer or Public Employee for Assisting Private Interests in Relation to Matters Before Him.

Compensating

(1) (RECEIVING COMPENSATION. A PUBLIC OFFICER OR PUBLIC EMPLOYEE COMMITS A MISDEMEANOR IF HE SOLICITS, ACCEPTS, OR AGREES TO ACCEPT COMPENSATION FOR ADVICE OR OTHER ASSISTANCE IN PREPARING OR PROMOTING A BILL, CONTRACT, CLAIM OR OTHER TRANSACTION OR PROPOSAL AS TO WHICH HE KNOWS THAT HE HAS OR IS LIKELY TO HAVE AN OFFICIAL DISCRETION TO EXERCISE.

(2) PAYING COMPENSATION. A PERSON COMMITS A MISDEMEANOR IF HE PAYS OR OFFERS OR AGREES TO PAY COMPENSATION TO A PUBLIC OFFICER OR PUBLIC EMPLOYEE WITH KNOWLEDGE THAT ACCEPTANCE BY THE PUBLIC OFFICER OR PUBLIC EMPLOYEE IS UNLAWFUL.

After discussion the committee decided that this section is unnecessary as the offenses were adequately covered in the other bribery provisions. It was agreed to delete the section with the understanding that the committee should check to see if there is any necessity to have this particular offense in view of the general bribery provisions.

Judge Brown presented the definitions section for the offense of perjury.

Definitions

(1) the definitions given in Section 240.0 apply; and

(2) "statement" means any representation of fact; and

(3) "official proceeding" means any trial, hearing, or proceeding which may be heard before any judicial, legislative, or administrative official authorized to take statements (EVIDENCE) under oath, including any judge, magistrate, commissioner, referee, hearing officer or other person taking testimony, deposition or bond in conjunction with any such trial, hearing, or proceeding.

The committee objected to the use of the term "evidence" in the definition of "official proceeding". Dean Keeton said that the word "statements" should be substituted especially since "statement" is defined in subsection (2). The committee agreed.

Judge Brown presented his proposed draft defining the offense of perjury and then presented the alternative proposed by Dean Keeton.

Perjury

(1) Offense Defined. (WHOEVER SHALL MAKE A FALSE STATEMENT ABOUT SOMETHING PAST OR PRESENT, UNDER OATH OR EQUIVALENT AFFIRMATION, OR WHO SWEARS OR AFFIRMS THE TRUTH OF A STATEMENT PREVIOUSLY MADE, WHEN SUCH STATEMENT IS MATERIAL AND WHEN HE DOES NOT BELIEVE IT TO BE TRUE SHALL BE GUILTY OF PERJURY.) Whoever, with intent (PURPOSE) to deceive, shall make a false statement, with knowledge of its meaning, about something past or present under oath or equivalent affirmation, or who swears or affirms the truth of a false statement previously made, with knowledge of its meaning, when such statement is material (AND WHEN HE DOES NOT BELIEVE IT TO BE TRUE) shall be guilty of perjury.

After discussing the merits of the two proposals, Judge Davidson proposed that the committee adopt Dean Keeton's draft tentatively and work on it. Judge Davidson questioned the use of the phrase "and when he does not believe it to be true". Judge Roberts said that this was Texas law except that it is presently a defensive matter which the defendant must put in issue by giving some evidence that he thought the statement was true. Judge Brown said that the state should not have to assume the burden of proving what the man had in his mind at the time he made the statement, and that he would delete the words from the draft because if the defendant honestly believes the statement is true he is laboring under a mistake of fact and can raise that as a defense. Dean Keeton said that this could be provided as a defense to perjury in the general presumption section. The committee agreed to accept the Keeton version with the phrase "and when he does not believe it to be true" deleted.

Judge Brown presented his section on grading.

(2) Grading. If such sworn or affirmed falsification is made during an official proceeding, the offense shall be first

degree perjury, a felony of the _____ degree.

If such sworn or affirmed falsification is made under any other circumstances, the offense shall be second degree perjury, a felony of the _____ degree.

Second degree perjury shall be a lesser and included offense of first degree perjury.

Judge Brown explained that he proposed to avoid the present Texas problems of distinguishing between perjury and false swearing and the accompanying problems of proving whether the proceeding in which the statement was made was an official proceeding by grading perjury in two degrees. The first degree would be where a false statement is made during an official proceeding as defined in the definition section, and the second degree would be if the statement is made under any other circumstances.

Judge Brown presented the remaining sections.

(3) Materiality. A falsification is material, regardless of the admissibility of the statement under rules of evidence, if it has a substantial evidentiary bearing on any issue in the proceeding. It is no defense that the declarant mistakenly believed the falsification to be immaterial. Whether a falsification is material in a given factual situation is a question of law.

(4) Retraction. Except as provided in subdivision (6), it shall be a defense to any prosecution for any sworn or affirmed testimony given during an official proceeding if declarant retracts his falsification before the completion of his testimony at such official proceeding, and before it becomes manifest that the falsification would be exposed, and before such falsification materially affected such proceeding.

(5) Irregularities No Defense. It is not a defense to prosecution under this section that the oath or affirmation was administered or taken in an irregular manner or that there was some irregularity in the appointment or qualification of the person who administered such oath or affirmation. A document purporting to be made under oath or affirmation at any time when the actor presents it as being so verified shall be deemed to have been duly sworn or affirmed.

(6) Inconsistent Statements. An indictment or information for perjury alleging that the offender, under oath, has made statements both of which could not be true, material to the issue or point in question, in the same or different official proceedings, where such oath or affirmation is required, need not specify which statement is false. At the trial, the prosecution need not establish which statement is false.

(7) Corroboration. No person shall be convicted of an offense under this Section where proof of falsification rests solely upon (CONTRADICTION BY) testimony of one witness (A SINGLE PERSON OTHER THAN THE DEFENDANT). This rule shall not apply to prosecutions for inconsistent statements.

(8) Subornation. Whoever shall intentionally (PURPOSELY) induce another to commit the offense of perjury shall be guilty of the offense of perjury.

The offense of subornation or perjury shall be a felony of the same degree as the perjury actually induced.

The committee approved subsections (3), (4), (5) and (6) as written. They agreed to modify subsection (7) by striking the words "contradiction by" and "a single person other than the defendant", substituting "one witness" for the latter phrase. The committee agreed that subornation should be left in unless and until it is determined to be unnecessary in the event that the general solicitation statute, yet to be drafted, makes it unnecessary.

Judge Brown presented the draft on Unsworn Falsification to Authorities, explaining that this would be entirely new to Texas law, but that he included it for the committee's consideration.

UNSWORN FALSIFICATION TO AUTHORITIES:

(1) IN GENERAL. A PERSON COMMITS A MISDEMEANOR IF, WITH PURPOSE TO MISLEAD A PUBLIC OFFICER OR PUBLIC EMPLOYEE IN PERFORMING HIS OFFICIAL FUNCTION, HE:

(a) MAKES ANY WRITTEN FALSE STATEMENT WHICH HE DOES NOT BELIEVE TO BE TRUE; OR

(b) PURPOSELY CREATES A FALSE IMPRESSION IN A WRITTEN APPLICATION FOR ANY PECUNIARY OR OTHER BENEFIT, BY OMITTING INFORMATION NECESSARY TO PREVENT STATEMENTS THEREIN FROM BEING MISLEADING; OR

(c) SUBMITS OR INVITE RELIANCE ON ANY WRITING WHICH HE KNOWS TO BE FORGED, ALTERED OR OTHERWISE LACKING IN AUTHENTICITY; OR

(d) SUBMITS OR INVITES RELIANCE ON ANY SAMPLE, SPECIMEN, MAP, BOUNDARY MARK, OR OTHER OBJECT WHICH HE KNOWS TO BE FALSE.

(2) STATEMENTS "UNDER PENALTY." A PERSON COMMITS A PETTY MISDEMEANOR IF HE MAKES A WRITTEN FALSE STATEMENT WHICH HE DOES NOT BELIEVE TO BE TRUE, OR PURSUANT TO A FORM BEARING NOTICE, AUTHORIZED BY LAW, TO THE EFFECT THAT FALSE STATEMENTS MADE THEREIN ARE PUNISHABLE.

(3) PERJURY PROVISIONS APPLICABLE. SUBSECTIONS (4), (6), NDA (7) OF SECTION 241.1 APPLY TO THIS SECTION.

Judge Barron recommended that this section not be included in the revision, arguing that if a statement is important enough to have a criminal penalty to back it up it should be sworn to before a proper official. The committee agreed to delete the section from the draft.

Judge Brown presented the draft on False Alarms to Agencies of Public Safety:

False Alarms

A person who knowingly causes a false alarm or fire or other emergency to be transmitted to or within any organization, official or volunteer, for dealing with emergencies involving danger to life or property commits an offense (A MISDEMEANOR).

Judge Davidson stated that his position was that established city ordinances on the subject should not be replaced by a provision in the penal code. Judge Kelton, Judge Brown and Mr. Stevenson felt that a state law would be preferable. Judge Roberts moved to postpone a decision on the section and consult with city attorneys who have had experience in dealing with the problem. The motion was adopted.

Note: The drafts on Offenses Against Public Administration were approved subject to redrafting for consistency. The legislative council staff is preparing a redraft.

The committee considered Joel Finer's draft on Sex Offenses. Mr. Finer presented the definitions.

Definitions

(a) For the purpose of Section 101 and 102, sexual intercourse has its ordinary meaning and occurs upon any penetration of the female sex organ by the male sex organ.

(b) For the purpose of Sections 101-104 deviate sexual intercourse means any act involving the sex organ of one person and the mouth or anus of the other with the intent (FOR THE PURPOSE) of arousing or gratifying the sexual desires of any person.

After discussion, the committee adopted the definitions section. Mr. Finer presented the drafts on sex offenses. Mr. Finer noted that the rape provision had alternative penalty provisions and that the reporters preferred the second penalty provision.

Rape

Section 101.

(A MALE WHO HAS SEXUAL INTERCOURSE WITH A FEMALE NOT HIS WIFE IN THE ABSENCE OF HER EXPRESSED OR IMPLIED CONSENT IS GUILTY OF RAPE.)

FOR PURPOSES OF THIS SECTION THE ABSENCE OF EXPRESSED OR IMPLIED CONSENT OCCURS ONLY UNDER THE FOLLOWING CIRCUMSTANCES:

(a) HE COMPELS HER TO SUBMIT OR PARTICIPATE BY (1) FORCE THAT OVERCOMES SUCH EARNEST RESISTANCE AS MIGHT REASONABLY BE EXPECTED UNDER THE CIRCUMSTANCES, OR (2) EXPRESSED OR IMPLIED THREAT OF DEATH, SERIOUS BODILY INJURY, EXTREME PAIN OR KIDNAPPING TO BE IMMINENTLY INFLICTED ON ANYONE, OR

(b) SHE HAS NOT GIVEN EXPRESSED OR IMPLIED CONSENT AND HE KNOWS SHE IS UNCONSCIOUS OR PHYSICALLY UNABLE TO RESIST, OR

(c) HE HAS SUBSTANTIALLY IMPAIRED HER POWER TO APPRAISE OR CONTROL HER CONDUCT BY ADMINISTERING WITHOUT HER KNOWLEDGE, DRUGS, ALCOHOL OR SIMILAR SUBSTANCES FOR THE PURPOSE OF PREVENTING RESISTANCE.

RAPE IS A FELONY IN THE SECOND DEGREE UNLESS THE ACTOR PURPOSELY, KNOWINGLY OR RECKLESSLY INFLICTS SERIOUS BODILY INJURY ON ANYONE IN THE COURSE THEREOF, IN WHICH CASE RAPE IS A FELONY IN THE FIRST DEGREE.

Alternative penalty provision:

RAPE IS PUNISHABLE BY A MAXIMUM OF LIFE IMPRISONMENT WHERE THE ACTOR HAS PURPOSELY, KNOWINGLY OR RECKLESSLY INFLICTED SERIOUS BODILY INJURY ON ANYONE IN THE COURSE THEREOF. VIOLATION OF SECTION 101(a) IN THE ABSENCE OF SUCH INFLICTION OF SERIOUS BODILY INJURY IS PUNISHABLE BY A MAXIMUM OF 20 YEARS IMPRISONMENT WHERE THE VICTIM IS NEITHER A VOLUNTARY SOCIAL COMPANION NOR HAS SHE PREVIOUSLY ENGAGED VOLUNTARILY IN NORMAL OR DEVIATE INTERCOURSE WITH THE ACTOR. VIOLATION OF SECTION 101(c) IS PUNISHABLE BY A MAXIMUM OF 20 YEARS IMPRISONMENT WHERE THE ACTOR IS A DOCTOR AND THE FEMALE IS HIS PATIENT. OTHERWISE VIOLATIONS OF SECTION 101 ARE PUNISHABLE BY A MAXIMUM OF 10 YEARS' IMPRISONMENT.

Gross Sexual Imposition

Section 102.

A MALE WHO HAS SEXUAL INTERCOURSE OR DEVIATE SEXUAL INTERCOURSE WITH A FEMALE NOT HIS WIFE COMMITS GROSS SEXUAL IMPOSITION IF:

(a) HE COMPELS HER TO SUBMIT OR PARTICIPATE BY ANY THREAT THAT WOULD PREVENT RESISTANCE BY A WOMAN OF ORDINARY RESOLUTION, OR

(b) HE KNOWS THAT AS A RESULT OF A MENTAL DISEASE OR DEFECT SHE IS PRESENTLY INCAPABLE OF APPRAISING THE NATURE OF HER CONDUCT; OR

(c) HE KNOWS THAT SHE IS UNAWARE THAT A SEXUAL ACT IS BEING COMMITTED; OR

(d) HE KNOWS THAT SHE SUBMITS OR PARTICIPATES BECAUSE SHE ERRONEOUSLY BELIEVES THAT HE IS HER HUSBAND; OR

(e) SHE IS IN LEGAL CUSTODY OR IN AN INSTITUTION WHICH UNDERTAKES CARE, CUSTODY AND TREATMENT OF HER AND THE ACTOR HAS SUPERVISORY OR DISCIPLINARY AUTHORITY OVER HER.

GROSS SEXUAL IMPOSITION IS A THIRD DEGREE FELONY, EXCEPT THAT VIOLATION OF SECTION 102(b) IS A SECOND DEGREE FELONY WHERE THE FEMALE IS AN INMATE IN A MENTAL INSTITUTION (AND VIOLATION OF 102(d) IS A MISDEMEANOR).

Deviate Sexual Intercourse by Force or Equivilent

Section 103.

A PERSON WHO ENGAGES IN DEVIATE SEXUAL INTERCOURSE WITH ANOTHER PERSON COMMITS A FELONY PUNISHABLE BY A MAXIMUM OF TEN YEARS IMPRISONMENT IF:

(a) HE COMPELS THE OTHER PERSON TO SUBMIT OR PARTICIPATE BY:

(1) FORCE THAT OVERCOMES SUCH EARNEST RESISTANCE AS MIGHT REASONABLY BE EXPECTED UNDER THE CIRCUMSTANCES; OR

(2) EXPRESSED OR IMPLIED THREAT OF DEATH, SERIOUS BODILY INJURY, OR EXTREME PAIN OR KIDNAPPING TO BE IMMINENTLY INFLICTED ON ANYONE; OR

(b) THE OTHER PERSON HAS NOT GIVEN EXPRESSED OR IMPLIED CONSENT AND THE ACTOR KNOWS THE OTHER PERSON IS UNCONSCIOUS OR PHYSICALLY UNABLE TO RESIST; OR

(c) THE ACTOR HAS SUBSTANTIALLY IMPAIRED THE OTHER PERSON'S POWER TO APPRAISE OR CONTROL HIS CONDUCT BY ADMINISTERING WITHOUT THE OTHER PERSON'S KNOWLEDGE, DRUGS, ALCOHOL, OR SIMILAR SUBSTANCES FOR THE PURPOSE OF PREVENTING RESISTANCE.

Deviate Sexual Intercourse by Gross Imposition

Section 104.

A PERSON WHO ENGAGES IN DEVIATE SEXUAL INTERCOURSE WITH ANOTHER PERSON NOT HIS WIFE, COMMITS A FELONY PUNISHABLE BY A MAXIMUM OF FIVE YEARS IMPRISONMENT IF:

(a) HE COMPELS THE OTHER PERSON TO SUBMIT OR PARTICIPATE BY ANY THREAT THAT WOULD PREVENT RESISTANCE BY A PERSON OF ORDINARY RESOLUTION; OR

(b) THE ACTOR KNOWS THAT AS A RESULT OF A MENTAL DISEASE OR DEFECT THE OTHER PERSON IS PRESENTLY INCAPABLE OF APPRAISING THE NATURE OF HIS CONDUCT; OR

(c) THE ACTOR KNOWS THAT THE OTHER PERSON IS UNAWARE THAT A SEXUAL ACT IS BEING COMMITTED; OR

(d) THE OTHER PERSON IS IN LEGAL CUSTODY OR DETAINED IN AN INSTITUTION UNDERTAKING HIS CARE, CUSTODY OR TREATMENT AND THE ACTOR EXERCISES SUPERVISORY OR DISCIPLINARY AUTHORITY OVER HIM.)

Mr. Finer explained the following points in the draft:

1. In subsection (1)(a) of section 101, he noted that Texas law is not clear on what type of resistance is required. The draft requires resistance to be reasonable under the circumstances.

2. Section 101 (1)(a)(2) would change Texas law because presently a threat of kidnapping is not sufficient for the threat required by the rape statute, and a threat to a person not a member of the victim's family is not sufficient to sustain a rape conviction. Threats under this section need not create a just fear as under present Texas law.

3. Section 101 (1)(b), Mr. Finer noted a Texas case which held that to have sexual relations with a sleeping woman is rape.

4. Section 101 (1)(c), is punished under existing law, but the draft uses modern terminology to define the woman's state of mind.

Mr. Finer went on to discuss the second punishment provision of Section 101. He stated that punishment depends on two factors: (1) serious bodily harm and (2) the relationship of the parties involved.

Judge Roberts expressed concern over the fact that if there were no serious bodily injury the actor could only be punished by 20 years. Mr. Finer explained that it is very difficult to prove that it was actually force and not consent where the parties are voluntary social companions. Judge Roberts said he had confidence in a jury's ability to ascertain the facts even though the parties were voluntary social companions, and he saw no need for a distinction based on the relationship of the parties. Judge Roberts also objected to the classification of third degree felony in Section 102 for cases involving a mentally ill woman. Mr. Finer said because the definition of mental illness is so vague that unless a woman is in a mental institution it is difficult to prove that the actor knew she was mentally ill.

Judge Barron pointed out that the purpose of the proposed draft is to keep the jury from doing obvious inequities. Judge Kelton expressed the opinion that the penalties should remain flexible and that there was no reason for all the distinction. Judge Davidson said that the present statute should be left alone.

Judge Sharpe said that he thought the draft just spelled out Texas law more precisley and clearly. Dean Keeton noted that all of the recent codes have tried to make reasonable distinctions in the area.

Judge Roberts said that he saw merit in assessing a higher penalty where serious bodily injury is inflicted, but that he preferred a wide range of punishment.

Judge Sharpe said that he didn't understand the difference between the gross sexual imposition provisions and the rape provisions. Mr. Finer said that they were distinguishable in terms of the seriousness of the offense.

Dean Keeton suggested the possibility of drafting the provision so that one section defining rape would include all of the instances listed in the Finer draft, and then have a very broad penalty section. Mr. Finer said that different kinds of threats were involved in the different sections, and that the parties involved were different. Mr. Conners said there would be many problems in trying to combine the offenses in one section. He pointed out that the rape section only involved sexual intercourse, while the other sections involved deviate sexual intercourse as well.

Dean Keeton moved to defer consideration of the rape statute until the next meeting. The committee considered the offenses included in Mr. Finer's draft and agreed on the criminality of the acts involved. Dean Keeton stated that in light of the committee's discussion, the provisions should be redrafted and discussed again at a later meeting.

The committee recessed at 5:00 p.m. and agreed to resume at 9:00 a.m. on Saturday, April 29.

The committee meeting reconvened on Saturday, April 29, at 9:00 a.m. The first topic of discussion was Dean Keeton's draft on the General Attempt statute. Dean Keeton presented the following draft:

Criminal Attempt

(1) Definition of Attempt. A person is guilty of an attempt to commit a crime, if, acting with the kind of culpability otherwise required for the commission of the crime, he:

(a) intentionally (PURPOSELY) engaged in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or

(b) when causing a particular result is an element of the crime, acts with the intent (PURPOSE) of causing and with the belief that it will cause such result without further conduct on his part; or

(c) acts with the intent (FOR THE PURPOSE) of completing a course of conduct which would constitute the crime, under the circumstances as he believes them to be, and his conduct constitutes a substantial step toward the commission of the crime.

(2) Conduct Must Be Strongly Corroborative of Intent (PURPOSE). Conduct shall not be held to constitute an attempt unless the actor's course of conduct is strongly corroborative of his intent (PURPOSE) to commit the crime.

(3) (CONDUCT DESIGNED TO AID ANOTHER IN COMMISSION OF A CRIME. A PERSON WHO ENGAGED IN CONDUCT DESIGNED TO AID ANOTHER TO COMMIT A CRIME WHICH WOULD ESTABLISH HIS COMPLICITY UNDER SECTION 2.06 IF THE CRIME WERE COMMITTED BY SUCH OTHER PERSON, IS GUILTY OF AN ATTEMPT TO COMMIT THE CRIME, ALTHOUGH THE CRIME IS NOT COMMITTED OR ATTEMPTED BY SUCH OTHER PERSON.)

Note: The committee agreed to delete this subsection temporarily, and to deal with the problem in the conspiracy provisions to be drafted later.

(4) Renunciation of Criminal Purpose. When the actor's conduct would otherwise constitute an attempt under Subsection (1)(b) or (1)(c) of this Section, it is an affirmative defense that he abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

The establishment of such defense does not, however, affect the liability of an accomplice or conspirator who did not join in such abandonment or prevention.

Within the meaning of this Article, renunciation of criminal purpose is not voluntary if it is motivated, in whole or in part, by circumstances, not present or apparent at the inception of the actor's course of conduct, which increase the probability of detection or apprehension or which make more difficult the accomplishment of the criminal purpose. Renunciation is not complete if it is motivated by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim.

Note: The committee generally approved the draft on renunciation as written, but postponed the decision on whether it should be included in the attempt provisions at all.

In his introductory remarks Dean Keeton stated that it would be better to have a general attempt statute than a variety of separate statutes dealing with attempts to commit specific crimes. He went on to explain that subsection (1)(a) means that impossibility based on the facts would not be a defense to the crime of attempt, but that the draft would not make an attempt a crime if the action intended was not a crime. Dean Keeton said that (1)(b) covered the case of the unsuccessful attempt, what is often called in Texas the case where "the last proximate act" is committed. He pointed out that this provision does not change the law. Dean Keeton explained (1)(c) deals with the problem of how far a person must go beyond mere preparation. He said that (1)(c) and (2) should be considered together so that not only must the last conduct constitute a substantial step toward completion of the offense, but also that the entire course of conduct must be strongly corroborative of intent.

The committee discussed the distinction between legal and factual impossibility, giving examples of each. Dean Keeton stated that from the discussion it appeared that there was agreement among the committee that impossibility should not be a defense or excuse, as long as it is based upon mistake of fact.

Mr. Glen Conner asked why Dean Keeton had not included omission in (1)(a) and (b) as the Model Penal Code does. Dean Keeton answered that he purposely omitted omission because he questioned whether an omission could constitute a substantial step toward the comission of an offense. He said that if any sort of omission is made an offense, it should be dealt with in the specific statute which is to be drafted on omissions.

Fred Cohen said that (1)(c) moves back the point in time when the police can stop or apprehend a person before he has taken

the last step. Judge Barron noted with approval that the provision would permit the Court of Criminal Appeals to define on a case-by-case basis just what constitutes a "substantial step."

Dean Keeton noted that the Model Penal Code had a specific provision making the attempt a lesser included offense of the primary offense, and asked Frank Maloney if our present attempts in Texas are lesser included offenses. Mr. Maloney said that they were not at present, but that he had understood that the committee had agreed upon having a general attempt statute with attempts made lesser included offenses. Dean Keeton replied, "That was my understanding."

The committee was in substantial agreement that subsections (1) and (2) be approved as written. The committee accepted the reporters' recommendation that subsection (3) be deleted, at least temporarily, and that the problem be handled in the conspiracy provisions to be drafted later.

Dean Keeton directed the discussion to the issue of renunciation, subsection (4). Frank Maloney noted that the purpose of the provision is to allow a person to stop the commission of a crime when he realizes that it would be better if he did not commit it. Judge Brown suggested that the words "or conspirator" should be inserted in the last sentence of subsection (4) making it read "affect the liability of an accomplice or conspirator who did not join in such abandonment, etc." Dean Keeton agreed that "conspirator" should be included unless the conspiracy statute to be drafted makes the inclusion unnecessary.

Judge Davidson stated that he was opposed to a man committing a crime and getting out of it by just saying, "I'm sorry." Judge Brown stated that the only justification for the section on renunciation was as compensation for setting attempt back almost to the "substantial preparation" area, which is not now covered under existing Texas law.

Dean Keeton asked the committee how many were in favor of leaving renunciation in the draft. Judge Davidson and Judge Roberts objected to leaving it in. Judge Brown suggested permittng renunciation to reduce the offense to a lesser degree or to a misdemeanor. Judge Kelton said it should be included because the issue will be raised in any attempt case anyway and the draft at least gives the court some guidelines for the charge. The committee agreed to postpone a decision on inclusion of the renunciation provision until a later meeting.

The committee next considered Fred Cohen's draft of <u>All Offenses Defined by Statute</u>: <u>Application of General Provisions of the Code</u>:

(1) No conduct constitutes a crime unless it is a crime under this Code or another statute of this State.

(2) The General Provisions (Part I) of this Code are applicable to all crimes defined by other statutes, unless the Code otherwise provides.

Mr. Cohen explained that subsection (1) corresponds to Texas Penal Code, Article 3, and is simply a restatement of present Texas law. Mr. Cohen explained that the purpose of subsection (2) is to provide a basic philosophy and structure for the entire system of criminal law, including the criminal statutes not included in the code.

Dean Keeton asked why subsection (2) should not read "unless the code or other statutes otherwise provide" since the legislature may want to draft a special statute of a regulatory nature and provide that the penal code general provisions do not apply. Fred Cohen replied that the section was strictly hortatory and expressed the hope that the legislature would observe the general provisions and make the laws they pass consistent with them. He explained the theory of the section was that the general provisions of a penal code have been thought about long and hard, but it can be assumed that penal provisions in other statutes have not been as seriously considered. Therefore, there is a good case for providing that the thought that goes into the penal code revision ought to control ad hoc decisions that are scattered around in the rest of our law.

Judge Davidson recommended eliminating subsection (2). Dean Keeton stated that he liked subsection (2) as a rule of construction and that the courts should be encouraged to use the general provisions of the code. Dean Keeton recommended that the committee vote on the provision. The committee approved the section as drafted.

Mr. Cohen then presented his recommendations concerning time limitations:

1. The Texas provisions concerning time limitations should be retained in the Code of Criminal Procedure.

2. The Committee should take action to urge the following changes in the Code of Criminal Procedure:

(a) Where necessary, the language of the CCP concerning limitations should be changed to conform with the terminology followed throughout our draft.

(b) The period of limitations for attempts should be identical with that for the principal offense.

(d) The period of limitations for the minor degrees of rape, e.g., assault with intent to rape, should be the same as the period for rape.

(e) Consideration should be given to having the statute begin on discovery in the case of public officials: but a maximum period should be included, e.g., three years, beginning at the time the public official leaves office.

Mr. Cohen stated that there were two alternatives for offenses involving public officials: (1) having a very long period of limitations for these offenses, or (2) having the period of limitations begin on discovery and then having a maximum period of three years or so after the person leaves office. It was agreed by the committee that the period of limitations should not run on discovery, but that the period of limitations should be long enough to allow an offense to be discovered if reasonable diligence is exercised on the part of those who are responsible for discovering offenses by public officials.

The committee adopted Mr. Cohen's recommendations 1, 2(a), 2(b), 2(c) and 2(d). In lieu of his recommendation (2)(e), the committee agreed to recommend that the period of time limitations in the case of public officials should be 10 years.

The committee went on to Saul Baernstein's on the offenses of seduction and abduction. Mr. Baernstein recommended the following:

Seduction: It is recommended that the offense of seduction be eliminated from the Texas Penal Code, and that a civil paternity suit be provided in its place.

Abduction: It is recommended that the offense of abduction, per se, be eliminated from the penal statutes, as the harms with which we are concerned are more adequately protected against by the laws pertaining to kidnapping, false imprisonment, pandering, and the general attempt statute.

Judge Brown noted that the only real social problem involved is that the crime of seduction is used to solve the problem of the illegitimate child. He said that in these instances a civil paternity statute would solve the problem to a certain degree, or at least as far as the law can handle the problem. The committee adopted Mr. Baernstein's recommendation that the offense of seduction be eliminated.

The discussion turned to Mr. Baernstein's recommendation that the offense of abduction be eliminated from the penal statutes. Dean Keeton asked the committee if anyone felt that an abduction statute is needed. The committee agreed that an abduction statute is not needed, and that the interests to be protected can be covered adequately elsewhere.

The meeting adjourned at 12:00 noon.

Date of minutes
December 6, 1967
meeting was
nov. 3, 1967

SUMMARY OF MINUTES

The Committee on Revision of the Penal Code met at The University of Texas School of Law on Friday, November 3, 1967, at 10 a.m.

The committee considered Mr. Robert Hamilton's proposed draft on corporate criminal liability, Mr. Frank Maloney's proposed draft on criminal homicide, and Mr. Newell Blakely's proposed draft on burglary. The following drafts were approved:

(NOTE: The drafts presented in this summary have been formally revised by the Texas Legislative Council staff to conform to the council's format and style; no substantive change was intended. The drafts actually presented by the reporters can be found in the body of the minutes. Those drafts indicate changes made by the committee.)

CORPORATE CRIMINAL LIABILITY

Sec. 2.071. DEFINITIONS.

In Sections 2.071-2.075, unless the context requires a different definition,

(1) "agent" means a director, officer, employee, or other person authorized to act in behalf of a corporation or association;

(2) "association" means a government or governmental subdivision or agency, trust, partnership, or two or more persons having a joint or common economic interest; and

(3) "high managerial agent" means

(A) a partner in a partnership;

(B) an officer of a corporation or association; or

(C) an agent of a corporation or association who has duties of such responsibility that his conduct reasonably may be assumed to represent the policy of the corporation or association.

Sec. 2.072. LIABILITY OF CORPORATIONS.

(a) If conduct constituting the offense is performed by an agent acting in behalf of a corporation and within the scope of his office or employment, the corporation may be convicted of

(1) a petty misdemeanor as defined in Section 1.04(6);

(2) an offense defined by a statute other than this code in which a legislative purpose to impose liability on corporations plainly appears; or

(3) an offense defined by a statute other than this code for which absolute liability is imposed, unless a legislative purpose not to impose liability on corporations plainly appears.

(b) A corporation may be convicted of an offense other than those described in Subsection (a) only if its commission was authorized, requested, commanded, performed, or recklessly tolerated by

(1) a majority of the board of directors acting in behalf of the corporation; or

(2) a high managerial agent acting in behalf of the corporation and within the scope of his office or employment.

Sec. 2.073. LIABILITY OF ASSOCIATIONS.

(a) Except as qualified in Subsection (b), an association may be convicted of an offense when the statute defining the offense expressly provides for liability of the association and the conduct constituting the offense is performed by an agent acting in behalf of the association and within the scope of his office or employment.

(b) The statute defining the offense controls over Subsection (a) to the extent that

(1) it designates the agents for whose conduct the association is liable; or

(2) it describes the circumstances under which the association is liable.

Sec. 2.074. DEFENSE TO LIABILITY OF CORPORATIONS AND ASSOCIATIONS.

(a) In a prosecution of a corporation or association for an offense included within the terms of Sections 2.072(a)(1) and (2) or 2.073, it is an affirmative defense that the high managerial agent having supervisory responsibility over the subject matter of the offense employed due diligence to prevent its commission.

(b) Subsection (a) does not apply if it is plainly inconsistent with the legislative purpose expressed in the statute defining the particular offense.

Sec. 2.075. LIABILITY OF PERSONS FOR CONDUCT IN BEHALF OF CORPORATIONS OR ASSOCIATIONS.

(a) A person is liable for conduct which he performs or causes to be performed in the name of or in behalf of a corporation or association to the same extent as if the conduct were performed in his own name or behalf.

(b) An agent having primary responsibility for the discharge of a duty to act imposed by law on a corporation or association is liable for the intentional, knowing, or reckless omission to

discharge the duty to the same extent as if the duty were imposed by law directly on him.

(c) When a person is convicted by reason of his liability for conduct performed in the name of or in behalf of a corporation or association, he is subject to the sentence authorized by law when a natural person is convicted of an offense of the same grade and degree involved without regard to the sentence authorized by law for a corporation or association.

* * *

Sec. 6.051. DEFINITIONS.

In Sections 6.051-6.054, unless the context requires a different definition,

(1) "agent" means a director, officer, employee, or other person authorized to act in behalf of a corporation or association;

(2) "association" means a government or governmental subdivision or agency, trust, partnership, or two or more persons having a joint or common economic interest; and

(3) "high managerial agent" means

(A) a partner in a partnership;

(B) an officer of a corporation or association; or

(C) an agent of a corporation or association who has duties of such responsibility that his conduct reasonably may be assumed to represent the policy of the corporation or association.

Sec. 6.052. SENTENCING CORPORATIONS AND ASSOCIATIONS.

(a) When a corporation or association is convicted of an offense, the court shall impose sentence pursuant to this section alone.

(b) If the statute defining the offense provides for a penalty consisting of a fine only, the court shall fine a corporation or association an amount not exceeding the fine provided in the statute defining the offense.

(c) If the statute defining the offense provides for a penalty which includes imprisonment for any period of time or contains no specific penalty, the court shall fine a corporation or association an amount not exceeding

(1) $10,000 if the offense is a felony of any degree;

(2) $2,000 if the offense is a gross or simple misdemeanor; or

(3) $200 if the offense is a petty misdemeanor.

(d) In lieu of the fines authorized by Subsections (b) and (c)(1) and (2), if the court finds that the defendant corporation or association has gained money or property through the commission of a felony or gross or simple misdemeanor, the court may fine the corporation or association an amount not exceeding double the amount of the gain.

Sec. 6.053. NOTIFYING ATTORNEY GENERAL OF CONVICTION.

(a) When a corporation is convicted of an offense, or when a high managerial agent is convicted of an offense committed

in the conduct of the affairs of the corporation, the court shall notify the attorney general in writing of the conviction when it becomes final and unappealable. The notice shall include

(1) the corporation's name, the name of the corporation's registered agent for service, and the address of the registered office, or the high managerial agent's name and residence address, or both; and

(2) certified copies of the judgment and of the complaint, information, or indictment on which the judgment was based.

(b) Any proceedings authorized by law for the purpose of dissolving involuntarily a domestic corporation, or revoking the certificate of authority of a foreign corporation, are in addition to criminal proceedings under Section 2.072.

Sec. 6.054. PROBATED SENTENCE.

The court may suspend in whole or part the imposition or execution of the sentence of a corporation or association convicted of an offense on such terms the court considers appropriate under the circumstances.

* * *

Sec. 1.13. GENERAL DEFINITIONS.

In this code, unless the context requires a different definition, . . .

(8) "person," "he," and "actor" include any natural person and, where relevant, a corporation and association; . . .

CHAPTER 14. CRIMINAL HOMICIDE

Sec. 210.0. DEFINITIONS.

In Chapters 14-17, unless the context requires a different definition,

(1) "another" means a person other than the actor;

(2) "bodily injury" means physical pain, illness, or any impairment of physical condition;

(3) "deadly weapon" means a firearm, or a weapon, device, instrument, material, or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is capable of producing death or serious bodily injury;

(4) "person" means a human being who has been born and is alive; and

(5) "serious bodily injury" means bodily injury which creates a substantial risk of death or which causes permanent disfigurement or protracted loss or impairment of the function of a bodily member or organ.

Sec. 210.1. TYPES OF CRIMINAL HOMICIDE.

(a) A person commits criminal homicide if by his conduct he intentionally, knowingly, recklessly, or negligently causes the death of another.

(b) Criminal homicide is murder, manslaughter, or negligent homicide.

Sec. 210.2. MURDER.

(a) Except as provided in Section 210.3(a)(2), a person commits murder if

(1) by his conduct he intentionally or knowingly causes the death of another;

(2) he intends to cause serious bodily injury to another and by conduct clearly dangerous to human life causes the death of another; or

(3) he commits or attempts to commit a felony, other than manslaughter or negligent homicide, and in the course of and in furtherance of the felony, or in immediate flight from the commission or attempt, he commits or threatens to commit an act clearly dangerous to human life which causes the death of another.

(b) Murder is a felony of the first degree.

Sec. 210.3. MANSLAUGHTER.

(a) A person is guilty of manslaughter if by his conduct he

(1) recklessly causes the death of another; or

(2) causes the death of another under circumstances which would be murder as defined in Section 210.2(a)(1) or (2), except that the homicidal act is committed under the immediate influence of a sudden passion not brought on by the actor's own conduct and for which there is reasonable explanation or excuse.

(b) The reasonableness of the explanation or excuse under Subsection (a)(2) is determined from the viewpoint of an ordinary person in the actor's situation.

(c) Manslaughter is a felony of the second degree.

Sec. 210.4. NEGLIGENT HOMICIDE.

(a) A person is guilty of negligent homicide if by his conduct he negligently causes the death of another.

(b) Negligent homicide is a felony of the fourth degree.

CHAPTER 21. BURGLARY AND OTHER CRIMINAL INTRUSION

Sec. 221.0. DEFINITIONS.

In this chapter, unless the context requires a different definition,

(1) "enter" means

(A) entry of any part of the body; or

(B) entry of any physical object connected with the body; and

(2) "occupied structure" means a structure or vehicle which is adapted for the overnight accommodation of persons, or in which business is carried on, and includes

(A) a separately secured or occupied portion of the structure or vehicle; and

(B) a structure appurtenant to or connected with the structure or vehicle.

Sec. 221.1. BURGLARY.

(a) A person commits burglary if

(1) with intent to commit a felony or theft, he enters a building or occupied structure at a time when it is not open to the public and he is not licensed or privileged to enter for any purpose;

(2) he conceals himself in a building or occupied structure at a time when it is open to the public and remains with intent to commit a felony or theft at a time when the building or occupied structure is not open to the public and he is not licensed or privileged to remain for any purpose; or

(3) he commits or attempts to commit a felony or theft in a building or occupied structure at a time when it is not open to the public and he is not licensed or privileged to be in the building or occupied structure for any purpose.

(b) A license or privilege obtained by force, threat, or fraud is not a license or privilege for the purposes of Subsection (a).

(c) It is not a defense to a prosecution for burglary or attempted burglary that no person other than the actor was present in the building or occupied structure at the time the burglary was committed or attempted.

(d) It is an affirmative defense to a prosecution for burglary or attempted burglary that the building or occupied structure was abandoned at the time the burglary was committed or attempted.

(e) Burglary of an occupied structure adapted for the overnight accommodation of persons, including a separately secured or occupied portion of, and a structure appurtenant to or connected with, an occupied structure adapted for the overnight accommodation of persons, is a felony of the first degree; otherwise, burglary is a felony of the second degree.

MINUTES
OF THE TEXAS STATE BAR COMMITTEE
ON REVISION OF THE PENAL CODE
FRIDAY, NOVEMBER 3, 1967

Present: Committee Members Page Keeton, Chairman; James Barlow; Judge Archie Brown; Emmett Colvin; Samuel Daugherty; Judge Truman Roberts; Travis Shelton; Judge T. Gilbert Sharpe; Carol Vance; Hume Cofer

Law Enforcement Advisory Committee Lewis Berry; G. C. Conner; Beverly Laws for R. A. Miles

Advisory Committee on Corrections Giles Garmon

Reporters Robert Hamilton; Frank Maloney; Newell Blakely; Michael Rosenthal; Peter Brett; Robert Dawson; Warren Schwartz; James Kelley

Staff Bill Reid; Mrs. Ione Stumberg

Texas Legislative Council Staff Seth S. Searcy III, Chief Revisor; Paul Echols; Allen Herrington; Michael Johnson; Miss Linda West

The Texas State Bar Committee on Revision of the Penal Code met on November 3, 1967, at The University of Texas School of Law in Austin, Texas, in the Alumni Lounge at 10 a.m.

The committee considered Robert Hamilton's draft on corporate criminal liability, Frank Maloney's draft on criminal homicide, and Newell Blakely's draft on burglary.

(NOTE: To reflect the action taken by the committee on the drafts, the minutes will present additions by the committee underlined and deletions in parentheses in capitals.)

Robert Hamilton presented the following draft on corporate criminal liability:

Sec. 2.071. DEFINITIONS.

In Sections 2.071-2.075, unless the context requires a different meaning,

(a) "agent" means any director, officer, employee, or other person authorized to act in behalf of a corporation or association;

(b) "association" means (INCLUDES) any government or governmental subdivision or agency, (ESTATE,) trust, partnership, or two or more persons having a joint or common economic interest (, AND ANY OTHER ORGANIZATION); and

(c) "high managerial agent" means (i) an officer of a corporation or association, (ii) a partner in a partnership, or (iii) each agent of a corporation or association having duties of such responsibility that his conduct may reasonably be assumed to represent the policy of the corporation or association.

Sec. 2.072. LIABILITY OF CORPORATIONS.

(1) A corporation may be convicted of

(a) a petty misdemeanor as defined in Section 1.04(6), or

(b) any offense defined by a statute other than this code in which a legislative purpose to impose liability on corporations plainly appears, if the conduct is performed by an agent of the corporation acting in behalf of the corporation within the scope of his office or employment. When absolute liability is imposed for the commission of an offense, a legislative purpose to impose liability on a corporation shall be assumed unless the contrary plainly appears.

(2) A corporation may be convicted of an offense other than those described in Subsection (1) only if its commission was authorized, requested, commanded, performed, or recklessly tolerated by (a) a majority of the board of directors acting in behalf of the corporation, or (b) a high managerial agent of the corporation acting in behalf of the corporation and within the scope of his office or employment.

Sec. 2.073. LIABILITY OF ASSOCIATIONS.

An association may be convicted of an offense which expressly provides for the liability of an association if the conduct is performed by an agent of the association acting in behalf of

the association within the scope of his office or employment, except that if the law defining the offense (a) designates the agents for whose conduct the association is accountable or (b) describes the circumstances under which the association is accountable, such provisions shall control.

Sec. 2.074. DEFENSE TO LIABILITY OF CORPORATIONS AND ASSOCIATIONS.

(1) In any prosecution of a corporation or association for the commission of an offense included within the terms of Section 2.072(1) or 2.073, other than an offense for which absolute liability has been imposed, it is an affirmative defense (IF THE DEFENDANT PROVES BY A PREPONDERANCE OF THE EVIDENCE) that the high managerial agent having supervisory responsibility over the subject matter of the offense employed due diligence to prevent its commission.

(2) Subsection (1) does not apply if it is plainly inconsistent with the legislative purpose expressed in defining the particular offense.

Sec. 2.075. LIABILITY OF PERSONS FOR CONDUCT ON BEHALF OF CORPORATIONS OR ASSOCIATIONS.

(1) A person is legally accountable for conduct which he performs or causes to be performed in the name of or on behalf of a corporation or association to the same extent as if the conduct were performed in his own name or behalf.

(2) An agent of a corporation or association having primary responsibility for the discharge of a duty to act imposed by law on such corporation or association is legally accountable for the intentional, knowing, or reckless omission to discharge such duty to act to the same extent as if such duty were imposed by law directly on him.

(3) When a person is convicted by reason of his legal accountability for the conduct of a corporation or association, he is subject to the sentence authorized by law when a natural person is convicted of an offense of the grade and degree involved without regard to the sentence authorized by law when a corporation or association is convicted of such offense.

Sec. 6.051. DEFINITIONS.

In Section 6.051-6.054, unless the context requires a different meaning,

(a) "agent" means any director, officer, employee, or other person authorized to act in behalf of a corporation or association;

(b) "association" means (INCLUDES) any government or governmental subdivision or agency, (ESTATE,) trust, partnership, or two or more persons having a joint or common economic interest (, AND ANY OTHER ORGANIZATION); and

(c) "high managerial agent" means (i) an officer of a corporation or association, (ii) a partner in a partnership, or (iii) each agent of a corporation or association having duties of such responsibility that his conduct may reasonably be assumed to represent the policy of the corporation or association.

Sec. 6.052. SENTENCING CORPORATIONS AND ASSOCIATIONS.

(1) When a corporation or association is convicted of an offense, the sentence to be imposed shall be determined pursuant to this section and without regard to other sections of this article and Article 7.

(2) A corporation or association may be sentenced to pay a fine as follows:

(a) if the statute defining the offense provides for a penalty consisting only of a fine, the amount of the fine to be imposed shall not exceed the fine so provided in such statute; or

(b) if the statute defining the offense provides for a penalty which includes imprisonment for any period of time or contains no specific penalty, the amount of the fine to be imposed shall not exceed:

(i) $10,000 if the offense is a felony of any degree;

(ii) $2,000 if the offense is a gross or simple misdemeanor; or

(iii) $200 if the offense is a petty misdemeanor; or

(c) if the court finds the defendant has gained money or property through the commission of a felony or gross or simple misdemeanor, in lieu of the fines authorized by Subsections (2)(b)(i) and (ii) the court may impose a fine not to exceed double the amount of the defendant's gain from the commission of the crime.

Sec. 6.053. DISSOLUTION AND REVOCATION.

(1) When a corporation is convicted of an offense, or when a high managerial agent is convicted of an offense committed

in the conduct of the affairs of the corporation, the court in sentencing the corporation or high managerial agent shall notify (MAY REQUEST) the attorney general of the conviction. (TO INSTITUTE CIVIL PROCEEDINGS FOR DISSOLUTION OR REVOCATION UNDER SUBSECTION (2) IN A DISTRICT COURT OTHER THAN THE COURT IN WHICH THE CORPORATION OR HIGH MANAGERIAL AGENT WAS CONVICTED.)

((2) A DOMESTIC CORPORATION MAY BE DISSOLVED INVOLUNTARILY, OR THE CERTIFICATE OF AUTHORITY OF A FOREIGN CORPORATION TO TRANSACT BUSINESS IN THIS STATE MAY BE REVOKED, IF THE COURT FINDS (i) THAT A MAJORITY OF THE BOARD OF DIRECTORS OR A HIGH MANAGERIAL AGENT ACTING IN BEHALF OF THE CORPORATION HAS, IN CONDUCTING THE CORPORATION'S AFFAIRS, [INTENTIONALLY] ENGAGED IN A PERSISTENT COURSE OF CRIMINAL CONDUCT, AND (ii) THAT FOR THE PREVENTION OF FUTURE CRIMINAL CONDUCT OF THE SAME CHARACTER, THE PUBLIC INTEREST REQUIRES SUCH DISSOLUTION OR REVOCATION.)

((3) CIVIL PROCEEDINGS TO CAUSE SUCH DISSOLUTION OR REVOCATION MAY BE INSTITUTED BY THE ATTORNEY GENERAL UPON REQUEST OF THE COURT AND SHALL BE CONDUCTED IN ACCORDANCE WITH THE PROCEDURES AUTHORIZED BY LAW FOR THE INVOLUNTARY DISSOLUTION OF A CORPORATION OR THE REVOCATION OF THE CERTIFICATE OF AUTHORITY OF A FOREIGN CORPORATION TO TRANSACT BUSINESS IN THIS STATE.)

(4) Proceedings under this section are in addition to any other proceedings authorized by law for the purpose of dissolving involuntarily any domestic corporation or revoking the certificate of authority of any foreign corporation.

Sec. 6.054. PROBATED (SUSPENDED) SENTENCE.

The court may suspend in whole or part the execution of the sentence of a corporation or association convicted of an offense on such conditions the court considers appropriate under the circumstances.

* * *

Sec. 1.13. GENERAL DEFINITIONS.

In this code, unless the context requires a different meaning, . . .

(8) "person," "he," and "actor" include any natural person and, where relevant, a corporation and association; . . .

Dean Keeton began the discussion by asking Mr. Hamilton to address an introductory statement to the primary issue--whether or not Texas should recognize corporate criminal liability.

Mr. Hamilton opened his remarks by noting that at the present time there is no corporate criminal liability in Texas, and that Texas is the only state in this position. He explained that the Texas position is largely due to the fortuitous circumstance of the absence of a procedure for making a corporation amenable to the criminal process, and not due to a rational decision against the concept of corporate criminal liability. He said that criminal liability would be an effective device to aid in enforcement of various economic regulations, such as tax regulations, water pollution, and air pollution, against corporations because there is a stigma attached to a criminal prosecution which civil enforcement procedures may lack. He stated that in states that have corporate criminal liability, the possibility of being prosecuted is a major inducement for corporations to conform their conduct to the law.

Mr. Hamilton stated that the argument that usually is made against recognizing corporate criminal liability is that since corporations can act only through agents, it makes sense to prosecute the agent who is responsible for the act being done on behalf of the corporation, rather than to prosecute the corporation itself. There are problems with that argument. For example, it may be difficult to determine which person in the corporation's hierarchy is responsible for the conduct. Another problem is that a jury may be reluctant to convict a person, who when he performed the criminal act, was merely following orders of someone higher up in the corporation. Also, a jury may feel that it is unfair to impose a fine on the agent when it is the corporation that profits from the act. Moreover, by means of stockholders' suits the fine may ultimately come to rest on the individual who ordered or condoned the criminal act. This should have the effect of encouraging the officials of the corporation to do what they can to prevent the performance of criminal acts by employees on behalf of the corporation.

Judge Brown complimented Mr. Hamilton for his excellent report, but said that he personally has misgivings about injecting corporate criminal liability into the jurisprudence of this state. His thoughts were that we can obtain the same objectives through civil regulatory measures. One problem is that incorporating corporate criminal liability into our penal statutes will require drastic procedural changes. In addition, Judge Brown said that he thinks the committee should not make too many things crimes, because when you do that, everyone is a criminal of some sort, and criminality loses its social stigma. He explained the idea by saying that when he first got a credit card it meant something, but now everybody has a credit card, so it does not mean as much. He said that we need to get back to the point where the important things are crimes, and the people who do those things are looked down upon. Until we do that, we're going to have trouble with law enforcement. He said that he was against extending criminal sanctions into an area where we have not had

them before, especially in view of the fact that the main criminal sanctions cannot be imposed on corporations. All we can do is extract monetary fines, and that can be done by civil regulatory measures. Judge Brown said that he thought that $10,000 out of the corporate coffers was a penalty, regardless of whether it came through the criminal courts or through the Secretary of State's office.

Mr. Hamilton explained that his proposal does not make criminal any acts which are not now criminal. It will simply make corporations answerable for the offenses that are already on the books.

Mr. James Barlow said that corporate criminal liability would be helpful in some cases, such as enforcement of the Blue Laws. He said that he dislikes having to go down and file on a store manager when the store manager is just acting under orders and has no say about whether the store stays open on Sunday. He thinks, however, that if we have corporate criminal liability at all, it ought to be severely limited. Most of these cases can be adequately handled under the nuisance law. Mr. Barlow expressed his opposition to burdening the district attorney with the obligation of regulating corporations, stating that a district attorney has about as much work as he can handle as it is. He does not have time to fool around with regulating corporations. Mr. Barlow said that he does not relish the idea of taking on that responsibility.

Someone asked whether or not the federal government covers the field in adulterated food cases. Mr. Michael Rosenthal explained that there must be some connection with interstate commerce, and while this may not be much of a problem under the Constitution, at times it may be a problem under the Food, Drug and Cosmetic Act.

Dean Keeton explained that there are statutes now on the books providing for criminal liability of corporations but there is no procedure for getting a corporation into court.

Mr. Carol Vance repeated that we already have corporate criminal liability on the books, but that we just cannot get a corporation into court. He said that this proposal would be more restrictive, since it is limited by the requirements of Section 2.072(2), which says that a corporation may be convicted of an offense other than those described in Subsection (1) only if its commission was authorized, requested, commanded, performed, or recklessly tolerated by (a) a majority of the board of directors acting in behalf of the corporation, or (b) a high managerial agent of the corporation acting in behalf of the corporation and within the scope of his office or employment. Mr. Vance explained that the fact there are already statutes on the books indicates that the legislature has expressed its desire

to make corporations liable, at least for certain criminal acts. Mr. Vance's primary concern about corporate criminal liability is pollution of the Houston ship channel. You do not want to prosecute the man who turns the valves to dump sludge into the channel since he was operating under orders of some night manager perhaps, but there really is no way to discover who made the decision to pollute the channel. Yet it is an act of the corporation which is happening day in and day out. Mr. Vance cannot see why Texas should be the only state that allows corporations to get by with this offense. As he reads the proposal, for a corporation to be liable, the statute defining the offense would have to clearly contemplate liability of corporations. The legislature can make up its own mind in enacting each statute whether or not to make corporations liable. Mr. Vance then said that while the proposal was very well drafted, until Texas has some procedure for getting the corporation into court, we still will be in the position we are in now. We also need a procedure for collecting the fine from a guilty corporation.

Mr. Hamilton explained that in his first draft he attempted to resolve the procedural problems, but that the Texas Legislative Council staff thought that it was a much more complex problem than envisioned by Mr. Hamilton, and the staff is working on a draft to solve the procedural problem.

Judge Sharpe said that he does think corporate criminal liability has its place on a limited basis. As an ex-federal prosecutor he had considerable experience with convicting corporations in cases where it was not possible to get convictions against individual defendants. He said that the federal government has been successful prosecuting corporations for offenses that corporations can commit. One example is a corporation that swindles somebody. He said that he thinks too often the position of the corporation is that an individual or two may be convicted for the swindling and pay a fine, but because the corporation stands to make several million dollars out of the deal, it is worth the risk.

Dean Keeton then said that he thinks corporate criminal liability will have a wholesome effect because if you fine the corporation, the stockholders will get rid of the man who is responsible for costing the corporation so much money, whereas if you just fine the individual, the stockholders will not be as likely to put a stop to his criminal activities. Too, swindling is the kind of conduct that cannot be controlled by civil remedies.

Judge Sharpe recommended that in the limited area to which it can be applied corporate criminal liability ought to be in our law so that the directors and the stockholders will be on notice that if certain actions are taken the money will come out of their pockets.

Judge Brown: "Okay, Gilbert, you sold me."

Dean Keeton then called for a vote on the question of whether or not Texas should have corporate criminal liability. The committee voted to recognize corporate criminal liability.

The committee then turned to a discussion of the draft.

Mr. Hamilton stated that the critical section on liability of corporations is Sec. 2.072. There is a fundamental difference between Sec. 2.072(1) and Sec. 2.072(2) in terms of whose performance, act, or intent will be attributed to the corporation. Sec. 2.072(1) deals with petty misdemeanors, most of which involve no evil intent, and offenses where absolute liability is imposed by statute. A corporation may be convicted under Sec. 2.072(1) if the state can show that the act was performed by an agent of the corporation on behalf of the corporation and that the act was within the scope of the agent's office or employment. In contrast, Sec. 2.072(2) deals with more serious offenses, such as swindling, murder, and rape. A corporation may be convicted under Sec. 2.072(2) only if an officer of the corporation, or the board of directors, authorized, requested, commanded, performed, or recklessly tolerated the action. Mr. Hamilton said that most of the prosecutions would be under Sec. 2.072(1), and that it would be a relatively rare case that would be prosecuted under Sec. 2.072(2)

Judge Roberts questioned whether, under Sec. 2.072(2), a criminal act could ever be within the scope of a high managerial agent's office or employment. Dean Keeton said that it happens all the time in tort law, and that the concept of "within the scope of employment" is the same in criminal law.

Mr. Hamilton said that while a conviction for murder or rape is highly improbable, a conviction for manslaughter is quite possible in a case where a high managerial agent, knowing an employee is drunk, sends him out to make deliveries in a truck. Dean Keeton noted, however, that the normal case under Sec. 2.072(2) is going to be fraud, swindling, or something similar.

The committee voted to approve Sec. 2.072.

The committee next considered Sec. 2.073 and the definition of "association" contained in Sec. 2.071(b).

Mr. Hamilton explained that problems are created by the fact that there are so many different kinds of associations, and the fact that traditionally an association was not an entity, and therefore could not be prosecuted. There are, however, some statutes in this state that clearly contemplate that partnerships and other kinds of associations can be liable criminally. The

purpose of Sec. 2.073 is to insure that the legislative decision that associations be held criminally liable be effectuated. Mr. Hamilton pointed out that an association may be convicted only if the statute defining the offense plainly contemplates conviction of that particular kind of association. Mr. Hamilton explained that what he is doing is reflecting the substantive law; he is not creating any substantive law.

Dean Keeton said that the question that interested him was why should associations not be held to the same criminal liability that corporations are; that is, why require specificity concerning associations when you do not always require it for corporations?

Mr. Barlow said that one reason may be that not all associations have officers.

Mr. Hamilton said that the principal reason is that there are so many different kinds of associations that they cannot very well be lumped together for purposes of criminal liability. Therefore, the statute defining the offense must express which kinds of associations are to be held liable. He said that it may be that partnerships and limited partnerships, which have some of the attributes of corporations, should be treated like corporations. That is a substantive question which the committee must decide. He resolved the question by treating partnerships like he treated all other associations, but there is something to be said for treating partnerships and limited partnerships like corporations. Those are the two principle kinds of associations that will run afoul of the criminal law, and Mr. Hamilton said that it would not make him unhappy if the committee wanted to limit "association" to partnerships and limited partnerships.

Mr. Barlow said he would like to keep "associations" broader than partnerships. He is plagued with bogus charities, and he would like to have a way to get at them. Mr. Barlow said, however, that he cannot imagine prosecuting a governmental agency.

Dean Keeton said that the question raised is whether we should eliminate governmental agencies from the definition of association, and the committee should address itself to that problem.

Dean Keeton said that it makes just as much sense to prosecute a small water or irrigation district that is doing something to hurt a lot of people as to prosecute a private corporation or association.

Judge Sharpe pointed out that it is the people in the water district or irrigation district that is prosecuted who would have to raise the money to pay the fine.

Dean Keeton said that the people harmed by the criminal act might well be outside the district, but that he thought "government or governmental subdivision or agency" could easily be removed from the definition of "association" without doing any great harm.

Mr. Vance suggested a case in which a small city is dumping garbage out on the public county land. Dean Keeton said that the taxpayers would put a stop to that if their little city was prosecuted criminally.

Mr. Barlow urged that the committee not forget that it is talking about criminal responsibility. He said that on things like rendering plants he had utilized the civil statutes to straighten out things like noxious odors and boneyards. He pointed out that it is not necessary to control everything through criminal responsibility, and that as a practical matter he could not picture himself returning a bill of indictment against the city of Castle Hill.

Judge Brown said that he could not see a reason for distinguishing between public associations and private associations in the criminal law so as to give one the privilege of engaging in conduct detrimental to society and deny the other the same privilege.

Mr. Emmett Colvin said he thought that Mr. Barlow had a good point. He said he could not picture any prosecutor bringing a bill of indictment against any governmental agency. Dean Keeton said that it might be a very popular move if most of the people in a community are being harmed by something that some little governmental agency is doing. Mr. Colvin said that he just did not see why the civil phase of enforcement would not be sufficient.

Mr. Daugherty said that the decision of whether or not to bring a case will rest with the district attorney just like it does in any other case, but that if this statute is not on the books there will not be a way to prosecute a case that clearly calls for prosecution.

Judge Brown pointed out that there are now governmental agencies performing services that at the time our penal code was drafted were being performed by private corporations and associations.

Judge Sharpe brought up the fact that Texas has been wrestling a long time with the question of governmental immunity from tort liability. He questioned the propriety of making governmental agencies criminally liable before they are made civilly liable.

Dean Keeton called for a vote. The vote was six for leaving governmental agency in the definition of association, and four against. The decision was to leave it in for the time being.

Dean Keeton called for the next question. Judge Sharpe questioned including "estates" in the definition of "association." Mr. Hamilton said that he knew of no statute that made estates criminally liable, but that he had not looked at every ordinance and every penal statute in the state of Texas.

Mr. Barlow said that an estate can act only through its guardian or administrator, and that there are statutes covering those people. He does not think that the estate itself ought to be obligated for the misconduct of the administrator or the guardian.

The committee agreed that "estate" should be eliminated from the definition of "association."

Dean Keeton then said he was a little worried about trusts for somewhat the same reasons. Mr. Hamilton said that a trust may be virtually a substitute for a corporation. Judge Roberts pointed out that a trust is represented by a board of trustees, where ordinarily an estate is represented by an executor or an administrator.

Dean Keeton said that in view of what had been said, he thought "trust" ought to be left in the definition of "association." It will not apply anyway unless the statute defining the offense says so.

Judge Brown said that if "trust" is eliminated anyone who has a bad idea will form a trust instead of forming a corporation or a partnership, and will be immune from the criminal law.

Mr. Hamilton pointed out that, unlike an estate, a trust is a voluntary sort of thing.

The committee agreed to leave "trust" <u>in</u> the definition of "association."

Dean Keeton then asked if there were any more questions. Someone questioned the concept of "common interest" in the definition of "association."

Mr. Barlow said he liked that because that might catch his little charities.

Judge Brown asked whether "common interest" should be defined. Dean Keeton said it is a joint enterprise concept.

Mr. Seth Searcy explained that this definition largely tracked the Uniform Commercial Code's definition. Judge Brown asked whether this would catch the community property interest of a husband and wife. Mr. Hamilton explained that it would not unless the substantive criminal statute so provided. Dean Keeton pointed out that while that is true, the draftsmen must be careful because if the substantive criminal statute just said associations were liable, it would catch the community interest.

Mr. Colvin thought that the statute should make clear what kind of common interest is encompassed.

The committee agreed that it should be "joint or common economic interest."

Dean Keeton said he thought "any other organization" should not be included in the definition of "association." Judge Brown agreed.

Mr. Searcy pointed out that the definition is not an exhaustive definition, and that the word used is "includes" rather than "means." This clearly implies that it might include entities other than the ones named. The reason the Uniform Commercial Code draftsmen used "includes" was to give the courts room to expand the definition to include any new form of business association that might appear.

Dean Keeton said that a partial definition might very well be desirable in the Uniform Commercial Code but not desirable in the criminal law.

Judge Brown pointed out that the committee is working under certain constitutional inhibitions, and that a partial definition may not give a person notice of what constitutes an offense.

Mr. Frank Maloney pointed out that a similar definition was held void for vagueness.

The committee agreed to change "includes" to "means" and to delete "any other organization."

Thus, Sec. 2.071(b) was amended to read as follows: "'Association' means any [government or governmental subdivision or agency,] trust, partnership, or two or more persons having a joint or common economic interest; and . . ."

The committee then moved to a discussion of Sec. 2.074, Defense to Liability of Corporations and Associations. Mr. Hamilton pointed out that the theory of this section is to give the corporation a defense that a high managerial agent exercised due diligence to keep a criminal conduct from occurring.

Mr. Barlow pointed out that this will put a higher burden of proof on the defendant than the law now requires, because it says it is an affirmative defense which must be proved by a preponderance of the evidence. He said that this is inconsistent with the Texas constitutional requirement that in a criminal case the state must prove guilt beyond a reasonable doubt.

Dean Keeton wanted to raise a fundamental question. He said it had been his general thinking that the burden of persuasion would be placed on the state for all these defenses, such as justification or excuse, in the general provisions part of the code. But in several instances the committee has, as this statute does, set up an "affirmative defense."

Judge Brown pointed out that in the present state of the criminal law, "affirmative defense" merely means that the state is not required to negative the defense in the indictment or on the proof. However, if the defendant comes forward with some evidence, the burden of persuasion on the issue is on the state.

Dean Keeton said he understood that, but the committee has to make a basic policy decision of whether it wants to create any defense where the burden of persuasion is on the defendant by a preponderance of the evidence.

Judge Brown said he did not see how such a burden can be imposed on the defendant without changing the constitution.

Mr. Maloney pointed out that the insanity defense is just such a defense.

Dean Keeton said he thought that this corporate criminal liability situation is one in which it would be constitutionally permissible to put the burden of proof of this defense on the defendant by a preponderance of the evidence. Whether the committee wants to do that or not is a different question. Mr. Warren Schwartz said that it probably is constitutional under the federal constitution, though the state of the law is uncertain.

Mr. Barlow asserted that under the Texas Constitution the section is unconstitutional on its face because it shifts the burden of proof. Mr. Barlow pointed out that in Texas all a defendant has to do to defeat the state's case is raise a reasonable doubt.

Mr. Hamilton pointed out that due diligence need not be a defense at all, and argued that if the law gives corporations a defense they would not otherwise have, it should be constitutional to place the burden on them to prove the defense by a preponderance of the evidence.

Mr. Daugherty stated that he understood the law to be that when a defense is stated in a section of the statute other than the section which defines the offense the state does not have to negative that defense, but when the defense is stated in the section that defines the offense the state must negative it in the indictment and on the proof. He said he could not see why a corporate defendant in a criminal case should have a different burden from the burden imposed on an individual defendant.

Dean Keeton said he understood that Mr. Barlow was saying that the Texas constitutional requirements are different from the federal constitutional requirements, but he did not necessarily agree with that position.

Mr. Hamilton urged that rather than take the preponderance of the evidence requirement out of the section, the committee should eliminate the whole section. He said that if due care is to be a defense to criminal prosecutions, the burden must be on the corporation to prove it by a preponderance of the evidence. Otherwise, an almost impossible burden would be imposed on the state.

Judge Brown moved that Sec. 2.074(1) be amended to read as follows: "In any prosecution of a corporation or association for the commission of an offense included within the terms of Sec. 2.072(1 or Sec. 2.073, other than an offense for which absolute liability has been imposed, it is an affirmative defense that the high managerial agent having supervisory responsibility over the subject matter of the offense employed due diligence to prevents its commission."

Judge Roberts said that if Judge Brown's motion is approved, and a high managerial agent testifies that he did everything he could to keep the criminal act from happening, the judge will have to charge the jury that if they have a reasonable doubt as to whether or not the high managerial agent used due diligence they must acquit the corporation.

Dean Keeton made it clear that the motion involves only this case and that the committee is not making a policy decision on whether or not it will ever be advisable to place the burden on a defendant to prove a defense by the preponderance of the evidence.

Mr. Hamilton again urged his position that to remove the preponderance of the evidence requirement would place an impossible burden on the state, and he urged that the whole section be stricken rather than just the preponderance of the evidence provision.

Judge Brown said that while it is true that if some corporate officer testifies that he used due care the judge will have to charge on it, the fact of the matter is that this evidence alone will not satisfy the jury in most cases. All the section does is recognize that there is such a defense as due diligence.

Dean Keeton then called for a vote and Judge Brown's motion passed unanimously. Dean Keeton said he wanted the minutes to reflect the meaning of the vote. That meaning of Judge Brown's amendment is that the committee intended to place the burden of going forward with some evidence on the defendant, but to leave the burden of persuasion on the state to prove its case beyond a reasonable doubt. It remains a question whether this should be

called a "defense" or whether it should be called an "affirmative defense." The committee will have to come to grips with that problem as part of the general provisions section of the code.

The discussion then went to Sec. 2.075, and Mr. Hamilton explained that it merely provides that even though a corporation may be liable for an offense, so may the individual who is responsible for that offense having been committed. The state should not be foreclosed from going after the individual as well as the corporation.

The committee approved Sec. 2.075 as written.

The discussion then went to Sec. 6.051, which contains the same definitions contained in Sec. 2.071. The definition of "association" in Sec. 6.051 should be conformed to Sec. 2.071 as amended so that Sec. 6.051(b) should read as follows: "'Association' means any [government or governmental subdivision or agency,] trust, partnership, or two or more persons having a joint or common economic interest; and . . ."

Mr. Searcy raised a question about Sec. 6.052(2)(c), saying that an individual may make restitution and thereby reduce his fine, and asking whether or not this would be desirable for corporations. Mr. Hamilton said he thought that was implicit in Sec. 6.054, the suspended sentence provisions for corporations and associations.

The committee approved Sec. 6.052 as written, and the discussion moved to Sec. 6.054. Judge Roberts questioned the use of the word "suspended" in that section, and Judge Brown agreed, saying that "suspended" is now a dirty word in the criminal jurisprudence of Texas. Judge Sharpe said that he was not so sure that "suspended" was not just the correct word to use in this section. He said here we do not have the possibility of imprisonment which we have with individuals, and that possibility was the reason that probation was substituted for the suspended sentence provision in the code of criminal procedure. Judge Sharpe said that since it is impossible to imprison a corporation "suspended" might well be the right word to use.

Judge Brown suggested that "execution of the" be inserted just before the word "sentence" so that Sec. 6.054 would read as follows: "The court may suspend in whole or part the execution of the sentence of a corporation or association convicted of an offense on such conditions as the court considers appropriate under the circumstances.

Mr. Vance said he thought that corporations ought to be given probation just like individuals with the exception of having to report to a probation officer. The committee agreed that corporation should be made amenable to the probation law, and that the code of criminal procedure will have to be amended. It was agreed that Sec. 6.054 should be entitled PROBATED SENTENCE rather than SUSPENDED SENTENCE, and that the words "execution of the" should be inserted just prior to the word "sentence."

The next section discussed was Sec. 6.053. Mr. Hamilton said that the purpose is to make applicable the civil remedies for dissolution and revocation when a corporation has been convicted of an offense. He explained that under the Texas Business Corporations Act a persistent course of criminal conduct is not grounds for dissolution.

Mr. Barlow said that this ground for dissolution ought to be put in the Texas Business Corporations Act, and that Texas does not need Sec. 6.053 because a court, without benefit of Sec. 6.053, can request that the attorney general do something.

Judge Brown said he was against anything that had the judicial branch requesting the executive branch to do anything when the court had no power whatsoever to enforce its order.

Mr. Maloney pointed out that we need subdivision (4) in the penal code because of the carving problem, and everyone seemed to agree.

Mr. Vance said he agreed with Judge Brown and Jim Barlow, and that the more important thing to come in here would be some means of collecting the fine. He said though that perhaps that was procedural, and Dean Keeton agreed with him and said it is no different from collecting a fine from an individual; they can be collected on execution.

Mr. Searcy said that the amendment to the code of criminal procedure that is being drafted to get corporations into the courthouse in the first instance will take care of this collection of the fine problem.

Dean Keeton stated that the question before the committee was whether or not to eliminate Subsections (1), (2), and (3) of Sec. 6.053.

Mr. Hamilton said that the first question was whether or not a persistent course of criminal conduct should be grounds for dissolution of a corporation, and that if the answer to that was affirmative, and he thought clearly that it should be affirmative, then the provisions could be put either in the penal code or in the Business Corporations Act.

Judge Brown said that he wanted to require the court to give notice of convictions to the attorney general.

Dean Keeton then said he wanted to get the sense of the committee on whether or not the committee thought that the Texas Business Corporations Act ought to be amended to include the substance of Subsections (1), (2), and (3) and the sense of the committee seemed to be that they did think the Texas Business Corporations Act should be so amended. Dean Keeton asked for a vote on (1) notification, (2) leave in subsection (4), and (3) that the Texas Business Corporations Act ought to be amended. The committee voted in favor of each of those propositions.

Mr. Maloney presented the following draft on criminal homicide:

Section 210.0. Definitions.

In Chapters 14-17, (offenses against the person), unless the context requires a different meaning,

(1) "person" means a human being who has been born and is alive; (Approved January 13, 1967)

(2) "bodily injury" means physical pain, illness, or any impairment of physical condition; (Approved January 13, 1967)

(3) "serious bodily injury" means bodily injury which creates a substantial risk of death or which causes permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ; (Approved January 13, 1967)

(4) "deadly weapon" means any firearm, or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is capable of producing death or serious bodily injury; <u>and</u> (Approved January 13, 1967)

(5) "another" means a person other than the offender. (AND)

((6) "FORCIBLE FELONY" MEANS ANY FELONY, EXCEPT MANSLAUGHTER OR NEGLIGENT HOMICIDE, WHICH INVOLVES THE USE OR THREAT OF PHYSICAL FORCE OR VIOLENCE AGAINST ANOTHER.)

Section 210.1. Criminal Homicide.

(1) A person is guilty of criminal homicide if by his conduct he intentionally, knowingly, recklessly, or negligently causes the death of a person.

(2) Criminal homicide is murder, manslaughter, or negligent homicide.

Section 210.2. Murder.

(1) Except as provided in Section 210.3(1)(b), a person is guilty of murder if by his conduct he:

(a) intentionally or knowingly causes the death of another; or

(b) intends to cause serious bodily injury to another and his conduct is clearly (INHERENTLY) dangerous to human life and causes the death of another; or

(c) commits or attempts to commit a (FORCIBLE) felony, other than manslaughter or negligent homicide, and in the course of and in furtherance of the felony or in immediate flight therefrom he commits or threatens to commit an act clearly (INHERENTLY) dangerous to human life which causes the death of another.

([(d) MANIFESTS AN EXTREME INDIFFERENCE TO THE VALUE OF HUMAN LIFE AND KNOWS THAT HIS CONDUCT CREATES A STRONG PROBABILITY OF DEATH OR SERIOUS BODILY INJURY TO ANOTHER AND CAUSES THE DEATH OF ANOTHER;])

(2) Murder is a felony of the first degree.

Section 210.3. Manslaughter.

(1) A person is guilty of manslaughter if by his conduct he:

(a) recklessly causes the death of another; or

(b) causes the death of another under circumstances which would be murder as defined in Subsections 210.2(1)(a) or (b), (OR (d),)

[except that the homicidal act is committed under the immediate influence of a sudden passion not brought on by the actor's own conduct and (EXTREME EMOTIONAL DISTURBANCE) for which there is reasonable explanation or excuse. The reasonableness of the explanation or excuse shall be determined from the viewpoint of an ordinary (A) person in the actor's situation (UNDER THE CIRCUMSTANCES AS HE BELIEVES THEM TO BE).]

([EXCEPT WHILE ENGAGED IN CONDUCT CAUSING DEATH HE IS RENDERED INCAPABLE OF COOL REFLECTION, AND IS ACTING UNDER THE IMMEDIATE INFLUENCE OF A SUDDEN MENTAL OR EMOTIONAL DISTURBANCE

FROM A CAUSE WHICH WOULD COMMONLY PRODUCE ANGER, RAGE, RESENTMENT, OR TERROR IN A PERSON OF ORDINARY TEMPER.])

(2) Manslaughter is a felony of the second degree.

Section 210.4. Negligent Homicide.

(1) A person is guilty of negligent homicide if by his conduct he negligently causes the death of another.

(2) Negligent homicide is a felony of the fourth degree.

Mr. Maloney said that he attempted to retain the substance of the present "murder with malice" offense, but to define it without using the term "malice aforethought." Culpable homicide has been divided into three areas. The first area is murder, the second area is manslaughter, and the third area is negligent homicide. The negligence required under the proposed negligent homicide draft is a much greater degree than that required under the present Texas negligent homicide statutes. Manslaughter, the next highest crime, includes recklessness as a culpable state of mind, and includes what amounted to voluntary manslaughter under the common law, plus what amounts to murder without malice under the present Texas law. The committee then turned to a detailed discussion of the draft on murder, Sec. 210.21. The committee approved Sec. 210.2(1)(a), which makes a person guilty of murder if he "intentionally or knowingly causes the death of another," virtually without discussion.

Judge Brown asked whether manslaughter is a lesser included offense under murder, and Mr. Maloney answered that a person charged with murder may be convicted of anything all the way down to simple assault.

The committee then went on to discuss Sec. 210.2(1)(b), which makes a person guilty of murder if he "intends to cause serious bodily injury to another and his conduct is inherently dangerous to human life and causes the death of another." Mr. Maloney pointed out that both the intention and the dangerousness must be proved. Dean Keeton pointed out that under the definition in Sec. 210.0(3), "serious bodily injury" need not be very serious, and therefore the conduct ought to be objectively dangerous to human life. He stated he was not sold on the word "inherently," suggesting that perhaps it would better read "and his conduct creates a substantial risk to human life." Some of the committee members did not like that suggestion very much, although Judge Brown thought he liked it better than "inherently." Dean Keeton thought that the jury might be confused by the word "inherently" and Judge Brown agreed, he thought this might be exchanging the

"malice" mumbo-jumbo for new mumbo-jumbo. It was then suggested that the word "inherently" simply be struck out and the statute read "and his conduct is dangerous to human life." Dean Keeton said he had thought of that too. Mr. Vance said he liked "involved a substantial risk" better. Judge Brown said that simply saying "is dangerous to human life" would lead to second quessing because the conduct might not have been foreseeably dangerous to human life. Mr. Cofer said he thought it would be better to say "involves a substantial danger to human life" instead of "substantial risk." Mr. Cofer said that all this is hindsight, and the fact is that the conduct caused a person's death. He said the committee needed to devise a test for telling whether or not the killer knew ahead of time that his conduct would cause a death or would be likely to cause death. Dean Keeton said that is what "substantial risk" means.

Mr. Vance said that when a man gets a baseball bat and hits somebody over the head with it and kills him, he ought to be guilty of murder. Mr. Maloney pointed out that under the present Texas law he is not guilty of murder unless he had the intent to kill.

Mr. Colvin said it was a question of semantics, and he would rather see it say "and his conduct is clearly dangerous to human life." Mr. Maloney agreed. Mr. Maloney said he thought the state ought not to be able to convict a man of murder when he intended to cause serious bodily injury, but not death, unless his conduct was clearly dangerous to human life. Dean Keeton called for a vote on whether to say "clearly dangerous" or just "dangerous." The vote was six for "clearly dangerous" and five for "dangerous." The committee did agree, however, that the conduct ought to be objectively dangerous.

The discussion then moved to Sec. 210.2(1)(c), which makes a person guilty of murder if he "commits or attempts to commit a forcible felony and in the course of and in furtherance of the felony or in immediate flight therefrom he commits or threatens to commit an act clearly dangerous to human life which causes the death of another." Mr. Maloney said that in discussing this subsection it was necessary to look at the definition of "forcible felony" which is set out on the first page of the draft. Judge Brown asked whether this would cover a killing which occurred in the process of a burglary or an arson. Mr. Maloney said it would include that killing only if, in addition to the commission of the offense of burglary or arson, some threat of physical force or violence was used against another person, or the offense itself was inherently dangerous.

Mr. Vance said that as he read Sec. 210.2(1)(c) it would not cover a case where a burglar goes into a home carrying a gun and the gun accidentally goes off and kills someone. Mr. Maloney agreed that case would not be covered. The question would be, did

he attempt to use physical force? Mr. Vance suggested striking the word "forcible" from Sec. 210.2(1)(c).

The committee agreed to eliminate the word "forcible" from Sec. 210.2(1)(c). This rendered the definition of "forcible felony" unnecessary so Sec. 210.0(6) was eliminated.

The discussion then centered on the fact that if Sec. 210.2(1)(c) were adopted it would, at least in part, do away with Article 42, and Mr. Barlow stated that he had sent numerous men to the penitentiary on strong-arm robbery which resulted in the victim being killed when there was no dangerous weapon used.

The committee then went into a long discussion about whether or not to retain the felony-murder doctrine as it is in Article 42 of the Texas penal code. Dean Keeton said that the theory of Sec. 210.2(1)(c) is to cut out felony-murder in those cases that sometimes arise where there was no real danger to human life, but by some happenstance, someone was killed. He stated that most of the recent codes have eliminated the felony-murder doctrine, or at least limited it to the extent that causing a death in committing a felony is not murder unless the actor engaged in some kind of dangerous conduct. Mr. Maloney suggested that maybe the best thing to do would be to deal with Article 42 at a later date, as it would affect the entire code.

Dean Keeton proposed that Sec. 210.2(1)(c) read as follows: "commits or attempts to commit a felony other than manslaughter or negligent homicide and in the course of and in furtherance of the felony or in immediate flight therefrom, he commits or threatens to commit an act clearly dangerous to human life, which causes the death of another."

He called for a vote to see how many were in favor of retaining Sec. 210.2(1)(c) as amended. The committee voted in favor of retaining Sec. 210.2(1)(c) as amended.

The committee then turned to a discussion of Sec. 210.2(1)(d). Judge Brown asked Mr. Maloney if he thought Subdivision (d) would cover the case of a parent who starves his child to death. Mr. Maloney answered that it would cover that situation.

Dean Keeton said that he had some reservations about this subdivision. He pointed out that Subdivision (d) simply describes an extreme kind of recklessness and, since recklessness also is the basis for manslaughter, when there is evidence of recklessness the judge would have to charge on both kinds. That would almost certainly confuse a jury. Dean Keeton pointed out that Subdivision (d) is M.P.C. language, but that the M.P.C. does not have Subdivisions (b) and (c); it merely has Subdivision (a) "intentionally or knowingly causes the death of another" plus this broad coverage

under Subdivision (d). Dean Keeton asserted that the penalty provisions for manslaughter are wide enough to cover all reckless homicide. Subdivision (d) makes some cases of reckless homicide murder, and Dean Keeton wanted to make all reckless homicides manslaughter.

Bill Reid pointed out that the committee had agreed on an extended term provision in the sentencing structure, and a person might be liable for 30 years imprisonment under that provision, based on expert opinion of the man's dangerousness.

Mr. Maloney said that it was his opinion that Subdivision (d) ought not to be in the murder statute.

The committee decided to go on to a discussion of manslaughter and come back to this.

Mr. Vance suggested eliminating Sec. 210.2(1)(d) and eliminating the offense of manslaughter on the basis that the wide range of possible penalties for murder would adequately provide for mitigating or aggravating circumstances for sentencing purposes under murder. Dean Keeton expressed his opposition to that view, pointing out that murder is a harsh word, and carries a much greater stigma than the word manslaughter. Mr. Maloney said that he was not at all sure that the defense attorney or the trial judge would would want to give that responsibility to the trial judge. Also, a jury might not want to convict a man of murder under circumstances that would amount to manslaughter under this draft. A vote was taken and the committee decided to retain the offense of manslaughter.

The discussion went to Sec. 210.3 on manslaughter. Sec. 210.3(1)(a) makes a person guilty of manslaughter if "by his conduct he recklessly causes the death of another." It was approved without discussion.

The discussion moved to Subdivision (b) which makes a person guilty of manslaughter if he causes the death under circumstances which would be murder as defined in Subsections 210.2(1)(a), (b), or (d),

[except that the homicidal act is committed under the influence of extreme emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of the explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be. (N.Y. and M.P.C.)]

[except while engaged in conduct causing death he is rendered incapable of cool reflection, and is acting under the

immediate influence of a sudden mental or emotional disturbance from a cause which would commonly produce anger, rage, resentment, or terror in a person of ordinary temper.]

Mr. Barlow said that he did not like the "extreme emotional disturbance" idea because the judge might be required to charge the jury on extreme emotional disturbance and on the insanity defense in the same manslaughter case. This would create quite a problem for the judge and the jury.

Mr. Vance said he liked the first bracketed exception better than the present "murder without malice" definition, but he wanted to have "emotional disturbance" qualified by the words "not brought on by his own conduct." Dean Keeton agreed that there ought to be a good reason for the actor's extreme emotional disturbance.

Judge Brown wanted to avoid the words "emotional disturbance," and was worried about the time element; that is, when the actor had to be under that influence.

Mr. Vance suggested using the first bracketed exception, but amend to read as follows: "except that the homicidal act is committed under the immediate influence of a sudden passion for which there is a reasonable explanation or excuse and such passion was not brought about by his own conduct." Someone else suggested amending the first bracketed exception to read: "except that the homicidal act is committed under the immediate influence of a sudden passion not brought on by the actor's own conduct, and for which there is reasonable explanation or excuse."

A question was raised concerning the determination of reasonableness; that is, whether the test should be from the viewpoint of an ordinary person in the actor's situation or whether it should be from the viewpoint of the actor himself as he reasonably believed the circumstances to be. Dean Keeton said the draft was "intentionally" worded to omit reasonableness, the idea being that if the actor was under the influence of a sudden passion, whether or not an ordinary, reasonable person in the same circumstances would have been under that influence makes no difference.

Judge Brown suggested that the sentence read: "The reasonableness of the explanation or excuse shall be determined from the viewpoint of the actor under the circumstances as he reasonably believed them to be."

Dean Keeton then suggested that the entire first bracketed exception read: "except that the homicidal act is committed under the immediate influence of a sudden passion not brought on by the actor's own conduct and for which there is reasonable explanation or excuse. The reasonableness of the explanation or excuse shall be determined from the viewpoint of an ordinary

person in the actor's situation." He called for a vote on that, and the committee was in favor of it.

The committee approved the manslaughter draft to read as follows:

Section 210.3. Manslaughter.

(1) A person is guilty of manslaughter if by his conduct he:
(a) recklessly causes the death of another; or
(b) causes the death of another under circumstances which would be murder as defined in subsections 210.2(1)(a), or (b), except that the homicidal act is committed under the immediate influence of a sudden passion not brought on by his own conduct and for which there is reasonable explanation or excuse. The reasonableness of the explanation or excuse shall be determined from the viewpoint of an ordinary person in the actor's situation.

The committee then discussed Sec. 210.4 on negligent homicide. Mr. Maloney called attention to the definition of negligence, found on p. 13 of the draft, which reads: "A person acts negligently, or is negligent, with respect to attendant circumstances or the result of his conduct, when he should be aware of a substantial and unjustifiable risk that the circumstances exist or that his conduct will cause the result and his failure to be aware of the risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the situation."

Judge Sharpe questioned the definition of negligence, saying that a jury would never understand it. Dean Keeton agreed that it does not make a good charge to a jury, but said the real question is whether or not the committee wants to include an offense of negligent homicide. He said that the committee had not settled on a final definition of negligence, but could work on that later. He also said he thought the substance of Sec. 210.2(1)(d), the "reckless" portion of the murder statute, should be used in defining "recklessness" for purposes of manslaughter.

The committee agreed that Subdivision (d) should be deleted from the murder statute, that the definitions of "recklessness" and "negligence" should be reworked, and that the substance of Subdivision (d) from the murder statute should be worked into the definition of "recklessness."

Dean Keeton said that before leaving homicide he wanted to raise a point that had not been discussed and would not be until the committee considers privileges and defenses. His point was that under the homicide statute as presently drafted a person would be guilty of murder if he abused his right of self-defense by using more force than was necessary to repel an attacker; that is, he intentionally killed a man under circumstances where he did not need to kill him. Dean Keeton's thought was that where a man has a legitimate defense, such as protection of property, but has exceeded his privilege, he ought to be guilty of manslaughter. Mr. Maloney said that amounts to giving a person an imperfect right of self-defense. Dean Keeton said he just raised the question for the committee to think about when it considers defenses.

Mr. Newell Blakely presented the following draft on burglary:

CHAPTER 21. BURGLARY AND
OTHER CRIMINAL INTRUSION

Section 221.0. DEFINITIONS.

In this article, unless the context requires a different meaning,

(a) "enter" includes

(i) entry of any part of the body; <u>and</u>

(ii) entry of any physical object connected with the body(; OR

(iii) THE DISCHARGE OF FIREARMS OR OTHER MISSILES INTO THE BUILDING OR OCCUPIED STRUCTURE).

(b) "occupied structure" means any structure or vehicle, a separately secured or occupied portion of any structure or vehicle, or any structure which is appurtenant to or connected with any structure or vehicle, if

(i) the structure or vehicle is adapted for the overnight accommodation of persons; or

(ii) the structure or vehicle is used for carrying on business therein.

Section 221.1 BURGLARY.

(1) A person is guilty of burglary if

(a) he enters a building or occupied structure with intent to commit a felony or theft (THEREIN) at a time when the building or occupied structure is not open to the public and the actor is not licensed or privileged to enter;

(b) he remains concealed in a building or occupied structure with intent to commit a felony or theft (THEREIN) at a time when the building or occupied structure is not open to the public and the actor is not licensed or privileged to remain; or

[(c) he enters or remains concealed in a building or occupied structure at a time when the building of occupied structure is not open to the public and the actor is not licensed or privileged to enter or remain and commits or attempts to commit a felony or theft (THEREIN).

(2) it is not a defense to prosecution for burglary that a person was not actually present in the building or occupied structure at the time the burglary was committed or attempted.

(3) it is an affirmative defense to prosecution for burglary (IF THE DEFENDANT PROVES BY A PREPONDERANCE OF THE EVIDENCE) that the building or occupied structure was abandoned.

(4) Burglary of an occupied structure adapted for the overnight accommodation of persons is a felony of the first degree; otherwise, burglary is a felony of the second degree.

Mr. Blakely explained that he began with the underlying rationale of protection of habitation in a place where a person, because of the special nature of the place, ought to be able to feel free from intrusion.

The first problem considered was what type building or structure should be protected by a special statute against intrusion. Mr. Blakely explained that the recommendation is at least "occupied structure." Mr. Barlow and Judge Brown said that "carrying on a business" is certainly very broad.

Mr. Vance suggested that while the security of habitation idea is very good, a person who builds a building and locks his property up in it is entitled to better protection than a person who would just leave his property out in the yard or somewhere else out in the open. Dean Keeton suggested that could be taken care of in grading the theft offenses.

Judge Brown was bothered by the fact that a warehouse that belonged to a business was protected under the draft, but a warehouse where a person stored his personal items was not protected. He thought that formulation would discourage good law enforcement.

Mr. Daugherty also was bothered by the difference between a business storehouse and a personal storehouse, and thought the distinction should not be made.

It was pointed out that this burglary statute would not cover a boathouse on Lake Whitney.

Mr. Blakely presented as an alternative, which he recommended, having the statute protect a "building or occupied structure."

Mr. Colvin read the definition of "occupied structure" to mean that not only the main structure, but also the appurtenances had to be adapted for overnight accommodation of persons or for carrying on business. However, that was not the intent and Sec. 221.0(b) will have to be redrafted to eliminate the possibility of that construction. He suggested thinking in terms of curtilege because there are thousands of cases defining curtilege.

Mr. Vance pointed out that most of the burglary cases arise where a person is caught inside of a building but before he has taken anything. Dean Keeton pointed out that under the general attempt statute there is no question but what that would be an attempted theft. Mr. Barlow asked how he would know whether the person was attempting misdemeanor theft or felony theft. Dean Keeton said he could see the problem, and suggested that it could be solved when the theft statutes are drafted by some device, such as making all thefts from buildings felony theft. That would make attempted theft easy to prove when a person is caught in a building not covered by the concept of occupied structure.

There was much discussion about boathouses, feedlots, and other structures which would not be covered by the concept of occupied structure and therefore would not be encompassed in the burglary statute. The feeling of the committee seemed to be that the people who owned these structures were entitled to some protection. Mr. Searcy brought up the fact that there will be a criminal trespass statute, not yet drafted, which will catch the person who breaks into a shack or boathouse. Judge Roberts asked whether it would cover coin-operated machines, and Dean Keeton said that had been put aside for consideration in a separate statute; he did not want to make it burglary if it could be avoided. Private vehicles also would not be covered, but Dean Keeton said that while that problem will require a lot of thought, it does not belong in the burglary statute.

Mr. Peter Brett suggested that the committee should consider the concept of breaking, but Mr. Barlow said that getting away from the concept of breaking would greatly improve the law.

Judge Brown said that he would like to keep "building or occupied structure" in the burglary statute, but have the definition of "occupied structure" include only "a structure or vehicle adapted for the overnight accommodation of persons"

and not include "one that is used for carrying on a business." He said "building" would cover all storage houses, businesses, and similar places.

Mr. Colvin suggested approaching the thing in terms of different degrees of burglary depending on the structure involved. Dean Keeton explained that the sentencing range was wide enough to take that kind of consideration into account.

Dean Keeton put the question. It was agreed to include "entering any building or occupied structure with the intent to commit a felony or theft," and that "occupied structure" should include a structure or vehicle used for carrying on a business therein.

Mr. Blakely said that the next problem to consider is the state of mind of the actor when he enters, and that present Texas law calls for intent to commit a felony or theft. The recommendation in the draft is the same. An alternative would be to have him enter with the intent to commit any offense. Mr. Blakely's advisory committee suggested the statute cover a person who entered with intent to commit any offense. The argument in favor of that is, of course, that the inhabitants of the building are equally disturbed no matter whether the intruder intends to commit a felony, a theft, or any misdemeanor. The argument against it is that a person ought not to be guilty of this high offense when he enters with a misdemeanor state of mind.

Judge Brown expressed his opinion that he would like to leave it just the way it is, that is, felony or theft. Mr. Vance said he would like to see crimes of violence included. Mr. Vance pointed out the problem of people going into houses to commit assault. However, Dean Keeton said that would be aggravated assault.

The committee agreed that the burglar's state of mind must be the intent to commit a felony, or a theft of any level.

Mr. Blakely said the next problem is the mode of entry. Do we require force, threats, or fraud? Mr. Blakely's inclination was to do away with all of that because the man is evil enough if he simply enters, even through an open door, with the required state of mind. The definition of "enter" was approved as to the first two methods, that is "entry of any part of the body," or "entry of any physical object connected with the body." There was a question about whether we should carry forward in the definition of enter some of the present Texas law, that is, entry by the discharge of firearms or missiles into the building or occupied structure. Judge Brown said he thought that including the discharge of firearms would be a good idea because a lot of people are convicted of burglary for shooting into houses. Dean Keeton, on the other hand, said that he thought that was a

specialized kind of conduct that ought to be dealt with elsewhere. Judge Brown said that unless it violated someone's basic philosophy, it is conveniently handled under burglary. Dean Keeton asked whether Judge Brown would limit it to firearms, and Judge Brown said yes. Mr. Colvin and Dean Keeton both said that it violated their philosophies. Mr. Barlow and Judge Brown both agreed that the discharge of firearms ought to be limited to occupied structures. Dean Keeton pointed out that he agreed with this and that this made it difficult to include it in the burglary statute.

It was agreed that it be noted that this is a serious problem and that the committee must deal with it, but that for the present time the decision is to deal with it somewhere else.

The next problem is concealment. This is Section 221.1(1)(b). Mr. Blakely explained that there is a problem of concealment only when the initial entry did not constitute burglary.

Dean Keeton said he would like to delete "building" from this provision and have concealment apply only to "occupied structures." Judge Brown agreed with Dean Keeton.

Mr. Barlow brought up the problem of a man concealing himself in Joskey's of Texas, and it was pointed out that this would be an "occupied structure." Someone else brought up the problem of a man concealing himself in a church. Dean Keeton said this would not be an "occupied structure" unless a church is a place where business is carried on. Judge Brown said that he was confident that the court of criminal appeals would hold that "occupied structure" includes a church and a school.

Someone suggested taking the "building" out and just saying "the occupied structure, church or school." Mr. Colvin said he thought he agreed with that; however, the committee seemed generally to agree that it is dangerous to list things in that manner, because of the possibility of leaving something out.

Judge Brown's position changed, and he was in favor of leaving in "building."

Mr. Blakely said that the next general problem was grading the crime. Mr. Blakely's advisory committee recommended just having one grade of burglary with an adequate range of punishment.

Mr. Colvin said he really wanted to make his pitch about the difference between an "occupied structure" and some old shack somewhere and he thinks that there ought to be different grades of burglary to take such differences into account. Mr. Vance said that he thought that burglary of a private residence,

regardless of whether it was daytime or nighttime, should be dealt with more seriously, and he would want it to be a felony of the first degree. Dean Keeton agreed with that.

It was agreed that Sec. 221.1(4), the penalty section, should be amended to provide that burglary of an occupied structure which is adapted for the overnight accommodation of persons is a felony of the first degree. Otherwise, burglary is a felony of the second degree.

Mr. Barlow said it was necessary to go back to Sec. 221.1(3) and eliminate the language "if the defendant proves by a preponderance of the evidence" because of the same problems talked about in the discussion of the corporate criminal liability statute. Everyone agreed that that language should be eliminated. It was agreed that Subdivision (3) should read: "It is an affirmative defense to a prosecution for burglary that the building or occupied structure was abandoned."

Mr. Blakely said the next general problem was whether to permit conviction both for the burglary and for the crime that the man actually committed after entry.

Dean Keeton said that it was his understanding that the committee would hold up on that because it presents a broad, general problem which probably should be dealt with in the general provisions part of the code. Mr. Blakely's comments on this problem are on p. 19 of his proposal, and they read as follows: "The proposed statute does not include a section on multiple convictions. The reporters agreed that multiple convictions should be allowed only if consecutive sentences are not permitted. However, because the question of multiple convictions will affect other sections of the code as well as burglary, the reporters recommended dealing with the problem in the general sentencing provisions."

Mr. Rosenthal said that the feeling of the reporters' meeting had been that the problem of consecutive sentencing appeared throughout the code and should be dealt with in one place in the sentencing provisions, remembering that burglary presented a special problem.

Judge Brown said he would vote to eliminate consecutive sentencing all together. He said the court of criminal appeals has turned over every stone trying to limit consecutive sentencing. Mr. Barlow said that it was his feeling that if a man is guilty of burglary and theft, he ought to be able to convict him of both and give him concurrent sentences. Dean Keeton said that he thought the feeling of the reporters' meeting was that the man could be multiply convicted, but not consecutively sentenced.

Mr. Barlow said that he ought to be tried for both offenses at one trial. Dean Keeton asked if he sensed the feeling of the committee that Texas ought not to have consecutive sentencing. Judge Sharpe pointed out that it is a big problem and that there is a lot to be said for the federal system under which a man can be given some time in prison and probation for the same offense. Mr. Barlow said he thought the committee would have to give that a great deal of thought. Dean Keeton pointed out that you can do that under the sentencing provisions already agreed on by the committee. It was agreed that multiple convictions and consecutive sentencing problems should be handled in the sentencing provisions and that to have consecutive sentences would be undesirable when the crimes grew out of the same transaction.

Mr. Blakely next raised the problem about whether it is necessary that the actor enter with the intent to commit a felony or theft inside the structure or whether it should be burglary if he enters with the intent to hide in the building and shoot somebody on the outside. He said his advisory committee recommended to strike the word "therein," and Judge Brown pointed out that that limitation does not exist in the Texas law now. It was agreed that the word "therein" be stricken from the statute.

The committee next turned to Sec. 221.1(1)(c). This subdivision was intended to deal with the man who develops his criminal state of mind subsequent to his entry. Judge Brown said that he was confused about the difference between (b) and (c). The difference is that under (b) the actor enters the building or structure at a time when it is open to the public, and remains concealed therein with the intent to commit a felony or theft, and under (c) he enters the building at a time when it is not open to the public or remains concealed in it when it is not open to the public but develops his intent to commit a felony or theft subsequent to his entry or concealment. There was some question about whether both (b) and (c) were necessary. Judge Roberts pointed out that under (b) the actor remains concealed with the requisite intent, and the state is not required to prove that he did anything, but under (c), the actor enters or remains concealed without criminal intent, but later he either commits or attempts to commit a felony or theft.

The committee agreed that both (b) and (c) ought to be left in Sec. 221.1(1).

Mr. Blakely said that the next problem was license or privilege obtained by force, threats, or fraud. The question was whether it is necessary to include in the statute a statement that license or privilege obtained by force, threats or fraud is

a nullity. Judge Brown said that without that statement there might be a problem when a man gets a license or privilege to enter purporting to do some work in the building, but really intending only to steal.

Mr. Blakely said that at the time he wanted to raise the problem under Sec. 221.1(1)(a), which says, "he enters a building or occupied structure with intent to commit a felony or theft at a time when the building or occupied structure is not open to the public and the actor is not licensed or privileged to enter." It is Dean Keeton's position that a person is never licensed or privileged to enter with the intent to commit a crime; in other words, a license or privilege is always limited to the purpose stated or implied, or at least some legitimate purpose. Mr. Blakely thought it necessary to include the language "and the actor is not licensed or privileged to enter" because it would cover the case or a person who has his brother-in-law visiting him for a few days and one night the brother-in-law goes down town and then decides to go back and steal from his brother-in-law's house. When he comes back and goes in the house he does not upset anyone because they are expecting him. Mr. Blakely did not think the brother-in-law ought to be guilty of burglary upon his entry. He is not disturbing anyone and disturbance of habitation is the basic rationale for burglary.

Dean Keeton and Mr. Blakely disagreed on the substance. Mr. Blakely did not want the brother-in-law to be guilty of burglary when he entered, but Dean Keeton did. Judge Brown pointed out that there are many cases in his court where a person gains entry into a house on the pretext of using the telephone, but commits theft while the occupant is in another part of the house.

Dean Keeton brought up the problem of a servant. He asked Mr. Blakely whether a servant who broke in at night would be guilty of burglary. Mr. Blakely said he would if he were not licensed to enter at night. Mr. Blakely said, however, that the special protection offered by the burglary statute has no place in cases where the occupant expects the actor to enter. Judge Brown disagreed. Mr. Blakely pointed out that under Dean Keeton's theory a man would be guilty of burglary upon entering his own house if, while away from home, he decided to go home and kill his wife. Mr. Blakely pointed out the case of the shoplifter. A shoplifter often intends to steal at the time he enters the store and he walks in and he picks up something. Mr. Blakely questioned whether or not a shoplifter should be guilty of burglary just because he made up his mind <u>before</u> entering the store.

Dean Keeton said the question was whether a person who had a privilege by law or a reason to be there should be guilty of burglary because under the circumstances of the particular case he intended to commit an offense or whether he should simply be

prosecuted for the offense he committed. He said that at that point he was pretty much disposed to agree with Mr. Blakely's position on the substance, but that the draft did not say what Mr. Blakely wanted it to say.

Mr. Daugherty said he thought the maid who has the right to come in and out of the house all of the time ought not be guilty of burglary when she enters with the intent to commit theft. Dean Keeton called for a vote and the committee agreed that people such as servants, firemen, and policemen who ordinarily would have a legitimate reason for entering, but who by happenstance on a particular occasion enter with the intent to commit a crime, should not be guilty of burglary. The draft will have to be worded some way to take care of that problem.

Mr. Blakely called the committee's attention to the fact that the attempted burglary statute was done away with because there will be a general attempt statute, and the statute on possession of burglary tools was done away with because there will be a general statute on possession of implements used in crime.

Mr. Vance mentioned burglary by explosion and asked whether it would be covered later. Dean Keeton said that was simply an aggravating circumstance which the wide range of punishment would allow to be taken into consideration.

Someone raised the question about burglary of railroad cars. Mr. Blakely explained that it is not covered under burglary, but it will be covered under criminal mischief, and perhaps under criminal trespass. It is clear that the actor would be guilty of theft or attempted theft.

Before adjourning the meeting, Dean Keeton recommended that in preparing to discuss the drafts that Mr. Michael Rosenthal will present on narcotics and dangerous drugs, the members of the committee read Mr. Rosenthal's article in the Texas Law Review for July 1967. The title of the article is "Dangerous Drugs in the United States: Recommendations and Comments."

Mr. Glen Conner of the Department of Public Safety raised a question about the fact that Texas now has a burglary of automobiles statute, and its substance has been left out in the draft approved at this meeting. The problem cannot be adequately covered under theft statutes because the amount or value of the property taken may be very small, while extensive damage is done to the automobile. Dean Keeton said it could be handled in the theft statute by simply providing that theft from an automobile is a felony. Judge Brown said he would not

like to do that because there should be a distinction between the kid who sticks his hand into an open automobile to take a package of cigarettes, and the person who breaks the windows, gets inside, and tears up the car. Mr. Searcy proposed that it might be possible to take into account the amount of damage done in deciding whether the theft is a felony or a misdemeanor. This same idea could be applied to theft from coin-operated machines. The proposal was to tie the amount of the punishment not only to the value of the property taken but to the value of the property destroyed.

Judge Brown said that the idea was good, but there should be a separate offense of breaking and entering automobiles, coin-operated machines, and whatever else might properly come under it. Dean Keeton agreed that the point was well taken. He said he would try to assign that project to someone.

The meeting adjourned at 4:30 p.m.

March 15, 1968

Summary of Minutes

The Committee on Revision of the Penal Code met at the Lila B. Etter Alumni Center, Austin, Texas, on Friday, February 9, 1968, at 10 a.m.

The committee considered Mr. Fred Cohen's proposed report on criminal responsibility. The following draft sections were approved:

> NOTE: The draft presented in this summary has been formally revised by the Texas Legislative Council staff to conform to the council's format and style; no substantive change was intended. The draft proposed by the reporters can be found in the body of minutes. That draft indicates changes made by the committee.

CHAPTER 4. RESPONSIBILITY

Sec. 4.01. MENTAL DISEASE OR DEFECT EXCLUDING RESPONSIBILITY.

A person is not responsible for what otherwise would be criminal conduct if at the time of the conduct as a result of mental disease or defect he did not have capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law he allegedly violated.

Sec. 4.02. MENTAL INCOMPETENCY TO PROCEED.

No person may be tried, convicted, or sentenced if, as a result of mental disease or defect,

(1) he lacks the mental competency to understand the nature of the proceedings against him; or

(2) he lacks the mental competency to assist and participate in the proceedings against him.

Sec. 4.03. RAISING THE DEFENSE AND COMPETENCY TO PROCEED.

(a) A defendant who seeks to rely on mental disease or defect as excluding responsibility shall enter a plea of "not guilty by reason of insanity" at least 10 days before trial begins, or if the court sets a pretrial hearing, the defendant shall enter the plea during the hearing. However, the court for good cause shown may permit entry of the plea at a later time determined by the court. Evidence of mental disease or defect excluding responsibility is not admissible if the defendant does not timely enter a plea of "not guilty by reason of insanity."

(b) After the indictment or information has been presented (or when pleading in a justice or corporation court), but before the trial on the merits begins, a defendant or his counsel may file with the court a written motion asserting that due to the defendant's mental disease or defect there is reason to doubt his mental competency to proceed. A defendant or his counsel may file the motion after the trial on the merits begins if for good cause shown the mental condition of the defendant was not known or apparent before the trial on the merits began.

(c) Before accepting a plea of "not guilty by reason of insanity," or acting on a motion challenging mental competency to proceed, the court shall state the consequences of the plea or motion to the defendant.

(d) Except as provided in Subsection (a), evidence of mental disease or defect is admissible

(1) if relevant to a material element of the offense charged;

(2) in extenuation or mitigation during the sentencing hearing.

Sec. 4.04. PSYCHIATRIC EXAMINATION OF DEFENDANT.

(a) When a defendant has entered a plea of "not guilty by reason of insanity," or has filed a motion asserting that there is reason to doubt his mental competency to proceed, or when the court after a hearing has reason to believe that mental disease or defect will otherwise become an issue in the trial, the court may appoint at least one psychiatrist to examine and report on the mental condition of the defendant. When a defendant wishes to be examined by a psychiatrist or other expert of his own choice, the court on timely request shall provide the examiner with a reasonable opportunity to examine the defendant.

(b) The court may order the defendant committed to a hospital or other suitable facility for an initial period not exceeding 30 days for examining and reporting on his mental condition. The court may extend the initial commitment period for an additional period not exceeding 60 days after

(1) providing the defendant and his counsel with notice and a hearing; and

(2) determining that there is good cause justifying the extension.

(c) The report of the examination shall include

(1) a description of the nature, content, and extent of the examination and any tests conducted;

(2) a diagnosis of the mental condition of the defendant; and

(3) if the defendant is found to be suffering from a mental disease or defect,

(A) a description of the treatment recommended, if any;

(B) an opinion as to the defendant's mental competency to understand and evaluate the nature of the proceedings against him and to assist and participate in the proceedings against him;

(C) an opinion on whether the defendant presently

(i) is a danger to himself or others;

(ii) is in need of treatment; and

(iii) is in need of hospitalization; and

(D) an opinion as to the extent, if any, to which there was at the time of the conduct impairment of the capacity of the defendant either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law he allegedly violated.

(d) Notwithstanding Article 39.14, Code of Criminal Procedure, 1965, the report of the examination shall be delivered to the clerk of the court, who shall file it with the papers of the case and furnish a copy each to the prosecuting attorney and to counsel for the defendant.

(e) A psychiatrist appointed by the court under Subsection (a), or the hospital or other facility to which a defendant is

committed under Subsection (b), is entitled to a reasonable fee for conducting the examination, to be fixed by the court and paid from the general fund of the county in which the court is sitting.

Sec. 4.05. EVIDENCE OBTAINED DURING EXAMINATION.

(a) Except as provided in Subsection (b), any statement a defendant makes during the course of a psychiatric examination, commitment, or treatment ordered under this chapter or at the instance of the state is admissible.

(b) Any statement a defendant makes during the course of a psychiatric examination, commitment, or treatment ordered under this chapter or at the instance of the state is not admissible if it is or includes either an admission of guilt of or a recitation of facts about an alleged offense.

Sec. 4.06. MENTAL INCOMPETENCY AS DELAY OF CRIMINAL ACTION.

(a) When a defendant's mental competency to proceed is put in issue under Section 4.03(b), or by evidence developed at trial, or by a motion filed before sentence is pronounced, the court shall determine the issue. If the court orders a psychiatric examination before determining the issue, or if the court finds the defendant mentally incompetent to proceed, the court shall declare a mistrial.

(b) If the mental incompetency issue is contested, the court shall hold a hearing and require the state to prove the defendant's mental incompetency to proceed by a preponderance

of the evidence, unless the defendant raised the issue, in which case the defendant must prove his incompetency to proceed by a preponderance of the evidence.

(c) If the court determines that the defendant is mentally incompetent to proceed, the court shall determine whether because of mental disease or defect the defendant presently is in need of hospitalization because he is either

(1) a danger to himself or others; or

(2) in need of treatment.

(d) If the court determines either that the defendant presently is a danger to himself or others or that he is in need of treatment, the court may order the defendant committed to a state mental hospital or other suitable facility until it is determined that he no longer is in need of hospitalization.

(e) The clerk of the court shall forward the commitment order to the institution together with certified copies of

(1) the complaint, information, or indictment; and

(2) the report of the defendant's mental condition filed under Section 4.04(c), if any.

(f) If the court does not order the defendant hospitalized, the court shall enter any orders necessary to facilitate the defendant's restoration to mental competency.

(g) Declaration of a mistrial under Subsection (a) does not constitute jeopardy nor does it prohibit the trial, conviction, or sentencing of the defendant for the same offense after he has been determined mentally competent to proceed.

MINUTES
OF THE TEXAS STATE BAR COMMITTEE
ON REVISION OF THE PENAL CODE
FRIDAY, FEBRUARY 9, 1968

Present: Committee Members Page Keeton, Chairman; Judge Archie Brown; Senator Galloway Calhoun, Jr.; Hume Cofer; Samuel E. Daugherty; George W. Gray III; Judge George M. Kelton; Frank Maloney; Judge John Onion, Jr.; Judge T. Gilbert Sharpe; Travis Shelton; Carol Vance

Law Enforcement Advisory Committee Glen Conner; Beverly Laws for R. A. Miles; O. W. Varedick for Herman Short

Advisory Committee on Corrections Dr. George Killinger; Bill Thompson; Luster Gollaher; Bill Anderson

Staff Bill Reid; Mrs. Ione Stumberg

Texas Legislative Council Staff Seth S. Searcy III, Chief Revisor; Paul Echols, Allen Herrington, Michael Johnson, and Miss Linda West, Revisors.

Reporter: Fred Cohen

Guests: Dr. Robert Glen, Mrs. Frank Maloney

Reporters' Advisory Committee: Judge Belcher

The Texas State Bar Committee on Revision of the Penal Code met on Friday, February 9, 1968, at the Lila B. Etter Alumni Center, Austin, Texas, at 10 a.m., to consider Fred Cohen's report on criminal responsibility.

The committee considered Sections 4.01-4.06 of the draft chapter:

> NOTE: To reflect action taken by the committee on the draft, the following sections show additions by the committee underlined and deletions in parentheses and capitals.

CHAPTER 4. RESPONSIBILITY

Sec. 4.01. MENTAL DISEASE OR DEFECT EXCLUDING RESPONSIBILITY.

A person is not responsible for what otherwise would be criminal conduct if at the time of the conduct as a result of

mental disease or defect he (LACKED SUBSTANTIAL) did not have capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law he allegedly violated.

((b) AS USED IN THIS CHAPTER, THE PHRASE "MENTAL DISEASE OR DEFECT" DOES NOT INCLUDE AN ABNORMALITY MANIFESTED ONLY BY REPEATED CRIMINAL OR OTHERWISE ANTISOCIAL CONDUCT.)

Sec. 4.01A. MENTAL INCOMPETENCY TO PROCEED.

No person may be tried, convicted, or sentenced if, as a result of mental disease or defect,

(1) he lacks the mental competency to understand (AND EVALUATE) the nature of the proceedings against him; or

(2) he lacks the mental competency (ADEQUATELY) to (REPRESENT HIMSELF OR TO) assist and participate (THOSE WHO REPRESENT HIM) in the proceedings against him.

Sec. 4.02. RAISING THE DEFENSE AND COMPETENCY TO PROCEED.

(a) (WHEN CALLED UPON TO PLEAD AT HIS ARRAIGNMENT.) A defendant who seeks to rely on mental disease or defect as excluding responsibility shall enter a plea of "not guilty by reason of insanity" within 10 days before trial. However, if the court sets a pretrial hearing, the plea shall be made at pretrial, and with good cause shown at a (HOWEVER, THE COURT FOR GOOD CAUSE SHOWN MAY PERMIT THE ENTRY OF THE PLEA WITHIN 10 DAYS AFTER THE DATE OF THE ARRAIGNMENT OR AT SUCH) later time as the court may determine. Evidence of mental disease or defect excluding responsibility is not admissible if the defendant does not timely enter a plea of "not guilty by reason of insanity."

(b) After the indictment or information has been presented (or when pleading in a justice or corporation court), but before the trial on the merits begins, a defendant or his counsel may file with the court a written motion asserting that due to the defendant's mental disease or defect there is reason to doubt his mental competency to proceed. A defendant or his counsel may file the motion after the trial on the merits begins if for good cause shown the mental condition of the defendant was not known or apparent before the trial on the merits began.

(d) Before accepting a plea of "not guilty by reason of insanity," or acting on a motion challenging mental competency

to proceed, the court shall state the consequences of the plea or motion to the defendant.

(d) (REGARDLESS OF A DEFENDANT'S PLEA.) Evidence of mental disease or defect is admissible

(1) if relevant to a material element of the offense charged;

(2) in extenuation or mitigation during the (PRE) sentencing hearing.

NOTE: The committee decided to have the legislative council staff redraft Subsection (d) so that it would not apply to the defense of insanity.

Sec. 4.03. PSYCHIATRIC EXAMINATION OF DEFENDANT.

(a) When a defendant has entered a plea of "not guilty by reason of insanity," or has filed a motion asserting that there is reason to doubt his mental competency to proceed, or when the court after a hearing has reason to believe that mental disease or defect will otherwise become an issue in the trial, the court may appoint at least one psychiatrist to examine and report on the mental condition of the defendant. The court may order the defendant committed to a hospital or other suitable facility for an initial period not exceeding 30 days for examining and reporting on his mental condition. The court may extend the initial commitment period for an additional period not exceeding 60 days after

(1) providing the defendant and his counsel with notice and a hearing; and

(2) determining that there is good cause justifying the extension.

(b) The report of the examination shall include:

(1) a description of the nature, content, and extent of the examination and tests, if any;

(2) a diagnosis of the mental condition of the defendant; and

(3) if the defendant is found to be suffering from a mental disease or defect,

(A) a description of the treatment recommended, if any;

(B) an opinion as to the defendant's mental competency to understand (AND EVALUATE) the nature of the proceedings against him and to assist (IN HIS OWN DEFENSE) and participate in the proceedings against him;

(C) an opinion on whether the defendant is (A DANGER TO HIMSELF OR OTHERS AND THEREFORE IN NEED OF HOSPITALIZATION; AND)

(i) a danger to himself or others; and

(ii) in need of hospitalization; and

(D) an opinion as to the extent, if any, to which there was at the time of the alleged conduct impairment of the capacity of the defendant either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law he allegedly violated.

(c) Notwithstanding Article 39.14, Code of Criminal Procedure, 1965, the report of the examination shall be delivered to the clerk of the court, who shall file it with the papers of the case and furnish a copy each to the prosecuting attorney and to counsel for the defendant.

(d) When (, NOTWITHSTANDING THE REPORT FILED UNDER SUBSECTION (c),) a defendant wishes to be examined by a psychiatrist or other expert of his own choice, the court on timely request shall provide the examiner with a reasonable opportunity to examine the defendant.

(e) A psychiatrist appointed by the court under Subsection (a) (OR (d)) is entitled to a reasonable fee for conducting the examination, to be fixed by the court and paid from the general fund of the county in which the court is sitting.

NOTE: The committee decided to relocate Subsection (d) as part of Subsection (a).

Sec. 4.04. EVIDENCE OBTAINED DURING EXAMINATION.

(a) Except as provided in Subsection (b), any statement a defendant makes during the course of a psychiatric examination, commitment, or treatment ordered under this chapter or at the instance of the state is admissible.

(b) If the defendant has entered a plea of not guilty, or has entered pleas of not guilty and not guilty by reason of insanity, any statement he makes during the course of a

psychiatric examination, commitment, or treatment ordered under this chapter or at the instance of the state is not admissible if it is or includes either an admission of guilt of or a recitation of facts about an alleged offense. (ANY STATEMENT A DEFENDANT MAKES DURING THE COURSE OF A PSYCHIATRIC EXAMINATION, COMMITMENT, OR TREATMENT ORDERED UNDER THIS CHAPTER OR AT THE INSTANCE OF THE STATE IS ADMISSIBLE UNLESS IT WOULD INCRIMINATE HIM.)

Sec. 4.05. MENTAL INCOMPETENCY AS DELAY OF CRIMINAL ACTION.

(a) When a defendant's mental competency to proceed is put in issue under Section 4.02(b), or by evidence developed at trial, or by a motion filed before sentence is pronounced, the court shall determine the issue. If the issue is contested, the court shall hold a hearing (ON THE ISSUE.) and require the state to prove the defendant's mental incompetency to proceed by a preponderence of the evidence, unless the defendant raises the issue, in which case the defendant must prove his mental incompetency to proceed by a preponderance of the evidence.

((b) IF THE DEFENDANT HAS BEEN ADJUDICATED MENTALLY INCOMPETENT UNDER THE TEXAS MENTAL HEALTH CODE AND THE ADJUDICATION REMAINS IN FORCE, THE PROSECUTING ATTORNEY AT THE HEARING MUST PROVE THE DEFENDANT'S MENTAL COMPETENCY TO PROCEED BY A PREPONDERANCE OF THE EVIDENCE. IF THE DEFENDANT HAS NOT BEEN SO ADJUDICATED, OR IF THE ADJUDICATION HAS BEEN SET ASIDE, THE DEFENDANT AT THE HEARING MUST PROVE HIS MENTAL INCOMPETENCY TO PROCEED BY A PREPONDERANCE OF THE EVIDENCE.)

(c) If the court determines that the defendant is mentally incompetent to proceed under one or both of the standards set out in Section 4.01A, the court shall

(1) suspend the trial or sentencing proceedings if trial is before the court, or

(2) discharge the jury and declare a mistrial if trial is before a jury; and

(3) determine whether because of mental disease or defect the defendant presently is a danger to himself or others and therefore in need of hospitalization.

NOTE: The committee decided that this section should be redrafted to handle the jeopardy problem.

(d) If the court determines that the defendant is not in need of hospitalization, the court shall enter any orders

necessary to facilitate the defendant's restoration to mental competency. If the court determines that the defendant is in need of hospitalization, the court shall order the defendant committed to a state mental hospital or other suitable treatment facility until it is determined that he no longer is in need of hospitalization.

(e) The clerk of the court shall forward the commitment order to the institution together with certified copies of:

(1) the complaint, information, or indictment;

((2) A TRANSCRIPTION OF THE REPORTER'S NOTES OF THE PROCEEDINGS; AND)

(3) the report of the defendant's mental condition filed under Section 4.03(c).

(f) Suspension of the trial or sentencing proceedings or declaration of a mistrial on determining that the defendant is mentally incompetent to proceed does not constitute jeopardy nor does it prohibit the trial, conviction, or sentencing of the defendant for the same offense after he has been determined mentally competent to proceed.

NOTE: The committee decided to have this subsection redrafted to better handle the jeopardy problem.

Dean Keeton opened the meeting by saying that he had heard from Emmett Colvin and that Mr. Colvin would not be able to attend. Mr. Colvin had read Mr. Cohen's report and the reporters' report and was in favor of the alternative test for criminal responsibility. Dean Keeton then turned the meeting over to Fred Cohen to present his report. Dean Keeton explained that Fred Cohen was on a leave of absence from the University this year and therefore had been unable to attend the reporters' meeting. Dean Keeton suggested that Mr. Cohen work from his draft and the committee could consider the reporters' amendments as they arose.

Mr. Cohen began by stating that he would like to present his draft on Responsibility by first stating the philosophy that was the basis for his draft. He said that he recognized that the insanity defense was one of the few areas of the criminal law that elicited an emotional response from almost everyone considering it. Mr. Cohen said that it was easy to state the function of an insanity defense but the real problem was how to implement it. From the moment that it was recognized that people operated on the basis of free will, the problem arose as how to accommodate those who could not be held morally culpable for their actions because they suffered from a serious mental disorder. One of the first examples of an insanity defense appeared in the 12th century. It was called the "wild beast" test. The "right and wrong" test later evolved as the verbal formula to meet the problem. The problem, however, has remained the same--that is, how can a rule of insanity and procedures implementing it be devised that will allow one to identify, with reasonable precision and some flexibility, a person accused of crime who is suffering from a serious mental disorder? Mr. Cohen said that he thought that the way he had stated the rule was much less important than the procedure he had used to implement it.

Mr. Cohen stated that the present Texas test was the M'Naghten "right and wrong" test. He said that there has never been a test more strenuously criticized than M'Naghten. Texas at one time, however, did have a counterpart to what is called the "irresistable impulse" test. Mr. Cohen said that his draft was an attempt to identify those persons to whom he would allow an insanity defense. He was also trying to correct a problem, both conceptual and semantical, that arose when the word "insane" was used. Mr. Cohen said that in his view there was only one correct use of the word "insanity," whether over cocktails or in the penal code. Insanity was synonymous with "criminal nonresponsibility at the time of the alleged offense." This was the only context in which it should be used. Insanity did not refer to any medical disorder. It had no counterpart

in medicine. Insanity did not refer to present insanity or mental competency. Mr. Cohen stated that there were two terms to be used in a penal code: (1) insanity--this referred to criminal responsibility; and (2) mental competency--this referred to the ability of the accused to stand trial, be sentenced, convicted, or executed. Mr. Cohen argued that this was more than just a semantical problem. Only last year in Pate v. Robinson the U.S. Supreme Court had problems with the term insanity because they did not know whether the Illinois court was referring to responsibility or competency. Mr. Cohen stated that not only did the misuse of the word insanity throw our thinking off, it had consequences operationally. Mr. Cohen said that Texas presented a horrible example of the misuse of the term "insanity." He knew of no other jurisdiction in which a "right and wrong" test was used to determine a person's competency to stand trial. Thus, Mr. Cohen stated that what he had attempted to do in this draft was to come up with a correct use of these two words, so that: (1) it could be determined whether the defendant should be held responsible for an offense he committed; and (2) whether the defendant was mentally competent to be tried, sentenced, convicted, or executed. Mr. Cohen stated that when a person was relying upon the insanity defense, the question was not really one of incarceration or not, but rather, where should an individual be incarcerated--in a penal institution or in a mental institution. He stated that the lawyer's job did not end with an acquittal or a conviction, but rather continued through such decisions as (1) when should the individual be released, and (2) what type of treatment should be made available. Mr. Cohen said that one might argue that much of his draft should be in a code of criminal procedure. However since the 1965 Code of Criminal Procedure, was in such bad shape, and since he was not writing on a clean slate, he had put much of the procedure in the penal code. Mr. Cohen re-emphasized that the procedure was probably more important than the semantic content the test for criminal responsibility.

Dean Keeton observed that what society was trying to do was determine how to protect itself from the dangerous person regardless of what the cause might be. Dean Keeton stated that he was not so concerned with the test of insanity as he was with how to determine, once a person has been placed in a mental institution, under what circumstances he should be allowed to get out. Dean Keeton also stated that a second problem the committee should address itself to was how to devise a way to prevent excessive delays in the process of handling an insanity defense. Dean Keeton thought this draft handled this problem whereas the old code did not.

Fred Cohen observed that in this and other jurisdictions the competency issue was used by both the prosecution and the

defense to avoid handling a tough case. He said that when he drafted his report he had in mind the resources that were available, not what he hoped would be available, to handle people who are mentally incompetent. For example, Mr. Cohen stated, he wanted to require a mandatory psychiatric examination by at least two psychiatrists every time the defense of insanity was raised, but that this was impractical given the facilities available at this time. He also wanted to make free psychiatric examination available, when the defense agreed, and the judge thought it necessary. He recognized that the people and the money were just not available. Thus, he tried to draft a code keeping in mind the resources that were presently available.

Frank Maloney observed that present procedures allowed $250 to indigent defendants for all expenses including psychiatric examinations.

Dr. Glen stated that he was very impressed with the report. He said that he felt the report would allow a psychiatrist to testify by stating his opinion and the basis for that opinion. This was preferred to the present law which forced a psychiatrist to testify to a legal conclusion. He said that he believed the trier of facts needed the basis for a psychiatrist's opinion, not just the opinion.

Dean Keeton said to Dr. Glen that in essence what Dr. Glen was saying was that a psychiatrist believed that the trier of facts needed the basis of the opinion and then the trier of facts could deduce the legal conclusion.

Dr. Glen replied, "Exactly."

Dean Keeton summarized by saying, "Thus, what you want from the doctor is the nature of the disorder."

Dr. Glen agreed. Dr. Glen stated that what the psychiatrist needed to do was to testify as to matters occurring over a period of time. Under the present code he could not do this except through subterfuge. Dr. Glen stated he thought the report should have some statement regarding the historical nature of testimony, so that there would be no doubt that the psychiatrist could testify as to the patient's history.

Mr. Cohen stated that it wasn't the nature of a penal code to take on the detail of the function of a witness. However, he pointed out that the doctor would find in this report rather explicit details of the nature of the testimony expected of a witness when was appointed by the court. The psychiatrist could go into the history of what was observed, thus the basis

of an opinion. He stated that the D. C. Court of Appeals (considering all the trouble they had had in the insanity area) last month decided that a doctor could not testify that certain behavior was the product of mental disease. Thus, they have gone full circle. Dr. Glen stated that although it might not be appropriate at this time, eventually the law should recognize that it must do away with the question of responsibility and ask the question, "Did the person do this (the act) and what should we do with the person?" He thought that this was the ultimate point of view and that society would eventually have to evolve to this state. He stated that as a psychiatrist he was delighted to see this draft and thought it would help the psychiatrist immeasurably.

Dr. Killinger stated that in essence he agreed with Dr. Glen, but he wondered how the chronic neurotic would be handled, for example, the sex psychopath. This was the type of person that he was concerned with--the chronic neurotic repeater. He stated that this person needed highly individualized treatment and he felt the problem should be covered.

Dean Keeton said this problem would be dealt with and that it was one of the problems discussed in the reporters' meeting. Dean Keeton requested that the discussion be centered on the report and asked Mr. Cohen for any comments he might have on Section 4.01.

Mr. Maloney asked if Mr. Cohen would tell about his three basic tests: responsibility (insanity), competency, and restoration. Mr. Maloney said that the reporters had recommended putting the substantive law and the procedure in one place as was done here. Mr. Maloney added that he also would like Mr. Cohen to explain what procedures went with what tests.

Mr. Cohen referred the committee to the chart labeled Appendix D on page 60 of the report. Mr. Cohen summarized the contents of the chart by stating that the first decision was "responsibility at the time of the criminal event" and the test was "whether the accused has substantial capacity to control his conduct." The next decision was "competency to proceed" (to trial or to be sentenced or executed) and the test was "the defendant's ability to understand the proceedings and assist in his defense." The third decision was "the hospitalization issue" and the test was a danger test, that is, "was the individual dangerous to himself or to others." The fourth decision was one of institutional transfer and the test for it was "can the individual benefit from such a transfer?" The fifth decision was "retention in a hospital" and the test was again the dangerousness test. The last decision was "discharge from the hospital" and the dangerousness test was used here again.

Mr. Daugherty asked if perhaps more meaningful terminology could be used. He explained that his problem in dealing with a psychiatrist was that the psychiatrist testified in one language and the lawyers talked in another.

Mr. Cohen responded that this was a pervasive question. He said that the Durham rule which was supposed to represent the age of enlightenment for lawyers and doctors and was supposed to have answered this question had been a complete failure. Under the Durham rule there was going to be dialogue. Doctors would speak their own language, lawyers would speak their own language, but it had failed because doctors continued to use their own terminology and lawyers continued to question in terms of right and wrong. The law was acting out a morality play and the doctors were acting out a diagnostic clinical play and they were in the same room. Mr. Cohen said that one can't legislate the dialogue, but can only set the framework.

Judge Brown stated that the doctors must learn to live with the law's language. He said that in San Antonio they had had psychiatrists that almost refused to come to court and testify because of the hassle that they had had with the lawyers. Judge Brown stated that he had just had to meet with the psychiatrists and attempt to explain to them what the law expected. He has asked the psychiatrists what language they would like to testify in, but they couldn't come up with anything. He said that the doctors were treating an illness and it was just not too relevant to them how the illness manifested itself unless it bore upon the type of treatment. Judge Brown stated that not all mentally ill persons should escape responsibility for their act.

Dean Keeton stated that Dr. Glen's problem was really a problem of evidence, and the committee was not directly concerned with it here. He observed that under this draft the doctor could talk about defects, not just illnesses, which was a big change in the law. Dean Keeton said he thought that there was room to argue that the doctor should not be allowed to state an opinion, but should testify only as to whether the person had a mental illness. He said it was for the judge or jury to determine whether the defendant should be held responsible.

Mr. Daugherty stated that he thought the medical profession had had quite a bit to do with the changes in the Mental Health Code; as a result the doctor could testify whether the person needed to be hospitalized or not. He recognized, however, that this was in a different area with different problems existing. He added that the doctors could come nearer using their language in a probate court than in a criminal court.

Judge Brown observed that discussing mental illness in a civil proceedings was much different than discussing it in a criminal proceeding. Judge Brown said the committee was not talking just about mental illness but about certain degrees of mental illnesses. Judge Brown observed that the field of psychiatry was growing by leaps and bounds and that the law should not limit itself to a term that was used today, because in a few years that term might be obsolete.

Dean Keeton stated that the psychiatrist should be allowed to state an opinion, but only after giving his basis for it. Dean Keeton thought that a psychiatrist's opinion, if the predicate had been laid, was valuable and should be admitted.

Mr. Cohen stated that when a lay witness, a doctor, or anyone else gave an opinion what he was really saying was, "This is what I want done with this man." Mr. Cohen said that he did not deal with this problem in his report. It was a matter of evidence that should be handled outside the penal code.

Dr. Glen said that the psychiatrist objected to giving an opinion. If the psychiatrist did give an opinion, he was either grandiose and hoped that he could affect the decision or he was humble and hoped to God that he couldn't.

Dean Keeton observed that society had to face up to its responsibility. Dr. Glen responded that it should be the 12 men that face up to the responsibility, not the doctor.

Judge Kelton observed that if the doctor's opinion was conclusive, the trial might as well be abolished.

Frank Maloney said that doctors gave conflicting opinions and it was up to the trier of facts to determine the credibility of the witness.

Dean Keeton said he thought the meeting was at a point where they could consider the individual sections.

Fred Cohen observed that there were two main portions of the chapter. Section 4.01 was one portion and all the rest was the other. Mr. Cohen stated that he would like to first of all spell out the choices that the committee had. He said that in his view an insanity test was a semantic description of a way to identify, with reasonable precision and some flexibility, persons accused of crimes who were seriously mentally disordered.

Mr. Cohen stated that there were many tests from which to choose. At one extreme was the British Royal Commission test.

That test asked the jury "was the defendant so serious mentally ill that he ought not to be held responsible for his conduct?"

Dean Keeton said that the reporters had actually considered that test.

Judge Brown added, "And rejected it."

Mr. Cohen diagrammed on the board what he said were the three main decisions to be covered by a test. First, does the accused have a mental disease? Second, was his conduct the product of a mental disease? Third, should the person be held responsible? He said the last decision is a moral decision. He said the British Royal Commission test skipped from the first decision to the last. It was the most open-ended type of test. The "product" test, Mr. Cohen stated, determined whether a person was mentally ill, whether his conduct was a product of that mental illness, and finally whether he should be held responsible for his conduct. Another test was M'Naghten. It asked, "Is the defendant mentally ill, and as a result of mental illness, is he able to appreciate the criminality of his conduct, or he is able to determine the difference between right and wrong." Mr. Cohen stated that the latter was strictly a cognitive test and it did not consider volition or the integration of the personality. Professor Globe once recommended another test. It identified all of these things. That is, was the person so mentally ill that as a result of his mental illness he was unable to know what he was doing, unable to control himself, unable to perform with the proper level of effect or emotion, and unable to integrate. Mr. Cohen said that last you had the test that he wanted to focus on. That is, we should identify the mental illness in relation to the conduct. He said, for example, that a person who had a broken leg and committed a crime should not be exculpated. He stated that there must be some kind of psychic impairment. It used to be called being a witch, but that now we called it mental illness. The person had to be so psychically impaired that he could not control his conduct and as a result should not be held responsible. This was the Currens test. Mr. Cohen observed that the reporters had favored the alternative test. He argued that there really was no difference in the two tests, but that by including the phrase "either to appreciate the criminality of his conduct" the alternative test might warm the cockles of certain peoples' hearts.

Judge Brown responded that the reporters recognized that there was probably no difference in the tests. However, they believed the second, or alternative test, would be easier to sell because it was stated in language in which the general public and lawyers around the state were more familiar. Judge

Brown also stated that by having the language spelled out it would not be necessary to explain what was meant to the 10,000 people who wouldn't understand it. Judge Brown said that this was a selling job.

Dean Keeton observed that if a man's mind was so devoid that he could not control his conduct then of course he could not appreciate the criminality of his conduct.

Mr. Cohen said he would buy Judge Brown's reasoning although he did think it was wrong.

Judge Brown said he thought that the reporters thought it was better to be practical than to be a purist.

Mr. Cohen said he didn't think it mattered which test was used. He said his objection was that if you were going to single out cognition or volition he would ask why you had not singled out the ability to integrate a personality.

Dean Keeton observed that they had singled out only one thing that had made it impossible for the person to control his conduct.

Judge Brown said that by singling out and recognizing "the capacity to appreciate the criminality" in the alternative test something different was implied than when only "ability to conform his conduct" was used.

Dr. Glen asked if this would be the same sort of test as the "policeman-at-the-elbow" test.

Mr. Cohen answered that he understood the "policeman-at-the-elbow" test to be a test used in certain states where the "irresistable impulse" test was used. The prosecution would ask or argue--would the accused have done the same thing if there had been a policeman at his elbow. He said he did not deal with this problem but felt the prosecutor could ask this type of question.

Dr. Glen said that he thought the law needed to focus on whether or not a particular individual could conform his conduct to the requirements of the law. He said the law presently required the psychiatrist to testify about a hypothetical person. He said that such testimony was meaningless. Each person had a specific thing relating to his illness. He stated that it had to be made clear that a psychiatrist could only testify as to the specific capacity of a specific individual.

Mr. Cohen answered that at this stage of the proceeding the focus was on the requirements of the law that the defendant had allegedly violated, and that his test was designed to meet this situation. For example, suppose a kleptomaniac was accused of committing rape. His compulsion came out in a way that was not necessarily even relevant to his ability to control his conduct involved in the offense. His compulsion must have been related to the crime he was alleged to have committed.

Judge Brown stated that his court had been confronted with the individual who heard voices telling him to do things, and the individual did not have the ability to resist. Judge Brown said that this person might know that what he was doing was wrong, and thus would not be covered by the M'Naghten test. As a result pyschiatrists had to subvert their own professional ethics in order to testify. He said the psychiatrists knew this man was crazy and should escape punishment. So they had to twist things around to bring him within an arbitrary rule and as a result, the situation was uncomfortable for all concerned. Yet, Judge Brown said, we recognized that those people existed and were not responsible for their acts.

Mr. Cohen asked for the committee's reaction to the test. He said there was a basic policy decision on whether or not to retain the M'Naghten test.

Frank Maloney observed that the alternative test, which is what the reporters recommended, included in the first part the cognitive and in the second part, the volitional elements. He added that the second part might encompass some form of "irresistable impulse."

Judge Kelton said it seemed to him that this went right back to M'Naghten.

Senator Calhoun pointed out that the tests were in the disjunctive and thus were alternative. Senator Calhoun was afraid that the test would encompass those who were ordinarily called sociopaths. He was afraid the word "defect" was too broad. Senator Calhoun said he thought that this test was so broad that one might get to the point where there wasn't such a crime as murder without malice.

Frank Maloney observed that there would still be a crime of murder without malice because the cognitive or volitional part of the test must relate to a mental disease.

Senator Calhoun said he realized that, but that he thought the word "defect" might be too broad and would thus cover any

type of personality disorder. He said, for example, he thought that anyone who killed someone had some type of mental defect.

Judge Brown observed that this problem came up in the reporters' meeting and the reporters recommended that some limitation be placed upon the word "defect" to exclude sociopaths. Judge Brown explained that the use of the word "defect" was meant to include the mental retardate who might have the mind of a four-year-old child, but did not have a mental disease. He observed that this person would not be covered under the present law, but the reporters did want to include him within the test of criminal nonresponsibility.

Frank Maloney asked Dr. Glen if by using the term "mental disease or defect" were they including personality disorders or were they just taking everything in the medical nomenclature down to personality disorders.

Dr. Glen observed that the latter was correct. Mental disease or defect did not include psychopathic or sociopathic disorders.

Senator Calhoun reiterated his question, "How broad is 'defect?' Would it include a bad temper, for example?"

Carol Vance stated that he thought most people who committed crimes had some type of mental defect and at the same time this was no reason they should be excused. Mr. Vance stated that he believed the law, in a broad sense, should encourage people to be responsible. He thus concluded that the solution to this problem was retaining the M'Naghten rule. Mr. Vance stated that he believed that a person should first go to the penitentiary and then if he needed medical help he should be sent to a hospital. Mr. Vance said he could not see any difference between the alternative test and murder without malice. Mr. Vance said that, in his interpretation of this definition, a person that was just "down right mean" could show a history of a violent temper and might come under this definition. He said he didn't belive that this was the type of person that we wanted to catch under an insanity definition.

Dr. Glen stated that the psychiatrist didn't want a person who was "just mean," out on the streets or in the mental hospital either, and that he didn't think the psychiatrist was going to testify that such a person was mentally ill. Dr. Glen reiterated that a psychiatrist would not look at mental disease or defect as a personality disorder and the way a psychiatrist would view mental defect would be to mean a retardate.

A committee member asked Dr. Glen if "mental defect" was left out of the definition would "mental disease" cover the retarded.

Dr. Glen answered, "No."

Judge Brown said that because of this doubt the reporters wanted to have the sociopath exclusion.

Dean Keeton said that he understood "mental disease" and "mental defect" were used in the medical sense.

A committee member asked if the test could read "mental disease or defect in a medical sense." The consensus was "No." A committee member asked that the committee consider the reporters' notes to save time.

Mr. Cohen said that the phrase "mental defect" referred to a situation that was not capable of improving and perhaps overlapped into a situation that involved organic brain damage. He next addressed himself to the manslaughter problem, which he said wasn't a real problem. Mr. Cohen stated that, in a charge of manslaughter, evidence of insanity would be admissible as in any other case if the person was relying on an insanity defense. If he was not relying on an insanity defense, it would probably not be appropriate to just show that the individual had a violent temper. The law expected him to live up to an objective standard. Mr. Cohen concluded that this draft would not change the present situation relating to manslaughter. Mr. Cohen said that the question that Mr. Vance raised was the basic question: should we retain M'Naghten? Mr. Cohen said this was a basic policy decision. He stated that he thought reasonable men could differ on this question. He said that he would like to review the facts that he believed important in choosing an insanity test. It has always been the policy of the law to attempt to identify those persons who were seriously mentally ill and deal with them in a different manner. The name of the test has changed (it has been called the "wild beast" test, witchcraft, M'Naghten) but the purpose remained the same. The purpose was to provide a means of identifying those persons society considered "insane." The question one must answer if the M'Naghten test was retained was, "Will the ability to distinguish between right and wrong identify all the people we want to exculpate?" Mr. Cohen argued that we know more about mental illness than we did at the time the M'Naghten test was formulated and should thus devise a test that would make use of that knowledge. He said, regardless of the words in which the test was framed, he didn't think many different people, if any, would

come within the test just because of a verbal change. He said that after the responsibility issue there still remained the question of what to do with the person. Sometimes society killed them and sometimes it treated them. He emphasized it was the procedures that counted.

Mr. Vance said that he could see this (the proposed) definition of mental disease or defect being turned upside down.

Mr. Cohen asked, "Don't judges let everything in that relates to mental disease or defect of personality under the present law?"

The judges said that they did. Mr. Cohen stated that if we presently let everything in that relates to cognition, volition, or personality, all we're doing by changing the statute is using 20th century language to describe the condition. Senator Calhoun said that although the courts let in evidence on all conditions, the test with which the jury was charged was, "Did the defendant know the difference between right and wrong?"

Dr. Glen re-emphasized that the testifying psychiatrist must state the reasons for his conclusion. Thus, he argued that if a psychiatrist brought in a bunch of hogwash, the jury wouldn't believe him.

Dean Keeton suggested that this was the appropriate time to bring up the reporters' addition. It said that mental disease or defect did not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

Dr. Glen commented that eventually when people were better educated this type of test would not be needed, but at this stage of the game it was a very necessary thing.

Dr. Killinger said that if the definition of mental defect was limited to mental retardation why not just say mental retardation instead of defect. He emphasized, however, that he did like the word defect.

Dean Keeton said the trouble with not limiting the definition of mental defect was that a layman might come to the conclusion that mental disease included repeated antisocial behavior. Dean Keeton said the basic issue the committee should decide was, do we want to limit this basic definition in some way such as the reporters have recommended?

Mr. Cohen said he would like to speak to that. First of all, no jurisdiction that had considered the Model Penal Code

(M.P.C.) had adopted this restriction. One of the reasons was that those persons who would have to testify under this restriction had always testified against it at the legislative hearings considering the restriction. He said what was intended to be accomplished was the exclusion of the psychopath or sociopath. Mr. Cohen referred to the language and emphasized the word "only." He argued that when "only" was included it was as though there had never been a restriction. He said that this restriction language just didn't accomplish its intended purpose. Mr. Cohen gave an example. Take a man who every day walked through the neighborhood nude. This was certainly anti-social behavior; and under the exception the evidence relating to the man's mental ability would be excluded. Mr. Cohen asked, why pick only one type of antisocial behavior to exclude? If this is the desire, why not just say in Subsection (a) "any person who is psychotic shall not be responsible," and in Subsection (b) "any person who is sociopathic shall be responsible." He said all that would be accomplished would be to turn the decision over to clinical judgment. He said that the proposed alternative test allowed the law to function as the thought it should. That function was to make the moral determination of whether or not the person should be held responsible for crime.

Judge Brown said the reporters intended to exclude people whose repeated criminal activity was the only manifestation of abnormality. Mr. Cohen said that a study conducted here in Texas showed that there were 202 criteria for diagnosing a sociopath and this test only focused on one--the repeated criminal activity. He said that this test didn't even identify the psychopath.

Senator Calhoun asked at what point did a mental condition become a mental disease.

Mr. Maloney answered that this was the whole point. This was what they were talking about. No doctor would testify that a sociopath had a mental disease or defect. He had a mental disorder or a personality disorder.

Dean Keeton said that one had to identify the person suffering from a mental illness, and "mental disease" and "defect" were the best words that they had found.

Senator Calhoun asked if all doctors would agree at what point a disease became a disturbance or vice-versa.

Mr. Maloney said that the psychiatrists had the APA diagnostic manual classifying psychiatric conditions. If they started calling a sociopathic condition a mental disease or defect, the lawyer

could point out to them that this was contrary to their manual and stop them at that point.

Dr. Glen said that what the psychiatrist was attempting to do was relate to the court and jury what was happening with an individual. Under M'Naghten he was required to make a crazy kind of statement which had nothing to do with mental illness. It was a half-diagnosis. As a result, he was forced into a position of distorting his knowledge.

Senator Calhoun argued that it didn't matter what kind of mental disease the person had or how extensive it was unless it prevented him from being able to differentiate between right and wrong.

Dean Keeton said he thought the alternative test would allow the jury more information.

Mr. Vance said a major portion of these people would be covered under the language of the M'Naghten test "did not appreciate the nature or extent of his act."

Bill Reid summarized the issues presented at the reporters' meeting and by Mr. Cohen's presentation. He said there were really three things they were trying to do to the present law: (1) include the mental defective as well as the person who was mentally diseased; (2) decide whether to include the volitional as well as the cognitive aspect of the personality; and (3) decide whether to introduce the concept of substantial impairment rather than requiring an all-or-nothing impairment.

Judge Brown said that if the man who heard voices was not covered then a situation existed where one crazy man went free and another crazy man was punished. Both of them were just as crazy medically.

Dean Keeton asked how many wanted to include defect as well as disease in whatever definition was adopted. The committee voted 12 to 0 to include mental defect. Dean Keeton asked how many favored the alternative proposal as opposed to M'Naghten.

Mr. Maloney asked to make a statement before a vote was taken. Mr. Maloney said the first statement in the alternative test was the M'Naghten test. Mr. Maloney summarized the arguments for the alternative test and against the M'Naghten test by saying that the M'Naghten test required the doctors to testify as to only half of what they knew. He said M'Naghten considered only the cognitive areas and not the volitional areas. He said the M.P.C.

test contains the volitional element. He said the alternative test represented a slight change from the M.P.C. test but not a very large change--mostly a wording change.

Mr. Cohen said that every state that had changed the test had considered the M.P.C. test. Every state that has reworded their test had included the volitional.

Mr. Maloney asked if there might be a constitutional problem if the volitional aspect was not included.

Mr. Cohen said that it was being argued in the alcoholic context.

Mr. Maloney said that psychiatrists wanted "volitional" to be included along with "cognitive." He re-emphasized that there still would have to be a mental disease or defect. This test changed the present law by including the volitional.

Dean Keeton said that regardless of the exact language, the question was whether or not the committee wanted to include volitional or not.

Dr. Glen said that whenever he testified that he had to conceal his knowledge from the jury under the M'Naghten test. He wanted to know if it was the purpose of the law to conceal from the jury something that was germane. Dr. Glen said that if one went to any mental institution and lined the patients up in a row, that maybe only 5 percent wouldn't know the difference between right and wrong, and they might have been in the institution for 20 years. Even this 5 percent would be foggy. In some areas they would be able to determine right and wrong and in other areas they would not. He said that the state hospitals could not be run today unless the patients knew right from wrong. The patients had to be very cooperative.

The committee voted 8 to 4 to include the volitional aspect. Dean Keeton called for a vote on whether or not to include the sociopath exclusion. He stated that he thought Fred Cohen caused him to change his mind and that now he didn't favor the sociopath exclusion.

Judge Brown noted that the reporters were also divided on the question.

Mr. Cohen said he would rather live with the "wild beast" test than with this sociopath exclusion.

The committee voted 9 to 3 to delete Subsection (b), the sociopathic exclusion.

Dean Keeton said the committee should not consider the specific language of the alternative test. Dean Keeton said that the present draft read "lacks substantial capacity" and in his opinion what it meant was to "substantially impair his capacity."

Judge Brown said the change was not the same that he had made at the reporters' meeting where he had suggested it read "as a result of a mental disease or defect would substantially impair his capacity."

Dean Keeton said what he intended was for it to read "A person is not responsible for what otherwise would be criminal conduct if at the time of the conduct he did not appreciate the criminality of his conduct or to conform his conduct to the requirements of the law and if he had a mental disease or defect which would substantially impair his capacity to do so."

Mr. Cohen said that changed the meaning. He said you had to identify the condition first, then had to focus on what was the function.

Dean Keeton agreed to leave the wording as it was in Mr. Cohen's report.

The word "substantial" was questioned and no one could figure out what "substantial" meant. Mr. Cohen stated that if substantial was left out a prosecutor could argue that what was meant by "capacity" was a total inability to conform his conduct to the requirements of the law. He said that medically you would be identifying only half of one percent of the people who were curled up in a corner somewhere. He said his use of "substantial" was a very conscious use of a modifier. He said the law was filled with words like substantial for no other reason than to set the emotional tone. He said capacity, in the fictional sense of the word, wasn't meant. For example, the law used to say that a woman had no legal capacity, or that a child under 10 had no capacity to commit a crime. The above uses of capacity were fictions. This fictional type of capacity was not the same type that he used in his test. He said he was trying to avoid the interpretation that for a person to be incapacitated he must be wholly unable to function. Mr. Cohen asked what would happen if "substantial" were knocked out and "all" were inserted. He said he thought this was what the committee was getting at. The committee disagreed.

Someone suggested substituting "adequate" for "substantial," but Mr. Cohen pointed out that this was a broader word than "substantial" and would allow more kinds of conduct to come within the test. Mr. Cohen gave an example of the Boston strangler. For a large portion of the day the Boston strangler had capacity to perform, feed his family, and work, but he still committed the most bizarre crimes.

Senator Calhoun and Dean Keeton pointed out that capacity was used with reference to the time of the act. The committee voted to leave out "substantial."

The word "lack" was questioned. Mr. Vance suggested changing "lack" to "did not have." It was argued that the jurors would not understand what the word "lacked" meant. The committee decided to substitute "did not have" for "lacked."

Mr. Cohen stated that under the "wild beast" test the test was "is the accused so totally taken by the Gods."

Dean Keeton said we might get that far.

Judge Brown said, "That would please Carol Vance."

The discussion went to Section 4.01A (Section 4.05 of the original draft). Mr. Cohen stated that this section was concerned with competency to proceed. Mr. Cohen stated there were numerous statutes in Texas today that spoke to this problem. They used all types of different language. It made sense to him to combine all of them into one section and ask "is a person mentally competent to be tried, convicted, sentenced, or executed." He noted that "executed" was left out by the reporters.

Dean Keeton jokingly said that he didn't understand why you could execute a sane person person but not an insane person. If you're going to execute someone, he had rather the insane be executed.

Mr. Cohen said he would have to teach the Christians something. (Laughter) He said the reason why the common law did not execute a person who was mentally ill was because it was deemed to be unChristian to execute a man who could not make peace with his God. Now if the committee wanted to stand and be counted . . . . (Everyone laughed.)

Judge Brown commented that there were other reasons, for example, it was contrary to the policy of the law to execute a man that didn't know he was being punished.

Mr. Cohen said that another reason was that he couldn't get a pardon. Mr. Cohen stated that under present procedure when a person became incompetent to proceed there was a decision-to-delay as opposed to a responsibility decision. He said he pulled all the decisions-to-delay together in a single section. Mr. Cohen said he thought he had covered all the delay proceedings in one statute by saying: (1) he lacks the mental competency to understand and evaluate the proceedings against him; or (2) he lacks the mental competency edequately to represent himself and assist those who represent him in the proceedings. Focusing on number two first, Mr. Cohen said that this was the common-law rule and also the rule in Texas as he understood it. This rule sought to exclude any references to right and wrong because they had no place in this determination. What one was interested in here was whether or not the defendant was able to function, that is, could he understand the charges, could he assist counsel in preparation of his case, etc. Mr. Cohen said that this had always been the test for sentencing, and now it was a constitutional requirement. A valid sentence could not be imposed on a person who could not effectively be present, that is, who was mentally incompetent. Subdivision (1) was designed to complement Subdivision (2), and Subdivision (1) was more specifically concerned with sentencing, while Subdivision (2) was concerned with the trial.

Mr. Cohen explained why he put "understand and evaluate" in Subdivision (1). He agreed they were somewhat redundant. "Understand" was meant to pertain to a grasp of the facts; "evaluate" meant roughly to have some notion of what the consequences might be. For example, the defendant might understand that he was being tried, but might not understand that he might be sent to prison or executed. Mr. Cohen said that this was a basic common-law test and he didn't think it had ever been improved upon.

Dean Keeton said that the reason the reporters' had decided not to include "execution" was that they wanted to prevent a delay in the appeal process. Thus they thought that delay of execution should be in a different section. The reporters did come to a definite conclusion that any incompetency on the defendant's part arising after sentencing should not delay the appeal.

Judge Brown pointed out that under present Texas law there were procedures that provided for an automatic stay of execution when the prisoner became insane before execution.

Senator Calhoun asked what the reason was for including both "tried" and "convicted."

Mr. Cohen said it was just to be more precise on the timing. Mr. Cohen said it had often been held as a matter of law that the jury's verdict could not be legally received unless the defendant was competent.

Senator Calhoun said that this was just another part of the trial. Mr. Cohen agreed.

Judge Brown gave an example. Suppose the judge was trying the case without a jury and he had heard all the evidence and had taken the case under advisement. During that period of time the accused became incompetent. The judge would have to determine the competency issue. The defendant could not be convicted until he was found competent.

Senator Calhoun pointed out that in this draft the issue of competency could be tried before the trial commenced, during the trial, after the trial, and before sentencing.

Dean Keeton stated that this was the present law and it might be a constitutional requirement. Dean Keeton said that this did not change the present Texas law. In fact, he believed that one could raise the competency issue now to delay an appeal. This draft would not allow it.

Mr. Maloney stated that the use of the word "conviction" would allow a delay of an appeal because in his belief it was constitutional law that a person in a criminal offense was not convicted until the case had been appealed.

Mr. Cohen suggested that it would help to take out the word "convicted."

Mr. Malony further pointed out that in a capitol case the defendant was not sentenced until after appeal.

Dean Keeton said that the committee should resolve the policy decision before they quibbled with the words. He said as he understood the consensus of the committee, what they wanted was that a person could raise the competency issue at any time before or during the trial or before sentence.

Judge Brown pointed out that Article 46.02 of the Code of Criminal Procedure (C.C.P.) would have to be amended.

Mr. Searcy said that it would have to be repealed.

Judge Onion wanted to know how much of the procedure would go back into the C.C.P. and how much would stay in the penal

code. Dean Keeton said that most of the time they didn't deal with criminal procedure unless it was necessary. Judge Onion pointed out that by repealing Section 46.02, material from the C.C.P. was brought over to the penal code, and he believed it should be left in the C.C.P. He wanted to keep the two codes somewhat separate.

Judge Brown said that he thought once the procedure was worked out to implement the penal provisions it could be moved back to the C.C.P.

Dean Keeton said that the drafting could be handled later if the committee agreed on the fact that they couldn't get away from talking about procedure. Dean Keeton agreed that Judge Onion had a good point, but said the committee shouldn't try to decide it now.

Judge Kelton said he had a very basic question, that is, under this test could a person bring up his competency before he was tried, have a trial on that issue, and then after the trial started, have another hearing on it.

Mr. Maloney pointed out that this was the present law and it was probably of constitutional dimension.

Mr. Hume Cofer said that he didn't like the word "evaluate." He was afraid that "evaluate" used here might require a higher standard of competency.

Mr. Cohen stated that it wasn't intended to. It was suggested to substitute "appreciate" for "evaluate," but the majority did not agree to make the change.

Dean Keeton said that the option appeared to be between saying "to understand the nature of the proceedings" or "to understand or appreciate the nature of the proceedings." It was suggested that the language be amended by adding the words "nature of" before "proceedings."

Mr. Cohen asked the judges if that change was made would they explain to a defendant not only that he was being tried, but what he was being tried for. The judges answered that they would. A vote was taken and the committee voted 10 to 2 to reword Subdivision (1) as follows: "he lacks the mental competency to understand the nature of the proceedings against him; or . . . ."

Carol Vance questioned the use of the word "adequately" in Subdivision (2). He said that he didn't think anyone without a

lawyer could adequately represent himself. He further pointed out that some people had a right to be tried without a lawyer and yet here they were requiring the defendant to be able to represent himself. It was pointed out that the "inadequacy" in the test must result from a mental disease or defect and not from a lack of legal training.

Mr. Vance said he understood and withdrew his objection to the use of "adequate." Mr. Vance said he would like to do away with Subdivision (2) altogether. This was put to a vote and it was decided to retain Subdivision (2) with the wording changes.

Mr. Cohen suggested that it be changed to read: "he lacks the mental competency to assist and participate in the proceedings against him." The committee approved this language and then recessed for lunch.

At 1:42 p.m. the meeting was called to order by Chairman Keeton. Dean Keeton read Section 4.02 as rewritten by the reporters. Dean Keeton observed that the basic change made was a rearrangement of the sentences. Dean Keeton said there were no substantive differences.

Fred Cohen said he agreed. He commented that this was a clear change in the Texas law. He said it added to the list of pleadings that could be entered now. The addition was "not guilty by reason of insanity." He said that the reason for requiring this special plea of "not guilty by reason of insanity" was the belief that the issues involved were sufficiently technical, abtruse, and difficult to require notice in advance so that the prosecution would not be taken by suprise. Mr. Cohen stated that there was no question that the issue of competency was material at any stage of the proceedings. He said those who argued that the issue of insanity could be raised at any time were incorrect because insanity related only to the time of the offense and did not necessarily have any bearing on competency to stand trial. He said that there was no constitutional requirement that the issue of insanity be considered at any stage of the proceeding as long as there was some procedure for determining the question of criminal responsibility. Exception: Suppose a defense attorney went all the way through a trial and then discovered that his client had been in a mental hospital three different times and had once before been acquitted by reason of insanity; that the defense attorney didn't take the time or was not able to discover this--under these facts the defense would be allowed to raise the issue of insanity. Mr. Cohen said this example was a matter for case law decision since it was unique. It should not be the subject of legislation.

Senator Calhoun asked if there was any reason to retain the plea of "not guilty by reason of insanity." He asked if it wouldn't be better to get away from the term "insanity" and all its ramifications. He proposed instead to have a plea of "not guilty by reason of mental disorder or defect."

Mr. Cohen responded that the word "insanity" was not used to refer to mental illness. "Insanity" was a catchword, a shorthand way of identifying the time and the conditions surrounding the criminal conduct.

Judge Kelton argued that by not using the word "insanity" in any place other than in the plea, the jury was going to be confused and all the problems that had existed in the past with the use of the word "insanity" would continue.

Dean Keeton asked if the jury was going to be hearing the plea. The question was answered, "yes."

Mr. Cohen said he appreciated the point but insisted that "insanity" was just a shorthand way of stating the criminal responsibility test and if the insanity plea was used consistently, there should be no confusion.

Senator Calhoun said that he liked the plea of insanity. He thought the jury understood what it meant.

Dean Keeton said that if he were a prosecutor that he would certainly want to use the word "insanity."

Fred Cohen said that it didn't really make any difference, because if mental disease or defect was used, the prosecutor would argue to the jury that not every mental disease or defect should be equated with criminally nonresponsibility.

Dean Keeton asked for a vote on the wording. "Not guilty by reason of insanity" received six votes and "not guilty by reason of mental disease or defect" received four votes.

Mr. Cohen asked if someone would state any objections there might be to Section 4.02. He said he couldn't anticipate them, but if there were any, it would probably be hurting the defense. He said the section was not intended to hurt anyone but he would like to hear any arguments to that effect.

Mr. Maloney said whenever there was a sentence that said "Evidence of mental disease or defect excluding responsibility is not admissible if the defendant does not timely enter a plea

of not guilty by reason of insanity," you were asking for problems. He said the judge and the defense would not be able to discern what was evidence of mental disease or defect. Mr. Maloney said that his problem was that with any serious crime, there was a mens rea problem, and the defense ought to be able to put on any evidence it had to disprove the mens rea element.

Mr. Cohen said that that was taken care of somewhere else.

Dean Keeton said that it was taken care of on page 3, Subsection (d).

Mr. Maloney said that Section 4.02(d)(1), "Regardless of a defendant's plea, evidence of mental disease or defect, is admissible (1) if relevant to a material element of the offense charged," plus the sentence in Subsection 4.02(a) "Evidence of mental disease or defect excluding responsibility is not admissible . . . ." created confusion in his mind. Mr. Maloney said that if the mens rea was lacking because of a mental disease or defect, the defendant at the time he committed the act was not responsible, and that, constitutionally, the defendant ought to be able to introduce that evidence at the trial.

Senator Calhoun said such a provision would be invading the trial court's province in determining the relevancy of evidence.

Dean Keeton said the real question was whether the committee should talk about this evidence question at all. He said that if a defendant had not entered his plea of "not guilty by reason of insanity," then the evidence was not relevant to an insanity defense. The trial judge would ascertain whether the evidence was relevant to some other issue of the case. Dean Keeton concluded that the penal code did not need to deal with this problem.

Judge Kelton said he agreed with Dean Keeton because it was the trial judge's function to admit or exclude evidence which might or might not be relevant.

Senator Calhoun argued that if "evidence of mental disease or defect excluding responsibility is not admissible . . . ." was taken out, then Section 4.02(a) should be taken out too because the court would not be able to function.

Mr. Maloney said that the effect of including that sentence was to say "unless the defendant enters a plea of not guilty

by reason of insanity within 10 days after arraignment or later for good cause shown, the court cannot charge that issue under any circumstances."

Judge Kelton said that if that was the result, a lot of trouble would be created. Judge Kelton asked what was going to happen to temporary insanity?

Mr. Cohen said temporary insanity would not exist under this draft. Mr. Cohen said that he would like to make a point, because if Mr. Maloney was correct, this section would have to be changed; but he believed there was a conceptual, not constitutional, problem. For example, a person had a defense of insanity (complete exculpation) if he had a mental disorder of a certain degree and he reached a certain stage of functional impairment. While the law had and still did talk about personal responsibility, mens rea, etc., the law operated differently. There was an objective standard of guilt that pervaded every crime, with the only exception being that of specific intent crimes. It was therefore an "either or" proposition. You were either mentally ill and nonresponsible or you weren't sufficiently mentally ill, and whether or not you had a mens rea was a fictional issue.

Mr. Maloney said that it was his understanding that the state was required to prove a specific intent or knowledge in the serious crimes.

Dean Keeton said in that context there had to be a mens rea. Mr. Cohen said that was a fiction. Dean Keeton said that it was not really a fiction but what Mr. Cohen was saying was that it had to be proved by circumstantial evidence.

Mr. Cohen said it was proved by the presumption of sanity: every person was presumed sane. The way the presumption was overcome in a criminal trial was the insanity defense, and although there was the rhetoric of personal guilt, it was clear that there was no personal guilt except in the sane person. For example, one presumed specific intent to kill was an element of the offense of murder, yet specific intent was disproved by evidence relating to mental disorder.

The committee decided that evidence of specific intent would be admissible under this draft. Mr. Maloney said that evidence of criminal nonresponsibility would not be admissible unless a plea of "not guilty by reason of insanity" had been entered. Dean Keeton said that was what the draft intended.

Judge Brown said that this draft accomplished one needed change. When the prosecution rested and the defendant got up and said, "I call as my first witness Dr. Smirch (who lives over a drugstore and has been sobered up for the purposes of this trial)," and Dr. Smirch walked in, the court could say, "Whoa, Dr. Smirch, I'm not going to let you testify."

Dean Keeton called for a vote on Section 4.02(a). Senator Calhoun said that in his county 65 percent of the defendants had no lawyer, and appointment of counsel was made at arraignment. He said that he didn't think that a lawyer who had never talked to his client or looked into his background would be in a position to enter a plea of "not guilty by reason of insanity."

Dean Keeton said that the reporters talked about that problem. The "or" was used so that the plea could be made later for good cause shown.

Senator Calhoun wanted to know why the defendant couldn't be given 30 days after his attorney was appointed to enter his plea. He said that the prosecution might say nothing for 6 months, and 15 days before the trial he could elect to ask for the death penalty.

Dean Keeton said that what was wanted was 30 days after arraignment.

Mr. Cohen said that change would really slow things up.

Senator Calhoun said that he didn't think that 30 days was necessarily needed but that the first 10 days ought to be by right.

Judge Onion said that under the 1925 C.C.P. arraignment (statutory arraignment) was only required in capitol cases. The only thing that was done in the 1965 C.C.P. was to make sure that the arraignment was somewhere in the record, and it was usually done just prior to pleading before the jury (after the jury had already been selected). The legislature provided for arraignment in all felony and misdemeanor cases requiring imprisonment because they considered arraignment to be the last point in the proceedings at which counsel could be appointed. Judge Onion said that if the records he saw every day meant anything, arraignment was still being handled in the same old way: as an afterthought after the indictment had been read to the jury and the trial was ready to begin. The result was that arraignment was handled in different counties in different ways and was not required to be at a certain time.

Judge Brown agreed that tying the plea to arraignment presented a problem. He knew of a court that called the defendant, and the defendant said he needed a lawyer, and the judge said, "All right, you're case is set for trial next month and I'll appoint a lawyer before I leave town and I'll arraign you when I come back for trial." Judge Brown suggested then that the plea should be made "X" number of days before trial.

Dean Keeton said that if he understood the consensus, what the committee wanted was to have the plea entered so many days before trial.

Mr. Maloney suggested that the plea be tied to the pretrial hearing. Someone said that Texas did not have a pretrial hearing. Mr. Maloney said that Texas should have a pretrial hearing if it didn't.

Judge Kelton said that in some courts the defendant was brought from the jail and a lawyer was appointed for him at that time. This court-appointed lawyer had a mandatory 10 days to get ready for trial and if the district attorney was really hot after the defendant, 10 days were all the appointed counsel would get. Thus, the day the lawyer was appointed he would have to enter his plea of insanity even before he talked to his client.

It was suggested that this situation would present good cause. Mr. Maloney reiterated his position that he believed it would be better to tie the plea in with the pretrial hearing.

Mr. Vance suggested that the committee leave the plea tied to arraignment. He said the result of tying the plea to the trial would be to create an automatic continuance. He said this would not happen if the plea was tied to arraignment. He said then the district attorney or judge would take the trouble to arraign the person. If they didn't, that was just their hard luck. The accused ought to be arraigned soon after indictment or information rather than at the trial itself. He said that this was especially true in the serious cases, because a lawyer needed to be appointed. Mr. Vance said that this was the practice in Houston.

Dean Keeton said if a trial judge was unreasonable about allowing the plea for good cause then he would get reversed.

Judge Onion said that that might be what happened in Harris County, but in most counties the judge didn't think about arraignment until the jury was in the box. If defendant was

allowed 10 days after the jury was in the box, then there were problems.

Senator Calhoun said if the plea was tied to arraignment and the defendant was given a mandatory 10 days to file his plea, a situation might arise (when the defendant wanted to plead guilty) where a waiver would have to be signed. However, if the defendant had a right to enter his plea any time up to 10 days before trial, or for good cause shown, there was no mandatory period and guilty pleas could be made without a waiver.

Dean Keeton said he didn't think it mattered which way the committee went, because if the trial judge abused his discretion and didn't allow an amended plea for good cause shown he would be reversed. He re-emphasized that the plea could always be allowed for good cause.

Judge Brown said that if 10 days before trial the defendant pleaded "not guilty by reason of insanity" there wasn't any psychiatrist in the world that could be obtained soon enough to examine that man. The court would have to commit the defendant for evaluation, thus, the plea became a built-in continuance. The result would be that all defense attorneys would be encouraged, although they knew they were going to plea not guilty by reason of insanity, to wait until the last minute to enter the plea. They would know what the result would be and that they would get a continuance. Judge Brown said that if the plea was entered prior to trial, 10 days were not enough, and that the plea should be entered at the time of arraignment.

Carol Vance suggested that arraignment be at a specific time before trial.

Judge Onion said that you might have a jury in the box and jeopardy might have attached.

Judge Brown said that the only way to handle the jeopardy problem was to make the raising of insanity during the trial, or after the jury was in the box, a request for a mistrial. Judge Brown said everyone wanted to get the plea made at the earliest possible time.

Mr. Vance stated that the prosecution had everything to gain by getting things moving, therefore, if the plea was tied to the arraignment the prosecution would see that the defendant was arraigned.

Mr. Maloney said that this was why a pretrial hearing was needed. He said that in the pretrial hearing there was a

motion for continuance, a motion to suppress evidence, a motion for change of venue, etc., and the law provided that when a criminal case was set for pretrial hearing the defendant should have five days after notice of setting in which to file his motions, pleadings, and exceptions. Any such preliminary matters not raised within the time allowed would not be allowed except by permission of the court with good cause shown. He said this was what the federal law did, and this was what the law was now. It was pointed out that this pretrial hearing was discretionary. Mr. Maloney said that the law could require that when the insanity issue was going to be raised that the defendant must request the court to set a pretrial hearing.

Judge Kelton said that some judges didn't like pretrial hearings because they operated as a motion for continuance.

Dean Keeton said he was impressed with what Mr. Vance had said because the prosecution had the burden to see that the defendant got arraigned.

Mr. Cohen said that Colorado had used this procedure since 1935. Someone asked what type of arraignment Colorado had. Mr. Cohen stated that they had the formal type of arraignment and the way that it worked was when a defendant was called upon at arraignment he pleaded "not guilty by reason of insanity" and was sent to a hospital to be examined. He said as a practical matter the result of the examination would determine the type of plea that would be made. He said that under this procedure there would not be many additional trials involving the sanity issue, certainly not more than five percent. He said that there would not be any time problem.

Mr. Vance said he would like to see the statute read something like this: "However, the court will permit the entry of the plea within 10 days after the date of arraignment or for good cause shown at such later time as the court may determine."

Senator Calhoun said that sometimes he needed more than 10 days.

Dean Keeton said that was the reason for the good cause shown and that he believed that you shouldn't have a longer mandatory time because some people would not need this mandatory time.

Mr. Gray said that this change would kill the little counties expense-wise. In districts that take in four and

five counties the judge came to a county and impanelled the grand jury in one day and received indictments. He had some people in custody, some people on bond, and some people that weren't even arrested. He only came to that county every two or three months. This would cause him to come back for arraignments and create extra expenses.

Judge Brown said that a judge in that position would come back for trial and arraign everybody. He wouldn't try quite as many cases.

Judge Kelton said that it would compel arraignments whereas arraignments might have been waived otherwise.

Carol Vance said the defendant could still waive arraignment.

Mr. Cohen suggested that the time be 10 days after indictment and the appointment of counsel.

Senator Calhoun said that Mr. Cohen's suggestion presented a problem when a person retained his own counsel. He said there was no way of telling when that counsel was retained.

Judge Brown suggested the following wording: "A defendant who seeks to rely on mental disease or defect as excluding responsibility shall enter a plea of 'not guilty by reason of insanity' within 10 days before trial. However, if the court sets a pretrial hearing, the plea shall be made at pretrial, and with such good cause shown at a later time that the court may determine." The committee agreed to adopt that wording and to either amend or repeal the applicable C.C.P. articles to conform to it.

The discussion went to Section 4.02(b). Mr. Cohen said he would like to comment on this section. He said as he understood Pate v. Robinson the competecy of the defendant was a constitutional requirement; that is, a substantive right. All the court said in that case was that there had to be a procedure designed so that due process rights were afforded in determination of the competency issue. It didn't say there had to be any particular kind of procedure. He said he didn't see the court now, or in the future, forcing the determination of this decision into any particular kind of mold. For example, it could not be raised anytime a new witness took the stand. It would be an extremely gross reading of the case. Mr. Cohen said there had been some objections raised to the fact that there was no way to limit the raising of competency. He disagreed with this. He thought that this draft did limit it.

Dean Keeton said that if there was a constitutional way to limit raising the competency issue that this committee should adopt a way that would prevent frivolous delays. Dean Keeton said he was in favor of Mr. Cohen's draft as long as it was constitutional. He asked if there were any comments on Mr. Cohen's handling of competency.

Judge Brown said he would like to add, "The filing of such motion after a trial begins shall be deemed a motion for mistrial."

Mr. Searcy wanted to know if that change could be handled in a separate provision with wording to the effect any time proceedings are halted because of mental competency, trying or retrying the defendant is not prohibited. He said his reason was that the change would be required in about three or four places in the draft.

Judge Brown said he was just afraid it might be omitted somewhere down the line. He wanted to insure that it was not forgotten.

Mr. Searcy said that the legislative council staff tried to deal with it on page 8, Section 4.05(f). He said that this wasn't a well-drafted section, but that he believed the essence of it was sufficient to handle the problem.

Mr. Cohen said he was perhaps ignorant, but he couldn't understand why this was a problem.

Judge Brown explained that if a mistrial was declared except at the defendant's request, jeopardy attached. Mr. Cohen wanted to know why this wasn't the case on a motion to suppress, motion for a new trial, or any of those types of motion.

Judge Brown said that was not the law now.

Mr. Cohen said he did not know this, but he now understood the problem.

Dean Keeton asked if Subsection (f) handled the problem.

Judge Brown said he was happy.

Dean Keeton read Section 4.02(c) and pointed out the reporters' draft changed Mr. Cohen's draft by deleting the phrase "and shall explain the consequences of the plea or motion to the defendant and insure that he understands." The committee agreed to delete this.

Dean Keeton read Section 4.02(d) and noted that the committee had discussed it.

Judge Brown said that one thing about Section 4.02(d) still bothered him. He said "innocense by reason of insanity" was certainly a material element of the offense charged, and if it was excluded because the defendant didn't plead "not guilty by reason of insanity" the defendant couldn't offer evidence on this point; yet this section said regardless of the plea, evidence was admissible.

Mr. Cohen said that he would go along with this change if it was followed to its logical conclusion. Sanity was a material element of every offense that required a mental element, and therefore the prosecution must prove it beyond a reasonable doubt.

Dean Keeton said this subsection should be worded so that it would be clear that it would not apply to a defense of insanity.

Senator Calhoun said it would be just as clear to have said "in absence of a plea of 'not guilty by reason of insanity' evidence of mental disease or defect will not be admissible unless it is relevant to another element of the offense."

Dean Keeton said that might be a good way to word it.

Mr. Cohen said the only problem with that wording was that insanity as used in his draft was a conclusion, and not an element of the offense.

Dean Keeton said it could not be drafted in this meeting and since everyone knew what was meant, another draft would be prepared for the committee's consideration.

Dean Keeton read Section 4.03.

Mr. Cohen said that this had been switched around from his draft. When he drafted this section, it said "the court <u>shall</u> appoint." He also had an initial period of 60 days for examination with a 30 day extension.

Judge Brown said the reporters just reversed it.

Dean Keeton observed there was a difference between "may" and "shall." Mr. Cohen said that there was a big difference.

Dean Keeton said the "shall" was changed to "may" because it would be impossible in some rural areas to appoint a psychiatrist.

Judge Brown said that in Bexar County the county psychiatrist screened everyone that was in jail. He might have already made a mental examination so why should the judge have to have him re-examined.

Dean Keeton proposed this language: "The court shall either appoint at least one psychiatrist to examine and report on the mental condition of the defendant or order the defendant committed to a hospital."

Judge Brown said suppose the man had already been examined by a psychiatrist.

Senator Calhoun said what if the district attorney was ready to go to trial without an examination. Should the defendant be committed, or be examined by someone else, if the prosecutor or the defendant didn't want an examination.

Judge Brown said he selfishly changed the "shall" to "may" because he was trying to get rid of as many "shalls" as he could in his business.

Frank Maloney asked Mr. Cohen why he wanted "shall."

Mr. Cohen responded that this illustrated his attempt, without knowing just how far he could go, to work within the limited resources that he thought would be available. He said that unless an examination was made directly and in anticipation of competency or insanity, and unless it was made in a more suitable facility than the jail, and at the specific instance of the prosecutor's office (and in his experience he found that they county physician was quite often an agent of the prosecuting attorney), you might as well forget about the hearing because it was going to tend to perpetuate the finding of sanity. The use of "shall" was intended to induce judges to use psychiatrists. Mr. Cohen said that the way a physician would look at a man in jail (generally to see if he was suicidal) was very different from the way he might look at him in anticipation of what was a new test of insanity in this state.

Senator Calhoun said the present draft allowed a person to be committed to a hospital without the insistence of the prosecution, and possibly at the insistence of the defendant, and did the committee want to do this.

Mr. Cohen said that a man who had funds and retained his own attorney was going to avoid this procedure like the plague.

Dean Keeton took a vote on "may" and a majority of the committee approved it.

Mr. Cohen said he thought this section had been undercut and as a result the committee should re-examine the notice section. He said a lot had been taken from the defendant and nothing given him. Mr. Cohen said that other jurisdictions had always tied the "giving notice by the defense to rely on insanity" with "the observation" privilege. Now, Mr. Cohen said, the defendant (90 percent of all defendants will be indigent) was obligated to come forward and plead his insanity defense and all he received was $250 to spend for everything. He couldn't even get a private psychiatrist to interview him for that amount. Mr. Cohen said that the result would be that the prosecution would make his examination which he might or might not share.

Dr. Glen said there would not be enough facilities available if it was mandatory that all the defendants who raised the issue of competency or insanity be sent to a state-supported hospital.

Mr. Cohen said that he didn't know whether there would be an increase in commitments or not, but that it was his feeling that the only way one could get a state of this type to provide more facilities was to create a crisis. He said that he had put the mandatory commitment in intentionally, hoping that perhaps more money would be appropriated to provide resources in this area.

Dean Keeton said no crisis would exist under a "may" provision, but it might under a "shall" provision.

Judge Kelton said that in his district he didn't think it would make any difference whether it was "may" or "shall," because there just weren't that many insanity defenses raised. Another vote was taken on the use of "shall" or "may," and the committee voted 9 to 1 to put in "may."

Mr. Cohen had one more point to make in this area. He said if there was going to be a "may" privision, how about putting in a provision that would allow the defendant, on motion, to apply for more than the $250 for private psychiatric examination. This would be limited to indigent defendants.

Judge Brown said that while Mr. Cohen was out of the state the code had been amended to allow for a motion by the defendant for additional money for private psychiatric examination.

Mr. Cohen said he would like to make a prediction:

> If you come up with this notice provision and then come up with a situation, which operationally works out, that, you're time after time, getting state-oriented psychiatrists coming in with conservative estimates, which will be sanity, and you don't have a reasonable provision for providing experts, and by that I mean beyond psychiatrists, handwriting experts, and so on, you're just looking for the courts to reverse you again. I am trying to anticipate what seems to me to be as clear as anything written in the law because the equal protection issue is expanded, that is really what we're talking about, a question of equal protection.

Mr. Searcy and Judge Brown pointed out that this was taken care of on page 5 in Subsection (d).

Mr. Cohen said that didn't do it. What that said was that if the defendant had a psychiatrist the psychiatrist got a chance to examine him.

Judge Brown pointed out that under Subsection (e), a psychiatrist appointed by the court under Subsection (a) or (d) is entitled to a reasonable fee to be fixed by the court and paid from the general fund of the county in which the court was sitting for conducting the examination.

Mr. Cohen said before his draft was hacked up, this section was only intended to provide access.

Judge Kelton said that what was meant was that the defendant was going to be given two shots. If the state didn't say what he liked, then he could go out and get his own psychiatrist.

Dean Keeton said he thought the problem could be handled in the draft, if there was a consensus that it was wanted. He said he believed that if an indigent defendant wanted a psychiatrist of his own choice, then he should be provided with one, but that he should be made to elect, and give notice of that desire, before he found out what the state-appointed psychiatrist was going to say.

Judge Kelton said he was fundamentally opposed to this proposition because there was no telling what it would cost a county like Podunk to provide psychiatrists for indigent defendants.

Senator Calhoun observed that the trouble with Judge Kelton's position was that in some areas the court would appoint one particular doctor every time. That doctor would give testimony favoring the state or he wouldn't get appointed the next time.

Mr. Cohen agreed. He said he didn't intend to use a judicial threat, but that if there wasn't some fair method found to provide reasonable resources for indigent defendants the courts were going to hold that the state had to provide them. He said it was not a matter of accusing anyone of anything, but just a matter of fact, that when a psychiatrist was appointed time and time again by the state, that they tended to lean toward the state with their testimony.

Dean Keeton said perhaps there wasn't anything to argue about since this draft did provide for the appointment by the court of a psychiatrist. If the courts didn't appoint psychiatrists for indigent defendants, they would be reversed. He said that since the committee didn't want to appoint a psychiatrist for a person that could afford one, maybe the solution was to allow the courts to be reversed if they didn't appoint psychiatrists for indigent defendants.

Mr. Cohen said that there was really something to argue about, and here was the point: a man who could afford it comes up with one, two, three, four, five psychiatrists of his own choosing; a man who could not afford it takes what the state gives him or gets nothing at all. That, said Mr. Cohen, was a classic statement of a denial of equal protection.

Dean Keeton said he thought the committee agreed with him. Senator Calhoun agreed. Judge Kelton said that he didn't agree with him. Dean Keeton said the only issue left since the committee voted for "may" was whether, in the case of the indigent defendant, the court <u>shall</u> permit an independent psychiatric examination.

Mr. Cohen said the problem with remaining silent on the issue was that no visible legislative issue was raised. Mr. Cohen said if it was provided for in the statute there was a talking point to the legislature. He said you could say to the legislature we think this is fair, this is what we want, and you could ask them for "X" amount of money.

Judge Brown said that when a psychiatrist was appointed for an indigent the psychiatrist should not be of the defendant's own choosing. The indigent shouldn't be allowed to pick and choose his own psychiatrist and have the state pay for his services. Rather, the court should select the psychistrist.

Dr. Glen interjected that the psychiatrist felt more comfortable being called by the judge as an amicus curiae rather than for the prosecution or defense.

Judge Kelton said that the indigent was not allowed to pick his own counsel.

Mr. Cohen said that in effect he did. He asked what would happen if the indigent didn't accept the appointed counsel?

Judge Kelton said that in his court if the counsel chosen was comptetent and the defendant didn't want him, he told the defendant to go find his own counsel. He said he wouldn't appoint another.

Judge Onion said don't do that or you'll get reversed.

The committee voted 5 to 3 not to require the appointment of independent psychiatrists for indigent defendants.

Dean Keeton directed the discussion to Section 4.03(b)(3)(C). Dean Keeton said that the language "an opinion on whether the defendant is a danger to himself or others and therefore in need of hospitalization" meant, ipso facto, that if the defendant was a danger to himself he therefore did need hospitalization. Dean Keeton said on second reading that was not what it said. He said that the language presented a big issue and the committee would come back to it. Dean Keeton invited Dr. Glen to speak to the requirements in Section 4.03(b).

Dr. Glen said he would like to see Subsection (b)(1), which read "a description of the nature and extent of the examination," changed to read "description of the nature and extent and content of the examination and tests, if any."

Judge Brown agreed that "tests" should be added. He said that it was most pertinent.

Mr. Searcy noted that this was not an exhaustive list because of the use of the word "include."

Dean Keeton emphasized that this merely directed the examiner to tell the court what he had done. It didn't set out what he had to do.

Dr. Glen thought that there was a danger in Subdivision (3)(A): "a description of the treatment recommended." He said there were some cases in the D.C. circuit where the psychiatrists testified that they recommended certain treatment and since that treatment was not available the defendant went free. Dr. Glen would like to delete Subdivision (3)(A).

Judge Brown noted that at the reporters' meeting the statement read "a description of the treatment recommended and available, if any," and the reporters eliminated the word "available."

Mr. Cohen said that if he was the defense attorney, he would want to have some kind of statement on record as to what kind of treatment was available for his client. This was especially true if the defendant was found innocent.

Judge Brown observed that the doctor might say he recommended a minimum of 24 shock treatments, and the defendant might decide he wasn't as crazy as he thought he was.

Judge Kelton asked what difference it made. He said that when the person is committed he would be re-examined and rediagnosed.

Mr. Cohen said that that wasn't the point. He said take a case where the doctor said this was a very sick man, he was incompetent, a chronic case, and at the moment there was no treatment. There were a number of places other than a state institution where he could receive treatment without that much deprivation of liberty. These other facilities would represent safety to the community and the defendant would receive a better form of treatment. Mr. Cohen said that this report wasn't binding on anyone, but just asked the doctor to speak to what he considered relevant operational issues. It kind of asked what was going on.

Judge Brown observed that mental defectives had been included and in most cases there was no treatment available for those people.

Mr. Maloney said that he certainly was going to want to know what treatment was available.

Dean Keeton suggested that it be changed to say "a description of the treatment recommended, if any." Everyone agreed on this.

Dr. Glen objected to the use of the word "opinion" in Subsection (3)(B) and (3)(C). He stated that he wanted to use "information" rather than "opinion."

Mr. Cohen pointed out that the preceding sections provided for the information, and that the lawyers did need an opinion; that information alone would not be enough.

Judge Brown agreed, and it was decided to leave "opinion" in.

Mr. Searcy pointed out that in the reporters' meeting it was brought out that Section 8 of the Texas Mental Health Code sets out in some detail the content of what was called the Certificate of Mental Examination, and there was a suggestion that it be copied verbatim. The theory was that the psychiatrists were already familiar with the Mental Health Code. Mr. Cohen said that that code had very different purposes.

Mr. Searcy read portions of Section 8.

Mr. Cohen noted that the requirements of that code were purely formal. They were not as inclusive as he wanted in this report.

Senator Calhoun questioned Subdivision (D) at the top of page 5. He said it should be made clear that the incapacity was at the time of the conduct.

Mr. Searcy pointed out that this was a typographical error and that "at the time of the conduct" should be added after the word "was" in the second sentence.

Dr. Glen asked what would be the situation if a psychiatrist employed at a state hospital were ordered to testify. Could a court order a doctor to testify? If so, he said he could see some problems arising.

Mr. Cohen said that the question really was, "Can the court order the psychiatrist to do the examination in the first place?" He said the court had subpoena powers, constitutionally based, to require any individual who had knowledge of a case to testify.

Judge Brown said that a psychiatrist's agreement to examine carried with it the obligation to report.

Mr. Cohen reiterated that the issue would be drawn if the psychiatrist refused to examine.

Dr. Glen gave an example: suppose a resident is working in the emergency room, and suppose a person is committed to the emergency room by court order. The resident has no knowledge of the court order. If the resident treats the person does he make a de facto agreement to appear in court?

Dean Keeton said his obligation to testify was not based upon any agreement, but was based upon his being a citizen.

Judge Brown said that if one was walking down a street on the way to a golf course and saw A step out and shoot B, then one would have to go to court and testify.

Dr. Glen asked if the psychiatrist then testified as an expert or as a regular witness?

Mr. Maloney said that lawyers were asking the same questions, that is, what were their rights in the cases where they were appointed to represent indigent clients.

Dr. Glen said there was a California case in which a doctor was ordered to appear as an expert witness, but that case was overruled by the California Supreme Court.

Dean Keeton said that he did not think the committee could deal with that question, but that it was a question for the law of evidence.

Judge Brown noted that we did provide for the doctor's compensation.

He said that the reason Dr. Glen was concerned was because if the doctor was not compensated it might make it more difficult to recruit doctors into the state to work for the state institutions. Judge Brown observed that in the reporters' draft, there was a provision to also compensate state employees who testified as expert witnesses.

Dean Keeton said that he would argue that a state employee required to come into court was getting paid. Dean Keeton further observed that what Dr. Glen would say to that notion was that you couldn't get people to work for the state under those conditions.

Dr. Glen observed that psychiatrists were afraid to come into court.

Judge Brown stated that he didn't believe the doctors were in fear as much as the defendant was.

Mr. Cohen asked if the fear went down as the fee went up. That was his experience.

Dean Keeton asked Mr. Cohen if a person was a danger to himself was he, ipso facto, in need of hospitalization.

Mr. Cohen said No, that the danger issue and the hospitalization issue were two different decisions.

Judge Brown observed that there might be a person who was not a danger to himself but who still needed hospitalization to get him ready to go to trial. The committee decided that a separate determination was wanted in Section 4.03(b)(3)(C) that is, a determination of whether the defendant was a danger to himself or others, and a separate determination on whether he was in need of hospitalization. The committee decided to relocate Subsection (d) on page 5 as part of Subsection (a). Dean Keeton read Section 4.04, "Evidence Obtained During Examination." Fred Cohen said he didn't even recognize this section.

Dean Keeton said that Section 4.04 merely reiterated what the law was now on self-incrimination.

Hume Cofer said that anything the defendant said that would tend to prove he was sane would tend to incriminate him, and thus would not be admissible under this section. After some discussion Dean Keeton agreed with Mr. Cofer that there was a problem here.

Dean Keeton said that he thought that maybe all that should be said here was that a person had a privilege against self-incrimination only as to the elements of the offense. Dean Keeton said that he thought statements that were relevant to the issue of sanity or insanity should be admitted. Thus Dean Keeton concluded that Mr. Cohen's draft of this section was better than the reporters' draft.

Senator Calhoun said that he didn't believe that anyone who relied on the defense of "not guilty by reason of insanity" should also be allowed to plead "not guilty." He said he felt that the two pleas inconsistent.

Judge Brown said that such an approach was not practical because what the person was really saying was, "I'm not guilty, because I didn't know the difference between right or wrong, but if I did know the difference between right or wrong, I still have my defense of self-defense."

Senator Calhoun said he agreed and he could understand why the two pleas were needed.

The committee agreed to return to Mr. Cohen's draft of Section 4.04.

Mr. Searcy said that as he understood present Texas law, laymen could testify as to insanity. He asked Mr. Cohen if he intended to keep this in the law.

Mr. Cohen said he intended to skirt the issue.

Mr. Searcy said that since this draft went to all the trouble of providing for psychiatric testimony, might not a court interpret the chapter to forbid lay testimony regarding insanity. His point was that if lay testimony as to insanity was desired, the draft should say so.

Mr. Cohen said he did not think there was any danger from his reading of the Texas cases.

Dean Keeton said the committee would not deal with that issue. Dean Keeton called for a discussion of Section 4.05.

Mr. Cohen agreed with the rewording of the reporters' draft of Subsection (a). He said that there was a fundamental issue raised by this section, that is, the judge's determination of competency. He said to take this function from the jury and give it to the judge would require a constitutional amendment.

Dean Keeton asked the committee for an expression of opinion on whether or not they wanted the judge to determine the competency issue instead of the jury.

Mr. Cohen said the rationale behind the change was that while insanity was sort of a moral, philosophical issue, and one which the jury could resolve, the issue of mental competency to proceed was more a question of jurisdiction--did the court have the power to try the person?

Dean Keeton said that there was also no question that if the judge made the determination he would dispatch business much faster. The committee agreed that the court should determine the competency issue.

Mr. Cohen commented on Section 4.05(b) by saying that it was way, way off of what he intended. Mr. Cohen said he did not deal with this problem, but that he could speak to it. He said he thought that there was a real conceptual hang-up here. First of all, one had to come to some agreement on what did it mean to be adjudicated incompetent under the Texas Mental Health Code. The only way that one could be adjudicated incompetent under the

Texas Menal Health Code, vis-a-vis the guardianship law, was by an indefinite commitment based on a separate finding of incompetency. The conceptual question that arose was how do you get restoration to competency after discharge. He said the courts had muddled this all up: if a person was discharged from a Texas mental hospital after he had been committed and found incompetent, then unless he went through judicial restoration (and it could have been 20 years since he was found incompetent), he was still deemed incompetent. But the question faced here was whether the committee wanted to continue this fiction. Mr. Cohen suggested that any involuntary commitment to a mental hospital was perfectly relevant evidence of competency or insantiy, but that it ought to stand on its own and not be accorded greater weight if an adjudication of incompetency was outstanding.

The committee decided to omit Section 4.05(b) in the reporters' draft, and return to Mr. Cohen's draft covering this area. Mr. Cohen's draft said the movant had the burden of proof. Mr. Searcy pointed out that the court could be the movant and the burden of proof could not be placed on the court. The committee decided to put the burden of proof on the state unless the defense raised the issue, in which case the burden would be on the defense.

Mr. Searcy pointed out that Section 4.05(c) would have to be redrafted.

Dean Keeton read Section 4.05(d) and said there was a fundamental question here.

Mr. Cohen said he could see where there was and would like to comment on it. Mr. Cohen said that just as a matter of logic, and probably rationality, it did not automatically follow that because a person was not competent to proceed he was necessarily in need of hospitalization. Mr. Cohen said there were two decisions to make. One was could the defendant proceed with the trial. Because that was answered No did not automatically require that he be put away in a mental institution.

Dean Keeton said that his main concern was that this subsection might be opening the door to a delaying tactic.

The committee decided to use Mr. Cohen's Subsection (d).

Judge Brown suggested eliminating Section 4.05(e)(2). The committee voted to eliminate it.

Dean Keeton asked the committee if it would be agreeable to them that the next time they met to meet on both Friday and Saturday morning. The committee agreed.

The question of the two-part trial and judicial confession (Section 4.08) was raised by Bill Reid; after some discussion Judge Brown moved to table the question until the next committee meeting. The motion carried and the meeting was adjourned at 5 p.m.

(July 3, 1968)

PENAL CODE REVISION PROJECT

Summary of Minutes

The Committee on Revision of the Penal Code met at the Lila B. Etter Alumni Center, Austin, Texas, on Friday and Saturday, April 26 and 27, 1968, beginning at 9 a.m. each day.

The committee considered a report on family offenses, the remainder of Mr. Cohen's report on criminal responsibility, and conforming amendments to the Code of Criminal Procedure necessitated by Robert Hamilton's report on corporate criminal liability. The following draft sections were approved:

> NOTE: The drafts presented in this summary have been formally revised by the staff; no substantive change was intended. The draft proposed by the reporters, showing changes made by the committee, can be found in the body of the minutes.

ARTICLE 230. OFFENSES AGAINST THE FAMILY

Sec. 230.1. BIGAMY.

(a) A person commits bigamy if

(1) he is married; and

(A) he purports to marry a person other than his spouse in this state under circumstances that would, but for the actor's prior marriage, constitute a marriage; or

(B) he lives with a person other than his spouse in this state under the appearance of being married; or

(2) he believes that a married person other than his spouse is married; and

(A) he purports to marry that person in this state under circumstances that would, but for that person's prior marriage, constitute a marriage; or

(B) he lives with that person in this state under the appearance of being married.

(b) It is an affirmative defense to prosecution under Subsection (a)(1) that the actor reasonably believed that his marriage was void or had been dissolved by death, divorce, or annulment.

(c) Bigamy is a gross misdemeanor.

Sec. 230.2. INCEST.

(a) A person commits incest if out of wedlock he has sexual intercourse or deviate sexual intercourse with a person he knows to be, without regard to legitimacy,

(1) his ancestor or descendant by blood or adoption;

(2) his stepchild or stepparent, while the marriage creating that relationship exists; or

(3) his brother or sister of the whole or half-blood or by adoption.

(b) Incest is a gross misdemeanor if it is a violation of Subsection (a)(3); otherwise incest is a felony of the fourth degree.

Sec. 230.3. INTERFERENCE WITH CHILD CUSTODY.

(a) A person commits an offense if he takes or retains a child younger than 18 years out of this state when

(1) he knows that his taking or retention violates a temporary or permanent judgment or order disposing of the child's custody; or

(2) he has not been awarded custody of the child by a court of competent jurisdiction and knows that a suit

for divorce, or a civil suit or application for habeas corpus to dispose of the child's custody, has been filed.

(b) It is an affirmative defense to prosecution under Subsection (a)(2) that the actor returned the child to the state within seven days from the date of the commission of the offense.

(c) An offense under this section is a felony of the fourth degree.

[Sec. 230.4. SEDUCTION.

(a) A male commits seduction if

(1) he has sexual intercourse with an unmarried female younger than 21 years; and

(2) the female submits to the sexual intercourse in substantial reliance on a promise of marriage the male makes but does not intend to perform.

(b) It is an affirmative defense to prosecution for seduction

(1) that before his arraignment the male married the allegedly seduced female or in good faith offered to marry her;

(2) that the female believed the male was married at the time the alleged seduction occurred; or

(3) that the allegedly seduced female had, before the seduction allegedly occurred, engaged promiscuously in sexual intercourse.

(c) Seduction is a felony of the fourth degree.]

Sec. 230.5. VOLUNTARY ABORTION.

(a) Except as provided in Section 231.6 of this code, a person commits voluntary abortion if he intentionally terminates

a woman's pregnancy otherwise than by live birth of a viable fetus.

(b) Voluntary abortion is a felony of the third degree.

Sec. 230.51. AIDING SELF-ABORTION.

(a) Except as provided in Section 231.6 of this code, a person commits an offense if for anything of value he knowingly aids a woman to use any means to intentionally terminate her own pregnancy otherwise than by live birth of a viable fetus.

(b) An offense under this section is a felony of the third degree.

Sec. 230.52. DISTRIBUTING ABORTIFACIENTS.

(a) A person, corporation, or association commits an offense if he sells, offers to sell, possesses with intent to sell, advertises, or displays for sale anything that he knows is specially designed to terminate a pregnancy or that he holds out as useful for that purpose.

(b) It is an affirmative defense to prosecution under this section

(1) that the sale, offer, or display is to a licensed hospital, a licensed physician or licensed pharmacist, or to an intermediary in a chain of distribution to licensed hospitals, physicians, or pharmacists;

(2) that the sale is made upon prescription or order of a licensed physician;

(3) that the possession is with intent to sell as authorized by Subdivisions (1) and (2); or

(4) that the advertising is addressed to persons named in Subdivision (1) and is confined to trade or professional channels.

(c) An offense under this section is a gross misdemeanor.

ARTICLE 231. THERAPEUTIC ABORTION

Sec. 231.1. DEFINITIONS.

In Sections 231.1-231.6, unless the context requires a different definition,

(1) "committee" means a therapeutic abortion committee;

(2) "hospital" means a hospital licensed by the State Department of Health;

(3) "incest" means the offense defined in Section 230.2 of this code;

(4) "nonconsensual sexual intercourse" means one of the offenses defined in Section 213.1, 213.2, 213.3, 213.4, 213.7, or 213.8 of this code;

(5) "physician" means a practitioner of medicine licensed by the State Board of Medical Examiners;

(6) "therapeutic abortion" means a voluntary abortion performed by a physician in accordance with this article; and

(7) "voluntary abortion" means the intentional termination of a woman's pregnancy otherwise than by live birth of a viable fetus.

Sec. 231.2. THERAPEUTIC ABORTION COMMITTEE.

A hospital may establish a therapeutic abortion committee composed of at least three hospital medical staff members, one of whom must be a specialist in obstetrics certified by the proper board of his school of medicine. The committee shall determine by at least a majority vote whether a proposed therapeutic abortion may be performed in the hospital.

Sec. 231.3. MINIMUM PROCEDURAL REQUIREMENTS.

(a) An application for a therapeutic abortion must be supported by the written consent of

(1) a custodial parent or guardian, if the woman is unmarried and younger than 16 years;

(2) the woman and a custodial parent or guardian, if the woman is unmarried and 16 years or older but younger than 21 years;

(3) a custodial parent or guardian, or her husband, if the woman is mentally incompetent; or

(4) the woman, if Subdivisions (1)-(3) are inapplicable.

(b) A committee may approve a proposed therapeutic abortion only if

(1) Subsection (a) is satisfied;

(2) the application is supported by the written opinion of a physician; and

(3) the committee finds that a voluntary abortion is advisable because

(A) the pregnancy resulted from nonconsensual sexual intercourse or incest, and the commission of the offense is established in the manner provided in Section 231.4;

(B) there is a substantial risk that continuing the pregnancy will endanger the woman's life or gravely impair her physical or mental health; or

(C) there is a substantial risk that the child will be born with a grave physical or mental defect.

Sec. 231.4. ESTABLISHING COMMISSION OF NONCONSENSUAL SEXUAL INTERCOURSE OR INCEST.

(a) The commission of nonconsensual sexual intercourse or incest is established only if the committee gives written notice of the application for the therapeutic abortion and the reason for it to the district attorney or criminal district attorney (or if there is neither to the county attorney) of the county where the alleged offense occurred, and

(1) the district attorney replies in writing stating that there are facts showing probable cause to believe that the alleged offense occured; and

(A) in a case of alleged incest, that a complaint has been filed against the accused; or

(B) in a case of alleged nonconsensual sexual intercourse, that the woman or some person acting in her behalf informed a magistrate, peace officer, or district, criminal district, or county attorney of the offense within a reasonable time after it allegedly occurred; or

(2) the committee does not receive a written reply from the district, criminal district, or county attorney within seven days from the date the committee sent written notice to him; or

(3) the woman seeking the therapeutic abortion obtains an order of a district court as provided in Subsection (b).

(b) If the district, criminal district, or county attorney notifies the committee that there is no probable cause to believe the alleged offense occurred, the woman seeking the therapeutic abortion may petition for an ex parte hearing in a district

court to determine whether the offense occurred. The court shall hear the petition on a date no later than one week after the date the petition is filed. If the court finds that the woman proved by a preponderance of the evidence that the alleged offense occurred, it shall issue an order so declaring. The court may exclude the general public (including representatives of the news media) from the hearing. The court's findings, conclusions, and order are not admissible in a criminal action, civil suit, or other proceeding. A court's order under this subsection is not appealable.

Sec. 231.5. RECORDS AND REPORTS.

A hospital in which a therapeutic abortion committee exists shall maintain records adequate to show that the operation of its committee complies with the requirements of this article. The hospital shall furnish to the State Department of Health such reports as the department may require, but the hospital may not include in a report the name of a person who applied for a therapeutic abortion.

Sec. 231.6. JUSTIFIABLE ABORTION.

(a) A physician may perform a voluntary abortion in a hospital with the approval of its therapeutic abortion committee that acted in accordance with Section 231.3.

(b) A physician may perform a voluntary abortion in an emergency when it is not medically feasible to comply with Subsection (a) because

(1) the woman's life is in imminent danger; and

(2) a voluntary abortion is necessary to preserve her life.

CONFORMING AMENDMENTS FOR FAMILY OFFENSES

Code of Criminal Procedure

Art. 38.11 HUSBAND OR WIFE AS WITNESS

Neither husband nor wife shall, in any case, testify as to communications made by one to the other while married. Neither husband nor wife shall, in any case, after the marriage relation ceases, be made witnesses as to any communication made while the marriage relation existed except in a case where one or the other is on trial for an offense and a declaration or communication made by the wife to the husband or by the husband to the wife goes to extenuate or justify the offense. The husband and wife may, in all criminal actions, be witnesses for each other, but except as hereinafter provided, they shall in no case testify against each other in a criminal prosecution. However, a wife or husband may voluntarily testify against each other in any case for an offense involving any grade of assault or violence committed by one against the other or against any child of either under sixteen years of age, or in any case where either is charged with incest of a child of either, or in any case where either is charged with bigamy, or in any case where either is charged with interference with child custody, or in any case where either is charged with persistent nonsupport of his or her minor child.

Art. 13.19 FALSE IMPRISONMENT AND KIDNAPPING

Venue for false imprisonment and kidnapping belongs either to the county in which the offense was committed, or to any

county through, into or out of which the person falsely imprisoned or kidnapped may have been carried.

Art. 37.09 OFFENSES CONSISTING OF DEGREES

The following offenses include different degrees: . . .

6. Kidnapping, which includes false imprisonment; and . . . .

Civil Statutes

Art. 4607. CERTAIN MARRIAGES PROHIBITED

(a) No person may marry

(1) his ancestor or descendant;

(2) his parent or child by adoption; or

(3) his brother or sister of the whole or half-blood.

(b) A marriage attempted in violation of Subsection (a) is void.

Art. 4630. ADULTERY

In any suit for divorce for the cause of adultery, if it shall be proved that the complainant has also committed adultery, or has admitted the defendant into conjugal society or embraces after he or she was aware of the spouse's adultery, or that the complainant, if the husband, connived at his wife's prostitution, or exposed her to lewd company, whereby she became ensnared to adultery, it shall be a good defense and a perpetual bar against said suit; or if it appears that the adultery complained of is occasioned by collusion of the parties, and done with the intention to procure a divorce, or where both parties shall have committed adultery, then no divorce shall be decreed.

Art. 5524. ACTIONS TO BE COMMENCED IN ONE YEAR*

There shall be commenced and prosecuted within one year after the cause of action shall have accrued, and not afterward, all actions or suits in courts for malicious prosecution or for injuries done to the character or reputation of another by libel or slander.

CONFORMING AMENDMENTS FOR CORPORATE CRIMINAL LIABILITY

Code of Criminal Procedure

CHAPTER SEVENTEEN-A

CORPORATIONS AND ASSOCIATIONS

Art. 17A.01 APPLICATION AND DEFINITIONS

(a) This Chapter sets out some of the procedural rules applicable to the criminal liability of corporations and associations. Where not in conflict with this Chapter, the other Chapters of this Code apply to corporations and associations.

(b) In this Code, unless the context requires a different definition,

(1) "agent" means a director, officer, employee, or other person authorized to act in behalf of a corporation or association;

(2) "association" means a government or governmental subdivision or agency, trust, partnership, or two or more persons having a joint or common economic interest;

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*Will be amended only if the proposed paternity statute is enacted and the common-law action for breach of promise of marriage is abolished.

(3) "high managerial agent" means

(A) an officer of a corporation or association;

(B) a partner in a partnership; or

(C) an agent of a corporation or association who has duties of such responsibility that his conduct may reasonably be assumed to represent the policy of the corporation or association; and

(4) "person," "personal," "he," and "him" include corporation and association.

Art. 17A.02 COMPUTATION OF TIME

(a) In computing a period of days under this Chapter, the first day is excluded and the last day is included.

(b) If the last day of any period is a Saturday, Sunday, or legal holiday, the period is extended to include the next day that is not a Saturday, Sunday, or legal holiday.

Art. 17A.03 ALLEGATION OF NAME

(a) In alleging the name of a defendant corporation, it is sufficient to state in the complaint, indictment, or information the corporate name, or to state any name or designation by which the corporation is known or may be identified. It is not necessary to allege that the defendant was lawfully incorporated.

(b) In alleging the name of a defendant association, it is sufficient to state in the complaint, indictment, or information the association's name, or to state any name or designation by which the association is known or may be identified, or to state the name or names of one or more members of the association, referring to the unnamed members as "others." It is not necessary to allege the legal form of the association.

Art. 17A.04 SUMMONING CORPORATION OR ASSOCIATION

(a) When a complaint is filed or an indictment or information presented against a corporation or association, the court or clerk shall issue a summons to the corporation or association. The summons shall be in the same form as a capias except that

(1) it shall summon the corporation or association to appear before the court named at the place stated in the summons;

(2) it shall be accompanied by a certified copy of the complaint, indictment, or information; and

(3) it shall provide that the corporation or association appear before the court named at or before 10 a.m. of the Monday next after the expiration of twenty days after it is served with summons, except when service is made upon the Secretary of State or Chairman of the State Board of Insurance, in which instance the summons shall provide that the corporation or association appear before the court named at or before 10 a.m. of the Monday next after the expiration of thirty days after the Secretary of State or Chairman of the State Board of Insurance is served with summons.

(b) No individual may be arrested upon a complaint, indictment, or information against a corporation or association.

Art. 17A.05 SERVICE ON CORPORATION

(a) Except as provided in Paragraph (d) of this Article, a peace officer shall serve a summons on a corporation by personally delivering a copy of it to the corporation's registered agent for service. However, if a registered agent has not been designated, or cannot with reasonable diligence be found

at the registered office, then the peace officer shall serve the summons by personally delivering a copy of it to the president or a vice-president of the corporation.

(b) If the peace officer certifies on the return that he diligently but unsuccessfully attempted to effect service under Paragraph (a) of this Article, or if the corporation is a foreign corporation that has no certificate of authority, then he shall serve the summons on the Secretary of State by personally delivering a copy of it to him, or to the Assistant Secretary of State, or to any clerk in charge of the corporation department of his office. On receipt of the summons copy, the Secretary of State shall immediately forward it by certified or registered mail, return receipt requested, addressed to the defendant corporation at its registered office, or, if it is a foreign corporation, at its principal office in the state or country under whose law it was incorporated.

(c) The Secretary of State shall keep a permanent record of the date and time of receipt and his disposition of each summons served under Paragraph (b) of this Article together with the return receipt.

(d) The method of service on a corporation regulated under the Insurance Code is governed by that code.

Art. 17A.06 SERVICE ON ASSOCIATION

(a) Except as provided in Paragraph (b) of this Article, a peace officer shall serve a summons on an association by personally delivering a copy of it

(1) to any managing official (including any partner if the association is a partnership) at any place where business of the association is regularly conducted;

(2) if the peace officer certifies on the return that he diligently but unsuccessfully attempted to serve a managing official, to any employee of suitable age and discretion at any place where business of the association is regularly conducted; or

(3) if the peace officer certifies on the return that he diligently but unsuccessfully attempted to serve a managing official or employee of suitable age and discretion, to any member of the association.

(b) The method of service on an association regulated under the Insurance Code is governed by that code.

Art. 17A.07 APPEARANCE

(a) In all criminal actions instituted against a corporation or association, in which original jurisdiction is in a district court, criminal district court, court of domestic relations, county court, county criminal court, or county court-at-law,

(1) appearance is for the purpose of arraignment; and

(2) the corporation or association has ten full days after the day the arraignment takes place and before the day the trial begins to file written pleadings.

(b) In all criminal actions instituted against a corporation or association, in which original jurisdiction is in a justice court or corporation court,

(1) appearance is for the purpose of entering a plea; and

(2) ten full days must elapse after the day of appearance before the corporation or association may be tried.

Art. 17A.08 PRESENCE OF CORPORATION OR ASSOCIATION

(a) A defendant corporation or association appears through counsel or its representative.

(b) If a corporation or association does not appear in response to summons, or appears but fails or refuses to plead,

(1) it is deemed to be present in person for all purposes;

(2) the court shall enter a plea of not guilty in its behalf;

(3) the court may authorize discovery procedures requested by the State; and

(4) the court may proceed with trial, judgment, and sentencing.

(c) If, having appeared and entered a plea in response to summons, a corporation or association is absent without good cause at any time during later proceedings,

(1) it is deemed to be present in person for all purposes; and

(2) the court may proceed with trial, judgment, or sentencing.

Art. 17A.09 PROBATION

(a) A corporation or association charged with an offense for which the maximum possible punishment is or includes confinement or a fine exceeding $200 may apply by written motion to the

court for probation in case of conviction. The motion must be verified by a high managerial agent of the corporation or association and must be filed with the court before the trial on the merits begins.

(b) The corporation or association applying for probation shall submit as part of the motion:

(1) a statement of whether or not the corporation or association has been convicted within the past ten years of a felony or of any other criminal offense similar to the present offense in a court of this or another state or of the United States, which conviction has been probated or become final and unappealable;

(2) if the statement under Subparagraph (1) of this Paragraph is affirmative, a certified copy of each judgment of conviction and of the complaint, information, or indictment on which it was based; and

(3) any other information reasonably required by the court.

(c) The court may suspend the imposition of sentence, and place the corporation or association on probation, if

(1) the corporation or association has properly applied for probation under Paragraphs (a) and (b) of this Article;

(2) the corporation or association agrees to comply with the terms of probation prescribed by the court; and

(3) the court believes, after considering the circumstances of the present offense and of any prior conviction

disclosed in the motion for probation, that the ends of justice and the best interests of society and of the corporation or association will be served by granting probation.

(d) The court shall design the period and terms of probation to prevent the corporation or association from engaging in similar criminal conduct in the future. The court shall supervise the corporation or association during probation. The clerk of the court shall furnish the corporation or association with a written statement of the period and terms of its probation, and with a written statement of any modifications later made in the period or terms.

(e) The terms of probation may include but are not limited to the requirements that a corporation or association

(1) commit no offense of the same character as the present offense against the law of this or another state or of the United States;

(2) pay all costs of its trial;

(3) pay so much of its fine as the court directs;

(4) make restitution to each victim of its offense; and

(5) report periodically to the court through a high managerial agent on the business affairs and conduct of the corporation or association that are relevant to the terms of probation.

(f) When the court has probable cause to believe that a corporation or association has violated a term of its probation, it shall summon the corporation or association to appear before it in the manner provided in Article 17A.04 of this Code. Service

of the summons and the corporation's or association's presence at the hearing are governed by Articles 17A.05, 17A.06, and 17A.08 of this Code. When the corporation or association appears, the court without a jury shall hold a hearing on the alleged violation and after the hearing shall continue, modify, or revoke the probation as the evidence warrants. If the court revokes the probation, it shall immediately pronounce sentence against the corporation or association.

(g) When it is granted probation a corporation or association is entitled to appeal its conviction as in other cases. It is also entitled to appeal the court's refusal to grant probation or the court's revocation of probation in the same manner it appeals the conviction. However, the refusal or revocation may not be set aside on appeal without a clear showing that the court in refusing or revoking probation abused its discretion.

(h) When the period and terms of probation have been satisfactorily completed, the court shall enter an order in the minutes of the court discharging the corporation or association from probation, setting aside the judgment of conviction, and dismissing the complaint, information, or indictment against it. After the action against the corporation or association is dismissed, the judgment of conviction may not be considered for any purpose except to determine the corporation's or association's entitlement to a future probation.

Art. 16.05 WITNESS PLACED UNDER RULE

The magistrate shall, if requested by the accused or his counsel, or by the prosecutor, have all the witnesses placed

in charge of an officer, so that the testimony given by any one witness shall not be heard by any of the others. However, if the defendant is a corporation or association, it may designate one representative in addition to counsel to assist at the examining trial, which representative may not be placed under the rule.

Art. 29.01 BY OPERATION OF LAW

Criminal actions are continued by operation of law if:

1. An individual defendant has not been arrested;

2. A defendant corporation or association has not been served with summons; or

3. There is not sufficient time for trial at that term of court.

Art. 36.03 WITNESS PLACED UNDER RULE

At the request of either party, the witnesses on both sides may be sworn and placed in the custody of an officer and removed out of the courtroom to some place where they cannot hear the testimony as delivered by any other witness in the cause. This is termed placing witnesses under the rule. However, if the defendant is a corporation or association it may designate one representative in addition to counsel to aid in the presentation of its case, which representative may not be placed under the rule.

Art. 40.03 GROUNDS FOR NEW TRIAL IN FELONY

New trials, in cases of felony, shall be granted for the following causes, and for no other:

1. Where the defendant is an individual and has been tried in his absence, or has been denied counsel;

2. Where the court has misdirected the jury as to the law, or has committed any other material error calculated to injure the rights of the defendant;

3. Where the verdict has been decided by lot, or in any other manner than by a fair expression of opinion by the jurors;

4. Where a juror has received a bribe to convict, or has been guilty of any other corrupt conduct;

5. Where any material witness of the defendant has, by force, threats or fraud, been prevented from attending the court, or where any written evidence, tending to establish the innocence of the defendant, has been intentionally destroyed or removed so that it could not be produced upon the trial;

6. Where new testimony material to the defendant has been discovered since the trial. A motion for a new trial on this ground shall be governed by the rules which regulate civil suits;

7. Where the jury, after having retired to deliberate upon a case, has received other testimony; or where a juror has conversed with any person in regard to the case; or where any juror at any time during the trial or after retiring for deliberation, may have become so intoxicated as to render it probable his verdict was influenced thereby. The mere drinking of liquor by a juror shall not be sufficient ground for a new trial;

8. Where, from the misconduct of the jury, the court is of opinion that the defendant has not received a fair and impartial trial. It shall be competent to prove such misconduct by the voluntary affidavit of a juror; and the verdict may, in like manner, be sustained by such affidavit; and

9. Where the verdict is contrary to law and evidence. A verdict is not contrary to the law and evidence, within the meaning of this provision, where the defendant is found guilty of an offense of inferior grade to, but of the same nature as, the offense proved.

10. Should the jury assess the death penalty when the State has made known, under the provisions of this Code, that it will not seek the death penalty, the court shall, upon written motion of the defendant, immediately grant a new trial.

Art. 42.02 SENTENCE

A "septence" is the order of the court in a felony or misdemeanor case made in the presence of the defendant, except in misdemeanor cases where the maximum possible punishment is by fine not exceeding $200, and entered of record, pronouncing the judgment, and ordering the same to be carried into execution in the manner prescribed by law.

Art. 42.15 AS TO FINE

(a) When the defendant is only fined the judgment shall be that the State of Texas recover of the defendant the amount of such fine and all costs of the prosecution, and that the defendant, if present, be committed to jail until such fine and costs are paid; or if the defendant be not present, that a capias forthwith issue, commanding the sheriff to arrest the defendant and commit him to jail until such fine and costs are paid; also, that execution may issue against the property of such defendant for the amount of such fine and costs.

(b) If the defendant is a corporation or association, the judgment shall be that the State of Texas recover of the

corporation or association the amount of such fine and all costs of the prosecution and, if the corporation or association does not pay such fine and costs, that execution issue against the corporation or association for the amount of such fine and costs.

Art. 43.01 DISCHARGING JUDGMENT FOR FINE

(a) When the judgment and sentence against an individual defendant is for fine and costs he shall be discharged from the same:

1. When the amount thereof has been fully paid; or

2. When remitted by the proper authority; or

3. When he has remained in custody for the time required by law to satisfy the amount thereof.

(b) The judgment and sentence against a defendant corporation or association for fine and costs shall be discharged:

1. When the amount thereof has been fully paid; or

2. When the execution against the corporation or association has been fully satisfied; or

3. When the judgment has been fully satisfied in any other manner.

<u>Business Corporation Act</u>

Art. 7.01. INVOLUNTARY DISSOLUTION

. . .

B. When a corporation is convicted of a criminal offense, or when a high managerial agent is convicted of a criminal offense,

in the conduct of the affairs of the corporation, the Attorney General may file an action to involuntarily dissolve the corporation in a district court of the county in which the registered office of the corporation is situated or in a district court of Travis County. The court may dissolve the corporation involuntarily if it is established that:

(1) The corporation, or a high managerial agent acting in behalf of the corporation, has engaged in a persistent course of criminal conduct; and

(2) To prevent future criminal conduct of the same character, the public interest requires such dissolution.

C. Article 7.02 of this Act does not apply to Section B of this Article.

Art. 8.16. REVOCATION OF CERTIFICATE OF AUTHORITY

. . .

B. When a foreign corporation is convicted of a criminal offense, or when a high managerial agent is convicted of a criminal offense committed in the conduct of the affairs of the foreign corporation, the Attorney General may file an action to revoke the certificate of authority of the foreign corporation to transact business in this State in a district court of the county in which the registered office of the foreign corporation in this State is situated or in a district court of Travis County. The court may revoke the foreign corporation's certificate of authority if it is established that:

(1) The foreign corporation, or a high managerial agent in behalf of the foreign corporation, has engaged in a persistent course of criminal conduct; and

(2) To prevent future criminal conduct of the same character, the public interest requires such revocation.

C. Article 7.02 of this Act does not apply to Section B of this Article.

Non-Profit Corporation Act

Art. 1396-7.01. INVOLUNTARY DISSOLUTION (as amended)

. . .

C. When a corporation is convicted of a criminal offense, or when a high managerial agent is convicted of a criminal offense in the conduct of the affairs of the corporation, the Attorney General may file an action to involuntarily dissolve the corporation in a district court of the county in which the registered office of the corporation is situated or in a district court of Travis County. The court may dissolve the corporation involuntarily if it is established that:

(1) The corporation, or a high managerial agent acting in behalf of the corporation, has engaged in a persistent course of criminal conduct; and

(2) To prevent future criminal conduct of the same character, the public interest requires such dissolution.

. . .

Art. 1396-8.15. REVOCATION OF CERTIFICATE OF AUTHORITY (as amended)

C. When a foreign corporation is convicted of a criminal offense, or when a high managerial agent is convicted of a criminal offense committed in the conduct of the affairs of the foreign corporation, the Attorney General may file an action to revoke the certificate of authority of the foreign corporation

to conduct affairs in this State in a district court of the county in which the registered office of the foreign corporation in this State is situated or in a district court of Travis County. The court may revoke the foreign corporation's certificate of authority if it is established that:

(1) The foreign corporation, or a high managerial agent acting in behalf of the foreign corporation, has engaged in a persistent course of criminal conduct; and

(2) To prevent future criminal conduct of the same character, the public interest requires such revocation.

MINUTES OF THE MEETING OF
THE TEXAS STATE BAR COMMITTEE
ON REVISION OF THE PENAL CODE
FRIDAY AND SATURDAY,
APRIL 26 and 27, 1968

Present: Committee Members Page Keeton, Chairman; James E. Barlow; Judge John M. Barron; Judge Archie S. Brown; Hume Cofer; Emmett Colvin Jr.; Samuel E. Daugherty; George W. Gray III; Representative Jim Nugent; Judge T. Gilbert Sharpe; James T. Townsend; Carol Vance

Law Enforcement Advisory Committee Mr. M. W. Stevenson for Charles Batchelor; C. Glen Conner

Advisory Committee on Corrections Bill Anderson; Luster P. Gollaher; Dr. George Killinger

Reporters Fred Cohen; Robert Hamilton

Staff Bill Reid

Texas Legislative Council Staff Seth S. Searcy III, Chief Revisor; Paul Echols, Allen Herrington, Michael Johnson, and Miss Linda West, Revisors

Guests Dr. Robert Glen; John Terry Weeks

The Texas State Bar Committee on Revision of the Penal Code met on Friday, April 26, and Saturday, April 27, 1968, at the Lila B. Etter Alumni Center, Austin, Texas, beginning each day at 9 a.m.

The committee considered a report on family offenses, the remainder of Mr. Cohen's report on criminal responsibility, and conforming amendments to the Code of Criminal Procedure necessitated by Robert Hamilton's report on corporate criminal liability.

> NOTE: To reflect action taken by the committee, the following drafts indicate by underlining additions made by the committee and by parentheses and capitalization deletions made by the committee.

Dean Keeton opened the meeting by informing the committee that it had become apparent to him that it would be impossible to have the new penal code drafted in time to submit it to the 1969 session of the legislature. He said that the job was simply bigger than he anticipated at the start, and it would not be advisable to rush through the remaining portions of the code to get it ready for submission in 1969.

Bill Reid said the present timetable called for finishing a tentative draft of the entire code by January 1969 and using calendar year 1969 to write the comments, edit the code, have it printed, and hold hearings on it throughout the state. The committee generally agreed to this timetable.

The committee then voted to have the next committee meeting on Friday, June 21, 1968, and Saturday, June 22, 1968, at which time the committee would consider reports on sexual offenses and general principles of justification.

Dean Keeton then introduced Paul Echols and Seth Searcy, who prepared the offenses against the family report. Bill Reid noted that major policy decisions had been made at an earlier reporters' meeting when the reporters considered Mr. Saul Baernstein's draft on offenses against the family; thus, the staff was not invading the province of the committee in preparing the report.

The committee then took up the discussion of offenses against the family.

ARTICLE 230. OFFENSES AGAINST THE FAMILY

Sec. 230.1. BIGAMY.

(a) A person commits bigamy if

(1) he is married; and

(A) he purports to marry a person other than his spouse in this state under circumstances that would, but for the actor's prior marriage, constitute a marriage; or

(B) he lives with a person other than his spouse in this state under the appearance of being married; or

(2) he believes that a married person other than his spouse is married; and

(A) he purports to marry that person in this state under circumstances that would, but for that person's prior marriage, constitute a marriage; or

(B) he lives with that person in this state under the appearance of being married.

(b) It is an affirmative defense to prosecution under Subsection (a)(1) that the actor reasonably believed that his marriage was void or had been dissolved by death, divorce, or annulment.

(c) Bigamy is a gross misdemeanor.

Sec. 230.2. INCEST.

(a) A person commits incest if out of wedlock he has sexual intercourse or deviate sexual intercourse (OUT OF WEDLOCK) with a person he knows to be, without regard to legitimacy,

(1) his ancestor or descendant by blood or adoption;

(2) his stepchild or stepparent, while the marriage creating that relationship exists; or

(3) his brother or sister of the whole or half-blood or by adoption.

(b) Incest is a gross misdemeanor if it is a violation of Subsection (a)(3); otherwise incest is a felony of the fourth degree.

(SEC. 230.21. AGGRAVATED INCEST.

(a) A PERSON COMMITS AGGRAVATED INCEST IF HE HAS SEXUAL INTERCOURSE OR DEVIATE SEXUAL INTERCOURSE WITH A PERSON HE KNOWS TO BE, WITHOUT REGARD TO LEGITIMACY,

(1) HIS CHILD BY BLOOD OR ADOPTION; OR

(2) HIS STEPCHILD, WHILE THE MARRIAGE CREATING THAT RELATIONSHIP EXISTS.

(b) AGGRAVATED INCEST IS A FELONY OF THE FOURTH DEGREE.)

Sec. 230.3. INTERFERENCE WITH CHILD CUSTODY.

(a) A person commits an offense if he takes or retains a child younger than 18 years out of this state when

(1) he knows that his taking or retention violates a temporary or permanent judgment or order disposing of the child's custody; or

(2) he has not been awarded custody of the child by a court of competent jurisdiction and knows that a suit for divorce, or a civil suit or application for habeas corpus to dispose of the child's custody, has been (OR IS ABOUT TO BE) filed (TO DISPOSE OF THE CHILD'S CUSTODY).

(b) It is an affirmative defense to prosecution under Subsection (a)(2) that the actor returned the child to the state within seven days from the date of the commission of the offense (48 HOURS AFTER HAVING ACTUAL NOTICE THAT A CIVIL SUIT OR APPLICATION FOR HABEAS CORPUS HAS BEEN FILED).

(c) An offense under this section is a felony of the fourth degree.

[Sec. 230.4. SEDUCTION.

(a) A male commits seduction if

(1) he has sexual intercourse (OR DEVIATE SEXUAL INTERCOURSE) with an unmarried female younger than 21 years; and

(2) the female submits to the sexual intercourse in substantial reliance on a promise of marriage the male makes but does not intend to perform.

(b) It is an affirmative defense to prosecution for seduction

(1) that before his arraignment the male married the allegedly seduced female or in good faith offered to marry her;

(2) that the female believed the male was married at the time the alleged seduction occurred; or

(3) that the allegedly seduced female had, before the seduction allegedly occurred, engaged promiscuously in sexual intercourse.

(c) Seduction is a felony of the fourth degree (GROSS MISDEMEANOR).]

Sec. 230.5. VOLUNTARY ABORTION.

(a) Except as provided in Section 231.6 of this code, a person commits voluntary abortion if he intentionally terminates a woman's pregnancy otherwise than by live birth of a viable fetus.

(b) Voluntary abortion is a felony of the third degree.

Sec. 230.51. AIDING SELF-ABORTION.

(a) Except as provided in Section 231.6 of this code, a person commits an offense if for anything of value (CONSIDERATION) he knowingly aids a woman to use any means intentionally to terminate her own pregnancy otherwise than by live birth of a viable fetus.

(b) An offense under this section is a felony of the third degree.

Sec. 230.52. DISTRIBUTING ABORTIFACIENTS.

(a) A person, corporation, or association commits an offense if he sells, offers to sell, possesses with intent to sell, advertises, or displays for sale anything that he knows is specially designed to terminate a pregnancy or that he holds out as useful for that purpose.

(b) It is an affirmative defense to prosecution under this section that

(1) the sale, offer, or display is to a licensed hospital, a licensed physician or licensed pharmacist, or to an intermediary in a chain of distribution to licensed hospitals, physicians, or pharmacists;

(2) the sale is made upon prescription or order of a licensed physician;

(3) the possession is with intent to sell as authorized by Subdivisions (1) and (2); or

(4) the advertising is addressed to persons named in Subdivision (1) and is confined to trade or professional channels.

(c) An offense under this section is a gross misdemeanor.

CONFORMING AMENDMENTS FOR FAMILY OFFENSES

Code of Criminal Procedure

Art. 38.11 HUSBAND OR WIFE AS WITNESS

Neither husband nor wife shall, in any case, testify as to communications made by one to the other while married. Neither husband nor wife shall, in any case, after the marriage relation ceases, be made witnesses as to any communication made while the marriage relation existed except in a case where one or the other is on trial for an offense and a declaration or communication made by the wife to the husband or by the husband to the wife goes to extenuate or justify the offense. The husband and wife may, in all criminal actions, be witnesses for each other, but except as hereinafter provided, they shall in no case testify against each other in a criminal prosecution. However, a wife or husband may voluntarily testify against each other in any case for an offense involving any grade of assault or violence committed by one against the other or against any child of either under sixteen years of age, or in any case where either is charged with incest of a child of either, or in any case where either is charged with bigamy, or in any case where either is charged with interference with child custody, or in any case where either is charged with nonsupport of his or her minor child.

Art. 13.19 FALSE IMPRISONMENT AND KIDNAPPING

Venue for false imprisonment and kidnapping belongs either to the county in which the offense was committed, or to any county through, into or out of which the person falsely imprisoned or kidnapped may have been carried.

Art. 37.09 OFFENSES CONSISTING OF DEGREES

The following offenses include different degrees: . . .

6. Kidnapping, which includes false imprisonment; and . . . .

Civil Statutes

Art. 4630. ADULTERY

In any suit for divorce for the cause of adultery, if it shall be proved that the complainant has also comitted adultery, or has admitted the defendant into conjugal society or embraces after he or she was aware of the spouse's adultery, or that the complainant, if the husband, connived at his wife's prostitution, or exposed her to lewd company, whereby she became ensnared to adultery, it shall be a good defense and a perpetual bar against said suit; or if it appears that the adultery complained of is occasioned by collusion of the parties, and done with the intention to procure a divorce, or where both parties shall have committed adultery, then no divorce shall be decreed.

Art. 5524. ACTIONS TO BE COMMENCED IN ONE YEAR*

There shall be commenced and prosecuted within one year after the cause of action shall have accrued, and not afterward, all actions or suits in courts for malicious prosecution or for injuries done to the character or reputation of another by libel or slander.

. . .

Beginning with Section 230.1, Bigamy, Dean Keeton explained that Subsection (a)(1)(A) deals with a person who goes through a ceremony with someone else under circumstances that would, but for the actor's prior marriage, constitute a marriage. There were no questions about that subsection.

Mr. Echols then explained that Subsection (a)(1)(B) is designed to prohibit open and notorious living together in adultery, and that this appears to be the proper place to deal with it in view of the reporters' recommendation to eliminate the offense of adultery. Subsection (a)(1)(B) is broader than a common-law marriage situation in that it does not require that either party intend a marriage, but the expansion seems desirable as a replacement for adultery. It was pointed out by Mr. Daugherty that in Texas a common-law marriage requires that the people have an agreement to marry, that they live together, and that they hold themselves out as being married. Thus, there was a question of policy before the committee on whether or not the members wanted this subsection to cover only those cases which would, but for the impediment, constitute a common-law marriage, or, in the alternative, to be as broad as it was presented to them.

Dean Keeton pointed out that one way of thinking about this is that when you are talking about bigamy you are not talking about something this broad; rather, you are talking about a situation which would, but for the impediment, constitute a marriage. Carol Vance

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Will be amended only if the proposed paternity statute is enacted and the common-law action for breach of promise of marriage is abolished.

said, however, that he wanted the draft to be broader than the common-law marriage type case if there will not be an adultery offense. He suggested that this offense might be entitled "bigamy or adultery" to indicate the legislative intent to cover both situations, but Mr. Searcy said that could be taken care of in the comments. This satisfied Mr. Vance.

There was some discussion of the meaning of the word "appearance" in Subsection (a)(1)(B), but Dean Keeton said that it could mean only that the couple's conduct conveys the notion to a reasonable man in the community that they are acting like married people.

The committee approved Subsection (a)(1) as written.

Mr. Echols then explained that Subsection (a)(2) is designed to cover an actor who is single and who either purports to marry or lives with a person who is married and whom the actor knows is married. He explained that ordinarily an actor in that situation would be guilty under Subsection (a)(1) as a principal, but that the married person, if she is not aware that she is married, would not have committed an offense by going through the ceremony or living with the actor; thus, the actor would not be guilty as a principal. Subsection (a)(2) would allow conviction of the actor under those circumstances.

There was some discussion about whether there might be a better way to draft this provision, but after Mr. Vance and Judge Barron said they liked it as written, the committee approved it as written.

The committee then considered Subsection (b), the affirmative defense. There was some discussion about whether or not there ought to be an affirmative defense since it provides an escape for people who go to Mexico and get a divorce that is invalid for civil purposes. The committee approved Subsection (b), however, after Mr. Cofer argued that failing to include the affirmative defense would result in more hardships than including it creates.

At this point Mr. Barlow raised a question about allowing the legal spouse to testify against a person charged with bigamy. It was pointed out that there is a recommended change to Code of Criminal Procedure (C.C.P.) art. 38.11, and the committee approved the recommended change. This will make spouses competent witnesses, though not compellable witnesses, against each other in bigamy cases.

The committee then discussed the penalty provision, Subsection (c). The recommended classification is gross misdemeanor. It was pointed out that this is a sufficient penalty to allow the state to break up the relationship and bring it to the actor's attention that he has done something against public policy. The committee generally agreed with this analysis and approved the penalty classification.

Mr. Barlow raised a question about venue. He was concerned because the draft omits a provision, which is in the present Texas law, providing that the actor can be prosecuted in the county where he entered the marriage or in the county where he is living with the spouse. Mr. Searcy pointed out that we do not intend to change the venue rules and that the present rules will continue to apply. It is probably not necessary to deal with venue because, unlike the present Texas law, the proposed draft makes the living together an offense that is committed wherever the parties are living together. Under ordinary venue rules this would place venue in the county where the couple lives together.

The committee then took up incest, Section 230.2 of the draft. Mr. Barlow raised a question about the definition of "deviate sexual intercourse" and its definiteness for purposes of constitutional vagueness. Mr. Searcy pointed out that both "sexual intercourse" and "deviate sexual intercourse" would be defined in the chapter on offenses against the family. He explained that the definitions had not been included in the report because they were to be the same as the definitions in the sexual offenses chapter, which had not been considered by the committee. "Deviate sexual intercourse" would probably be defined to mean "intercourse per os or per anum."

Mr. Barlow said that he thought that deviate sexual intercourse should not be dealt with in the incest statute; rather, it should be dealt with as a separate category. It was pointed out, though, that the committee may decide not to make criminal any sexual acts between consenting adults in private. If this is true, and deviate sexual intercourse is not dealt with in the incest statute, a person who has deviate sexual intercourse with an adult relative will not be guilty of any offense. It was also pointed out that the basis of the incest statute is the disruption of family relational interests that results from this kind of conduct, and that deviate sexual intercourse is at least as disruptive, if not more so, as sexual intercourse. The committee agreed to leave deviate sexual intercourse in the incest statute.

The next question raised was why have the phrase "out of wedlock" in the statute? Mr. Echols explained that the present Texas incest statute prohibits marriage, but that the reporters thought there were some family members, specifically brothers and sisters by adoption, who ought to be allowed to marry. This was on the theory that they well may be adults before they ever meet and before they become adoptive brother and sister. However, many times adoptive brothers and sisters are raised in the same family from infancy and sexual intercourse or deviate sexual intercourse between those adoptive brothers and sisters would be very disruptive of family harmony. Thus, the draft prohibits them from having sexual intercourse. However, if they are allowed to marry, the incest statute must prohibit sexual intercourse between them only out of wedlock.

The committee voted to relocate the phrase "out of wedlock" to make it clear that it applies to both sexual intercourse and deviate sexual intercourse.

Dr. Glen questioned whether this statute would apply to adolescents who engage in normal sexual exploration. He was satisfied when informed that a person younger than 10 years cannot be convicted of an offense, and that between ages 10 and 17 or 18 the child can be dealt with only by the juvenile court.

Mr. Barlow pointed out that under the statute as drafted if he were single he could marry his mother and then have sexual intercourse with her but would not be guilty of incest. It was pointed out, however, that a civil statute prohibiting marriage between certain people was contemplated [Staff note: See the amendment to Article 4607 on page 10 supra.] and that because he could never marry his mother, his sexual intercourse with her would be out of wedlock and he would be guilty of incest.

The discussion then moved on to Subsection (b), the penalty provision. It was pointed out that ordinary incest was made a gross misdemeanor, but aggravated incest was made a felony of the fourth degree. The committee seemed generally to agree with this policy, but Mr. Barlow argued that it was unconstitutional to enact two statutes describing precisely the same conduct with different penalties. With this in mind the committee voted to strike Section 230.21 and to make incest between a brother and sister a gross misdemeanor and all other kinds of incest felonies of the fourth degree.

There was then some general discussion about the family code committee's desire to include aunts, nephews, uncles, and nieces in the incest law, but the committee decided that the primary objective of an incest prohibition is to get at conduct that is disruptive of relational interests among family members living in the same household. Since aunts and uncles do not usually live in the same house with their nieces and nephews, those relationships were not included.

The committee then considered the draft on interference with child custody, Section 230.3.

Mr. Searcy explained that the purpose of this section is to take care of parental kidnapping. The usual case finds a noncustodial parent taking a child and fleeing the state in violation of a court order awarding custody to the other parent. The custodial parent then must go to the state to which the noncustodial parent fled and (usually) relitigate the custody question. Often that state will change the custody award. By making the conduct a felony offense, the fleeing parent can be extradited and the child returned to Texas. Mr. Searcy explained that under present Texas law this conduct may constitute kidnapping, but few prosecutors indict for kidnapping and even

fewer fully prosecute. Another problem is that the state to which the actor fled may be reluctant to extradite on a kidnapping charge against a parent who simply took his own child. Thus, this draft provides a tool by which Texas courts may protect their jurisdiction.

The kidnapping draft for the new penal code, previously approved by the committee, deals with the real kidnapping harms of terror and threat of injury, neither of which is present in the ordinary parental kidnapping case. A father who takes his own child from the custody of his wife may be guilty of misdemeanor false imprisonment under Section 212.3 previously approved by the committee, but it is impossible as a practical matter to obtain extradition for misdemeanors, even though the Uniform Extradition Act provides for it.

The committee was in complete agreement that a statute of this kind is needed in Texas. The discussion then turned to the specific provisions of the section. The first question was raised by Mr. Vance. He pointed out that this statute would apply only when the child is taken out of the state, but many times the child will simply be secreted in the same state or even in the same city. He thought that concealment alone ought to be covered because the actor would have knowingly violated a court order. Mr. Searcy explained that the reporters thought that as long as the actor remains in the state the court's contempt powers would be sufficient to deal with the problem. Judge Barron agreed with Mr. Vance that the statute should apply when the actor remains in the state. Mr. Barlow said he wanted only a tool to give prosecutors an extraditable offense when the person runs with the child to another state, and he thought that the court's contempt power was sufficient to deal with the problem when the actor did not leave the state. Mr. Searcy and Dean Keeton pointed out that this conduct, assuming the actor stays within the state, will constitute misdemeanor false imprisonment under Section 212.3 previously approved by the committee. The only reason for making this conduct a felony under this section is to facilitate extradition. Judge Barron agreed that the conduct was not serious enough to warrant felony treatment except as an extradition tool.

Mr. Daugherty pointed out that the contempt power is probably the better tool when the actor remains within the state because the actor can be brought to trial a lot quicker. The misdemeanor false imprisonment section, 212.3, covers children up to age 16 who are removed from one place to another within the state. The committee voted 5 to 3 against making in-state interference with child custody an offense. Dean Keeton stated that the false imprisonment draft will be changed to exclude these parental kidnapping situations.

There was some discussion about the use of the 18-year age limit in Subsection (a) because a child is entitled to support from his parents after age 18 if the child is incompetent. However, since this statute is concerned only with custody, age 18 is consistent with the civil statute because the court loses the power to award custody of a person when that person reaches age 18.

Mr. Searcy stated that the reporters suggested that the statute read "takes or retains a child younger" to catch the person who takes the child out of the state legally for a periodic visit and then refuses to return the child to the state when the visitation period ends. The committee voted to insert the retention idea into the statute. There had been a question at the reporters' meeting whether or not retention would be an extraditable offense, but Mr. Searcy explained that he was satisfied that the retention offense would be extraditable as a matter of comity under Section 6 of the Uniform Extradition Act. [Staff note: A custody interferer also could probably be arrested by federal authorities for violating the fugitive felon law, 18 U.S.C. § 1073 (1964).]

The committee voted to insert the phrase "or order" in Subsection (a)(1) immediately after the word "judgment." Mr. Colvin asked whether or not this should refer only to a Texas judgment or order, but the committee decided to leave it as written so that it would apply to an order of any court. This was necessary because a wife living in Texas could have a California judgment granting custody.

The next question raised was that of retaining the phrase "or is about to be" in Subsection (a)(2). The committee members did not like that phrase because if the custody issue has not been litigated then either parent has a right to custody and, if suit has not yet been filed, the court's jurisdiction has not been invoked and needs no protection. Therefore, the committee voted to eliminate the phrase.

The committee also voted to insert in Subsection (a)(2) an express reference to divorce suits to make it clear that the civil suit contemplated by the statute is not one that is filed solely to dispose of the child's custody.

The committee then discussed Subsection (b), the affirmative defense. Mr. Searcy explained the reason for having the affirmative defense was that the purpose of the statute is to get the child back within the jurisdiction of the court and, if the actor returns the child to the state there is no further interest in pursuing him. The committee agreed generally with that policy, but did not like the actual notice provision in Subsection (b). Because of the elimination of the phrase "or is about to be" from Subsection (a)(2), the necessity for actual notice in the affirmative defense no longer existed. The committee voted to change it to "seven days from the commission of the offense."

After some discussion the committee approved the fourth-degree felony classification to facilitate extradition.

The committee also voted to recommend a further amendment to C.C.P. art. 38.11 to allow spouses to testify against each other in cases of interference with child custody.

The committee then took up the proposed paternity statute. Mr. Searcy explained that the idea behind this statute was to substitute for the offense of seduction a civil paternity statute that would provide support for illegitimate children, but would not force marriages. He explained that the seduction prosecutions presently are instituted only when the prosecutrix is pregnant, and then only to coerce a marriage. Mr. Searcy said that forcing marriages is not a proper purpose of the criminal law and, if that is the actual use to which the statute is being put, it ought to be repealed. However, under present Texas law an illegitimate child is not entitled to support from its father.

Dean Keeton stated that the Family Code Project is involved in this area, and he asked whether or not Mr. Searcy had been in contact with project personnel. Mr. Searcy answered that he had, but that they had not had much time review this report. Their initial response, in Mr. Searcy's opinion, was not adequate. They expressed fear of a paternity statute because of the possibility of blackmail and of injustice like that in the Charlie Chaplin case. In Charlie Chaplin's case, both his and the plaintiff's doctors testified that the blood tests showed that Charlie Chaplin could not have been the father, but the jury found he was the father and an intermediate California court affirmed. This could not happen under the proposed paternity statute because Chaplin's case would have ended at the pretrial stage. Moreover, a paternity statute using fully modern blood-testing techniques would deter blackmail, and providing support for the illegitimate child is worth the slight risk of blackmail, of which there is little concrete evidence anyway.

Dean Keeton asked whether the penal code revision committee should go to the trouble of making a detailed study of the proposed paternity statute in view of the fact that this area of the law is being considered by the Family Code Project. He suggested that the committee take up the seduction statute and decide whether or not a seduction statute should be retained if the family code revisors do include a paternity statute in the family code. Mr. Barlow said he was in favor of both a paternity statute and a seduction offense because in his area the Latin people are more worried about the child having a name than they are about the support problem. Mr. Searcy mentioned that the proposed paternity statute would not deal with legitimating the child, so it would not solve Mr. Barlow's problem. Mr. Searcy added that the family code people were considering an acknowledgment statute that would legitimate the child without the necessity of the father marrying the mother.

Mr. Daugherty stated he thought one major objection of people familiar with the present family law was that forced marriages create more problems than they solve.

Dean Keeton asked Mr. Barlow how long a forced marriage lasts. Mr. Barlow stated they lasted about 30 minutes, but that it was about like the father signing an 18-year note.

Mr. Searcy stated that another justification for a paternity statute results from the Social Security Act Amendments of 1967. A new provision requires each state to provide a method for determining paternity of illegitimate children who are members of families receiving aid for families with dependent children. He expressed the fear that unless Texas enacts a paternity statute there is danger of losing a percentage of its federal welfare grant.

Mr. Searcy concluded by explaining that the proposed statute deals only with support, and not with whether a child is legitimate for purposes of workmen's compensation or social security or anything else. It does, however, deal with custody and visitation rights because it is convenient to settle these collateral matters during the support proceeding.

Mr. Barlow moved that the committee vote on whether or not to retain a seduction offense in the penal code without regard to what the Family Code Project does about a paternity statute. He stated he is in favor of having both a paternity statute and a seduction offense.

The committee then voted unanimously to recommend the enactment of a paternity statute and to communicate its recommendation to the Family Code Project.

The committee next took up the seduction offense, Section 230.4. The committee voted 5 to 3 against having a seduction offense, but decided to discuss the details of the draft so there would be a seduction offense drafted in the best way possible if it later became necessary to include one in the penal code.

The first question raised was by Mr. Vance, who stated that he did not like to deal with deviate sexual intercourse in a seduction statute. Mr. Searcy stated that the crux of the offense is the fraud involved, and that a woman who engages in deviate sexual intercourse on a false promise to marry is every bit as much defrauded as the woman who engages in sexual intercourse on a false promise to marry.

Mr. Daugherty said that he and Chief Stevenson of the Dallas Police Department were on the advisory committee for Saul Baernstein when he did the original report on offenses against the family. That committee had reached the decision that it was better not to have a seduction offense than to have the one that is presently on the books, but that it was necessary to give some protection to young ladies who are over the age for statutory rape purposes. Because of this, the advisory committee wanted to lower the seduction age cut-off to 21 years.

Mr. Anderson, the Adult Probation Officer of Travis County, stated that in his view any law that forced marriages was a bad law because while it may solve some minor problems it creates many more serious problems than it solves.

Mr. Barlow said that he could not see any difference between a woman 26 years old who submits on a promise to marry and a woman 18 years old who submits on a promise to marry. Mr. Searcy agreed with him and said that was why there was no age limit stated in the proposed section.

The committee voted to eliminate the phrase "or deviate sexual intercourse" from Subsection (a)(1).

Dean Keeton then raised the question of an age limit, and the committee voted to insert the phrase "younger than 21 years" immediately after the word "female" in Subsection (a)(1).

The next question raised was by Judge Barron, who questioned the use of the word "substantial" in Subsection (a)(2). Mr. Searcy explained that he consciously used that word to overrule a line of Texas cases holding that unless the promise to marry was the sole inducement for the female's submission there was no seduction. Dean Keeton said that what the court had done was to misinterpret the word "reliance" because, at least in tort law, it would mean a but-for cause--although there could also be other causes. Mr. Searcy agreed, but added that he feared that unless the word "substantial" was in the statute, the court of criminal appeals might follow the old line of cases.

Judge Barron withdrew his objection, and the committee voted to approve Subsection (a)(2) as written.

Mr. Searcy explained that Subsection (b)(1) is simply a continuation of present law and that Subsection (b)(2) was made a defense because a woman ought not be allowed to rely on a promise of marriage from a man she believes is already married. Subsection (b)(3) was included because a woman who has engaged promiscuously in sexual intercourse ought not be allowed to rely on a promise to marry.

Mr. Searcy stated that Texas law contains an offense of abandonment after marriage to escape prosecution for seduction, but that he had omitted this offense on the theory that to force the marriage in the first place is bad enough, but to force the people to live together for two years is wholly irrational.

Mr. Daugherty then reaised the question of age again, stating that he would like to see the same four-year age differential for seduction that appears in modern statutory rape offenses. Mr. Vance said that a better provision to protect against bad cases would be to make the offense a fourth-degree felony so as to screen each case through the grand jury instead of putting the burden on a county attorney with an irate father on his hands. He said the grand jury is an effective device for taking the monkey off of the prosecuting attorney's back. The district attorney, in the secrecy of a grand jury hearing, can state whether or not he has a good case.

Mr. Daugherty said he was not in favor of a seduction offense at all if it did not have an age differential and if it was a felony.

The committee then voted to approve Subsection (b) as written, and to increase the penalty classification to a felony of the fourth degree.

The committee then began discussion of the abortion provisions, beginning with Section 230.5.

Mr. Barlow was concerned about attempted abortion in the case where the woman was not actually pregnant, though the actor thought she was pregnant. The present penal code contains an offense of attempted abortion. Mr. Echols explained that that kind of case would be covered under the general attempt statute in the new penal code, which makes a person guilty of an attempt if he intentionally engaged in conduct that would constitute an offense if the facts were as he believed them to be. The committee then approved Subsection (a) as written.

Mr. Echols explained that in his original draft the penalty classification for abortion was a felony of the fourth degree unless the pregnancy had continued beyond the 26th week, in which case it was a felony of the third degree. However, establishing that the pregnancy had continued beyond the 26th week was considered by the reporters to be a virtually impossible burden for the prosecution to carry, resulting in the penalty being made a felony of the third degree in all cases. The committee approved Subsection (b) as written.

The discussion then moved to the offense of aiding self-abortion, Section 230.51.

Mr. Barlow asked whether this section would cover the woman's boyfriend. Mr. Echols explained that it was not intended to cover the boyfriend or someone else who helped the woman abort herself by heating water for her or performing some other nonprofessional task. That was the reason for inserting the phrase "for consideration" in Subsection (a). The section is aimed at the professional abortionist, and will take from him a possible defense that he did not perform any acts on the woman, but merely provided her with the instruments to use on herself. Mr. Echols explained that this section is not intended to provide an escape hatch for agents of a professional abortionist. It is contemplated that they would be guilty under the complicity sections of the new penal code.

Mr. Vance expressed his view that the phrase "for consideration" was somewhat vague. After much discussion and many suggestions the committee voted to substitute the phrase "anything of value" for the phrase "for consideration" in Subsection (a). With that change the committee approved Subsection (a).

The committee approved Subsection (b) as written.

The committee then began discussion of the offense of distributing abortifacients, Section 230.52.

Mr. Echols explained that this section is designed to prevent the distribution of things that are capable of causing abortions, when distributed for that purpose, outside of professional channels. It would cover drugs, knitting needles, rubber tubes, kerosene, or anything else that the possessor holds out as useful for terminating pregnancy. The committee approved Subsection (a) as written.

Dr. Glen questioned the use of the word "abortifacient" in the section caption without some qualifying word because it might be confusing to doctors since to them an abortifacient is a chemical. The committee directed the reporters to check the definition of abortifacient to see whether the caption should be changed. [Staff note: Steadman's Medical Dictionary, in the unabridged lawyer's edition of 1961, defines "abortifacient" as "an agent that produces abortion;" "agent" in turn is defined as "an active force or substance capable of producting an effect."]

Concerning Subsection (b), Mr. Daugherty stated that he thought that those provisions should not be affirmative defenses, but that the state should have to negative each one of them. Mr. Glen Conner agreed with Mr. Daugherty, saying that the draft would make everyone who possessed those items subject to prosecution.

Mr. Searcy stated that they had been made affirmative defenses on the suggestion of Judge Archie Brown at the reporters' meeting because, while the state would not ordinarily have much trouble negativing each of the defenses, the state still would have to go through all the motions to do it and the indictment would be several pages long. As for Mr. Conner's objection, Mr. Searcy stated that the dangerous drug act is drafted with affirmative defenses rather than exceptions, and that druggists are not arrested or prosecuted solely for possessing dangerous drugs. As a practical matter people will not be called upon to assert an affirmative defense very often. Mr. Vance expressed his view that they ought to be affirmative defenses or else the committee might as well do away with the statute. The committee voted to leave Subsection (b) drafted in terms of affirmative defenses.

The committee then took up the discussion of each of the subdivisions contained in Subsection (b). It was pointed out that Subsection (b)(1) did not mention hospitals, and hospitals regularly purchased abortifacients. The committee voted to add licensed hospitals to Subsection (b)(1).

The committee approved Subsections (b)(2) and (3) as written.

In discussing Subsection (b)(4), Mr. Vance expressed his view that the advertising ought to be confined to professional journals, but it was pointed out that this would eliminate direct mail

advertising to hospitals, pharmacists, and physicians. The committee voted to approve Subsection (b)(4) as written.

The committee also approved Subsection (c) as written.

The committee then took up the discussion of the draft on therapeutic abortion, Article 231.

ARTICLE 231. THERAPEUTIC ABORTION

Sec. 231.1. DEFINITIONS.

In Sections 231.1-231.6, unless the context requires a different definition,

(1) "committee" means a therapeutic abortion committee;

(2) "hospital" means a hospital licensed by the State Department of Health;

(3) "incest" means the offense defined in Section 230.2 of this code;

(4) "nonconsensual sexual intercourse" (RAPE) means one of the offenses defined in Section 213.1, (AND) 213.2, 213.3, 213.4, 213.7, or 213.8 of this code;

(5) "physician" means a practitioner of medecine licensed by the State Board of Medical Examiners;

(6) "therapeutic abortion" means a voluntary abortion performed by a physician in accordance with this article; and

(7) "voluntary abortion" means the intentional termination of a woman's pregnancy otherwise than by live birth of a viable fetus.

Sec. 231.2. THERAPEUTIC ABORTION COMMITTEE.

A hospital may establish a therapeutic abortion committee composed of at least three hospital medical staff members, one of whom must be a specialist in obstetrics certified by the proper board of his school of medicine. The committee shall determine by at least a majority vote whether a proposed therapeutic abortion may be performed in the hospital.

Sec. 231.2. THERAPEUTIC ABORTION COMMITTEE.

A committee may approve a proposed therapeutic abortion only if

(1) the application is suppported by the written consent of (THE WOMAN, OR IF SHE IS A MINOR OR INCOMPETENT, BY THE WRITTEN CONSENT OF A CUSTODIAL PARENT OR GUARDIAN, OR HER HUSBAND:)

(A) a custodial parent or guardian, if the woman is unmarried and is younger than 16 years;

(B) the woman and a custodial parent or guardian, if the woman is unmarried and is 16 years or older but younger than 21 years;

(C) a custodial parent or guardian, or her husband, if the woman is incompetent; or

(D) the woman, if Subdivisions (A), (B), and (C) are inapplicable;

(2) the application is supported by the written opinion of a physician; and

(3) the committee finds that a voluntary abortion is advisable because

(A) the pregnancy resulted from nonconsensual sexual intercourse (RAPE) or incest, and the commission of the offense is established in the manner provided in Section 231.4;

(B) there is a substantial risk that continuing the pregnancy will endganger the woman's life or gravely impair her physical or mental health; or

(C) there is a substantial risk that the child will be born with a grave physical or mental defect.

Sec. 231.4. ESTABLISHING COMMISSION OF NONCONSENSUAL SEXUAL INTERCOURSE (RAPE) OR INCEST.

(a) The commission of nonconsensual sexual intercourse (RAPE) or incest is established only if the committee gives written notice of the application for the therapeutic abortion and the reason for it to the district attorney or criminal district attorney (or if there is neither to the county attorney) of the county where the alleged offense occurred, and

(1) the district attorney replies in writing stating that there are facts showing probable cause to believe that the alleged offense occurred; and

(A) in a case of alleged incest, that a complaint has been filed against the accused; or

(B) in a case of alleged nonconsensual sexual intercourse (RAPE), that the woman or some person acting in her behalf informed a magistrate, peace officer, or district, criminal district, or county attorney of the offense within a reasonable time after it (THE) allegedly (RAPE) occurred;

(2) the committee does not receive a written reply from the district, criminal district, or county attorney within seven days from the date the committee sent written notice to him; or

(3) the woman seeking the therapeutic abortion obtains an order of a district court as provided in Subsection (b).

(b) If the district, criminal district, or county attorney notifies the committee that there is no probable cause to believe the alleged offense occurred, the woman seeking the therapeutic abortion may petition for an ex parte hearing in a district court to determine whether the offense occurred. The court shall hear the petition on a date no later than one week after the date the petition is filed. If the court finds that the woman proved by a preponderance of the evidence that the alleged offense occurred, it shall issue an order so declaring. The court may exclude the general public (including representatives of the news media) from the hearing. The court's findings, conclusions, and order are not admissible in a criminal action, civil suit, or other proceeding. A court's order under this subsection is not appealable.

Sec. 231.5. RECORDS AND REPORTS.

A hospital in which a therapeutic abortion committee exists shall maintain records adequate to show that the operation of its committee complies with the requirements of this article. The hospital shall furnish to the State Department of Health such reports as the department may require, but the hospital may not include in a report the name of a person who applied for a therapeutic abortion.

Sec. 231.6. JUSTIFIABLE ABORTION.

(a) A physician may perform <u>a voluntary</u> abortion in a hospital with the approval of its therapeutic abortion committee that acted in accordance with Section 231.3.

(b) A physician may perform <u>a voluntary</u> abortion in an emergency when it is not medically feasible to comply with Subsection (a) because

(1) the woman's life is in imminent danger; and

(2) <u>a voluntary</u> abortion is necessary to preserve her life.

. . .

Dr. Glen raised a question about the definition of abortion in Section 231.1(1). He said that in medical terminology abortion does not mean the intentional termination of a pregnancy, rather abortion can be a spontaneous occurrence. He said that what the draft defines as abortion doctors call voluntary abortion. [Staff note: In line with Dr. Glen's objection the reporter has substituted the phrase "voluntary abortion" for the word "abortion"

throughout Article 231. This change in terminology has not changed the substance of any of the drafts.]

The committee approved the remainder of Section 231.1 as written.

The committee then began discussion of Section 231.2, Therapeutic Abortion Committee.

Mr. Barlow raised the first question about this section, noting that there are many places in Texas where there are not three hospital medical staff members and no specialists in obstetrics. There was much discussion and it was recognized that requiring three medical staff members, one of whom is a specialist, on the abortion committee would result in many hospitals being unable to establish a therapeutic abortion committee. However, it was also brought out that having a committee at least this large would insulate the doctors from criticism and allow them to share the responsibility for approving abortions. It would also avoid to some extent the possibility of some hospital in a little town becoming recognized as an abortion mecca for the state. It was also pointed out that this draft expands the situations permitting abortion beyond the present Texas law, and that in an emergency situation a doctor need not go through an abortion committee. In a situation that is not an emergency a delay of a few days is not crucial, and the woman seeking the abortion can travel to a city with a hospital large enough to have a therapeutic abortion committee conforming to the standards set out in Section 231.2.

It was pointed out by Mr. Nugent, however, that osteopaths are not approved by the American Board of Obstetrics and Gynecology even though they are licensed physicians and have their own specialists in obstetrics. Section 231.2 was therefore revised to eliminate the specific board reference, and the committee voted to approve Section 231.2 as written.

Dr. Glen suggested that where the mental health of the woman is in issue a psychiatrist ought to be involved. The committee decided to hold that question for discussion under Subdivision (2) of Section 231.3(b) where the requirement of a written opinion of a physician is listed.

This discussion then moved to Section 231.3, Minimum Procedural Requirements.

There was lengthy discussion about Subdivision (1) concerning whether above a certain age the prospective abortee's written consent should be required in addition to the consent of a custodial parent or guardian. Dr. Glen expressed the view that it should because he had seen severe mental problems created by a young girl being forced into an abortion. Below a certain age, however, a young girl is incapable of making a decision on the propriety of having the baby. Dr. Glen thought that if the girl is 16 years or older her written consent ought to be required. After much

discussion and many suggestions about the age at which the girl's consent should be required, the committee voted that a hospital committee should be allowed to approve an abortion on the consent of a custodial parent or guardian if the woman abortee is unmarried and is younger than 16 years, but that if the woman abortee is unmarried and is between the ages of 16 and 21 both her consent and the consent of a custodial parent or guardian ought to be required. Of course if the woman abortee is incompetent she is incapable of giving her consent; in that case a hospital committee should be allowed to approve an abortion on the written consent of a custodial parent or guardian or husband. If the woman is 21 years or older only her consent should be necessary, and the same is true of a married woman regardless of her age since marriage emancipates her for most purposes. The committee directed the reporter to redraft Subdivision (1) with those policy decisions in mind.

The discussion then moved to Subdivision (2).

Dr. Glen suggested that the application should be supported by the written opinion of a specialist, particularly when the reason for the proposed therapeutic abortion is that continuing the pregnancy will gravely impair the woman's mental health.

Mr. Echols explained that in his original draft, before it was changed at the reporters' meeting, Subdivision (2) read "the application is supported by the written opinion of a specialist in the disease or condition, if any, which is advanced as the reason for the proposed therapeutic abortion." Dr. Glen said he was in favor of that draft. Mr. Echols explained that the draft had been changed to require just the written opinion of a physician to make the statutory scheme easier to use. Mr. Barlow suggested leaving it as written.

The committee voted to leave Subdivision (2) as written.

The discussion then moved to Subdivision (3), the reasons for permitting abortion.

Mr. Echols explained that the reasons contained in Subdivision (3)(A) are the same reasons that are contained in the therapeutic abortion law in the M.P.C., in the Colorado statute, in the North Carolina statute, and, with the exception of risk that the child will be born with a great physical or mental defect, in the California statute.

The committee approved all of Subdivision (3) as written.

The committee then took up Section 231.4, Establishing Commission of Rape or Incest.

Mr. Barlow objected to putting the burden on the district attorney to say whether or not a woman had been raped. He favored requiring the woman to get a court order. Under Section 231.4 the district attorney has three options. He may reply to the committee in writing stating that there is probable cause to believe

that the alleged offense occurred or that there is not probable cause to believe that the alleged offense occurred, or he may just fail to reply. Mr. Echols pointed out that the decision is a legal decision rather than a medical decision, and the hospital committee is not qualified to determine whether or not an offense has occurred.

It was also pointed out that determining whether or not there is probable cause to believe that an offense has occurred is an everyday function in a district attorney's office. The district attorney must also state that in a case of alleged incest a complaint has been filed against the accused. This is necessary in incest cases because whether or not a particular act of intercourse is incest depends upon the identity of the accused. In cases of rape the draft requires that the woman or some person acting in her behalf inform an officer of the law of the offense within a reasonable time after the alleged rape occurred.

There was some discussion about requiring a complaint to be filed in cases of alleged rape. Mr. Vance questioned the propriety of requiring a complaint in alleged rape cases because many times a woman is discouraged by the police when, after hearing her story, they do not think a successful prosecution could ensue. A woman should be entitled to rely on the opinion of the first law enforcement official with whom she comes in contact. Mr. Vance said that probably more than half of the rape complainants are turned away by the police department.

Mr. Echols stated that this draft is substantially like the California statute, but that the North Carolina statute requires only that the woman report the alleged offense to a law enforcement official within seven days.

There was some sentiment on the committee for the proposition that if the prosecuting attorney did not reply to the hospital committee the woman should be required to get a court order. Mr. Glen Conner asked who would pay the legal fees for indigent people attempting to take advantage of this draft. Mr. Anderson stated that the harder the law makes it to get a therapeutic abortion the more these women will be driven back to the butchers.

Mr. Cofer then moved that the committee approve Section 231.4 as written. The committee approved Section 231.4 as written.

Mr. Echols then stated that the North Carolina therapeutic abortion law contains a residency requirement, but that the Colorado statute does not contain one and that the proposed draft does not contain one. The reasons for not having a residence requirement are, first, that residency is a legal concept and a hospital committee is not qualified to determine whether or not the residency requirements have been met; and, second, that requiring a period of residency may result in a woman being unable to obtain a therapeutic abortion during the time in which

it is medically feasible for her to do so. He also stated that the Colorado experience has been that not having a residency requirement has not resulted in Colorado becoming an abortion mecca. It was pointed out by Mr. Daugherty that as more states enact therapeutic abortion laws Texas and Colorado will not likely be in the minority because their laws lack residency requirements. There was no further discussion and the committee opted for not including a residency requirement.

The committee then took up Section 231.5, Records and Reports.

Mr. Reid explained that this provision was taken from the bill introduced in the 60th Legislature by the late Senator Parkhouse, and that it was included so that the State Department of Health could keep track of which hospitals were becoming abortion meccas and of how many abortions were being performed in the state. The committee approved Section 231.5 as written.

The committee then discussed Section 231.6, Justifiable Abortion.

The committee approved Subsection (a) as written.

There was some discussion concerning whether or not Subsection (b) permitted a physician to perform an abortion on a woman even over her objection, and Dean Keeton stated that he thought it did and that he was not at all certain he was in favor of it because of that. It was pointed out, however, that this subsection deals only with criminal liability, and would not affect a physician's civil liability. Dr. Glen pointed out that there are situations in which an abortion must be performed almost immediately to save the woman's life without time to get anyone's permission. Dean Keeton said that on second thought he was in agreement with the idea that a physician who performs an abortion under these circumstances should not be criminal. Subsection (b) merely continues present Texas law.

The committee approved Subsection (b) as written.

The discussion then turned to the three offenses that had been deliberately omitted from the draft by the reporters. The first of these was abduction. Mr. Searcy stated that abduction is a form of false imprisonment to force a woman into marriage or prostitution. There have been very few abduction prosecutions in Texas. The conduct involved in abduction is covered by other sections of the penal code, such as the sex offenses, false imprisonment, and kidnapping.

The committee voted to omit the offense of abduction from the proposed penal code.

(Judge Sharpe relieved Dean Keeton as chairman.)

Mr. Echols then explained that the M.P.C. contains an offense called "Endangering the Welfare of Children," which

the draftsmen contemplated would replace present state laws on contributing to the delinquency of minors. He said that he had not only omitted the M.P.C. offense from the draft, but recommended omitting any statute on contributing to the delinquency of a minor. He said that at their meeting in February 1967 the reporters had considered Mr. Baernstein's draft on offenses against the family and had agreed that the problems that needed to be dealt with in contributing to the delinquency of a minor statute were drinking, narcotic drugs, sex, and inducing a child to engage in criminal conduct. It was Mr. Echols' opinion that all of this conduct would be covered by other offenses in the new penal code, thereby rendering a section on contributing to the delinquency of minors unnecessary.

Mr. Barlow said that he thought a contributing to the delinquency of minors statute was needed, and that he used it quite a bit to reduce more serious offenses, such as statutory rape, to misdemeanors. Judge Barron remarked that prosecutors liked to use it to support arrests, too.

Mr. Daugherty pointed out that if it is the parents who are contributing to the child's delinquency the situation can be handled under the dependant and neglected children statute, but he thought the code ought to contain some statute to deal with people outside of the family who have undue influence on children.

Mr. Vance stated that in his office they use the contributing to the delinquency of a minor statute quite extensively, and he could recall cases where somebody has done a combination of several acts, none of which alone constitute a crime, but cumulatively contribute to the child's delinquency.

Mr. Searcy asked the committee to give the reporters some help in drafting a statute that was both specific enough to pass constitutional muster and at the same time covered all of the things the committee wanted to cover.

Judge Sharpe suggested that the reporters take another look at this subject and report back to the committee with some concrete evidence that we would not be eliminating something that is needed. Bill Reid responded to that by saying that there had been about three months' effort put in on drafting a statute in this area, but that every time it came down to the point of identifying the conduct to be prohibited, the reporter discovered that the conduct was already prohibited or would be prohibited by another section in the new penal code.

Mr. Colvin stated that the fact that prosecutors use the statute does not establish its need.

The committee's final decision was to postpone decision on a contributing section until the reporters decide whether or not there are specific offenses not included in the new penal

code that should be covered by the contributing to the delinquency of a minor section.

Mr. Echols next discussed nonsupport of minor children. He explained that the M.P.C. contains an offense called "persistent nonsupport," which makes it a misdemeanor for a person to persistently fail to provide support that he can provide and that he knows he is obliged to provide a spouse, child, or other dependant. The M.P.C. draftsmen intended that offense to replace present state penal laws on wife and child desertion. Mr. Echols stated that he recommended not enacting an offense of persistent nonsupport. He noted that at their meeting in February 1967 the reporters recommended making nonsupport an offense, but not making desertion an offense if the actor simply left home but continued to provide support. On that basis it was his thought that there were adequate civil remedies available and that it did little good to convict the husband of a misdemeanor.

Someone stated, however, that the civil remedies in this field are, as a practical matter, wholly ineffective.

Mr. Vance and Mr. Barlow stated that the civil remedies are ineffective because most of these families are indigents and need the legal aid provided by the prosecutor's office in these cases. Mr. Vance stated that were it not for the need to provide legal aid to these indigent people he would be very happy to get rid of this responsibility. As it is, however, even if a civil judgment is obtained, the defendant may ignore it.

The committee voted unanimously to retain the present law, but to revise it as necessary to conform to federal welfare law. The committee voted to keep the "necessitous circumstances" requirement that is presently contained in P.C. art. 602. The committee voted to classify the first offense a misdemeanor and subsequent offenses felonies.

RESPONSIBILITY

NOTE: Because the committee did not approve any of the proposed drafts remaining in the responsibility chapter, none is set out here.

Mr. Fred Cohen was introduced to the committee and began discussing the draft sections of his January 12, 1968 report on mental responsibility for crime that had not yet been considered by the committee. (These were Sections 4.07-4.11, reproduced in a consolidated draft dated April 27, 1968 and distributed to the committee at the beginning of Mr. Cohen's discussion. All references in these minutes are to sections of the consolidated draft.) Mr. Cohen noted that two basic issues remain for the committee's decision: (1) whether the plea of not guilty by

reason of insanity alone should operate as a judicial confession of guilt (Section 4.09(b)); and (2) whether a bifurcated trial, with the insanity issue determined in a hearing separate from the hearing on the issue of guilt or innocence, should be required or permitted (Section 4.09(c)).

Mr. Cohen explained that the judicial confession feature was entirely voluntary, that is, the defendant confessed his guilt only if he entered the plea of not guilty by reason of insanity by itself. If he coupled that plea with a plea of not guilty, the state as in other cases had to prove his guilt beyond a reasonable doubt.

The bifurcated trial provision, Mr. Cohen explained, is based on the California practice. The bifurcated trial allows the trier of facts to focus sharply and exclusively on one issue--whether insanity or guilt or innocence, the order of determination is probably unimportant--at a time. Mr. Cohen pointed out that Section 4.09(c) vests the court with discretion to determine whether insanity and guilt or innocence should be determined in separate hearings or together. This discretion will allow courts to experiment and permit use of the procedure the individual judge finds more suitable for his court.

Mr. Vance inquired whether it would be constitutionally permissible for the court without a jury to determine mental competency to stand trial. Mr. Cohen replied that, although there is no obstacle under the federal constitution, the Texas Constitution would now prohibit this. At its February 9 meeting, however, the committee voted to make this change in the present law, and a proposed constitutional amendment was included in the January 12, 1968 report on responsibility.

Mr. Barlow raised the problem connected with discharging patients acquitted by reason of insanity and then committed to the Rusk State Mental Hospital. He described a bill he and Judge Brown drafted, which has been approved by the Bexar County Medical Association and the Texas Medical Association, creating a board of psychiatrists to review on a statewide basis this type of patients' eligibility for discharge from the hospital. If created, Mr. Barlow explained, the board will take the discharge decision out of the hands of the hospital superintendent and will also insure application of medical standards in reaching this decision. Mr. Cohen agreed that discharge was a real problem, but stated that the real cause of the problem was the standards now used for commitment and discharge. The present law makes little sense, he said, to commit a defendant because he proved by a preponderance of the evidence that he did not know the difference between right and wrong; it makes less sense to decide his eligibility for discharge in terms of whether he can now distinguish between right and wrong. Under proposed Chapter 4, by contrast, both a defendant's need for commitment and eligibility for discharge are determined according to the standard of dangerousness and need for hospitalization.

Dr. Killinger voiced a concern earlier expressed by Dr. Glen to the effect that use of a dangerousness standard would discourage hospital superintendents from furloughing patients committed by a criminal court. Mr. Cohen replied that dangerousness had nothing to do with a patient's entitlement to furlough. Chapter 4 intentionally does not deal with the furlough question because this is exclusively a treatment decision in the hands of the medical staff. Rather, by providing in Section 4.[10](a) that a person committed to a state mental hospital under Chapter 4 was to be treated like every other patient (except with regard to discharge), the proposed section relegates the furlough question to the Texas Mental Health Code that now provides ample authority for furlough as a treatment device.

The committee recessed at 5 p.m. until the next day.

The committee reconvened at 9 a.m. on April 27, 1968 with Dean Keeton in the chair.

Mr. Cohen began by recapitulating the discussion on Friday afternoon. He summarized the three determinations that must be made in this area--responsibility, mental competency to stand trial, and discharge from involuntary hospitalization--and then surveyed Sections 4.01-4.06 that had been approved by the committee at its February 9 meeting.

Mr. Vance questioned the desirability of Section 4.05, which deals with the admissibility of evidence obtained during a psychiatric examination. Mr. Colvin asked whether this section would protect the conversations of a defendant with his privately selected psychiatrist, that is, a psychiatrist hired without the court's intervention. Mr. Colvin pointed out that C.C.P. art. 46.02, Sec. 2(f)(4), as amended in 1967, makes any "statement made by the defendant during examination into his competency [inadmissible] against the accused on the issue of guilt in any criminal proceeding no matter under what circumstances such examination takes place." Mr. Cohen replied that Section 4.05 did not speak to the private psychiatrist situation, but that it probably should be revised to cover it.

Mr. Daugherty questioned whether, if a defendant hires his own psychiatrist, the court then has power under Section 4.04(a) to commit the defendant for psychiatric examination, say, on motion of the state. The committee agreed that the court did have this power under the language of Subsection (a).

The committee then debated at considerable length the merits of Section 4.05. Mr. Cohen explained that the intent of the section, when read together with Section 4.09, was to exclude from evidence at a trial on the issue of guilt or innocence a defendant's inculpatory statements made to a court-appointed psychiatrist. This exclusion, in Mr. Cohen's opinion, is required by the fifth amendment to the federal constitution as applied to the states through the fourteenth amendment.

Mr. Vance argued that a defendant's inculpatory statements made during a psychiatric examination would also bear materially on the issue of his insanity. Why not, therefore, treat the defendant's entry of the plea of not guilty by reason of insanity as a waiver of his testimonial privilege? Mr. Cohen asserted that this would be unconstitutional because you cannot condition the exercise of one constitutional right--the insanity defense--upon the surrender of another constitutional right--the privilege against self-incrimination. Mr. Cohen admitted, however, that this precise question, in the insanity defense context, had never been decided by the U.S. Supreme Court, but had been decided, against Mr. Vance's proposal, by the Supreme Court of Colorado in the case French v. District Court, Div. 9, 384 P.2d 268 (Colo. 1963).

Mr. Vance then suggested that Section 4.05 be omitted from the chapter. He urged that the committee not attempt to predict the development of constitutional law in this area, but rather leave the testimonial privilege question to judicial resolution. Some committee members agreed with Mr. Vance, but his recommendation was never voted on.

Dean Keeton summarized the policy choice alternatives in Section 4.05: (1) Should a defendant's conversations with a private psychiatrist, not appointed by the court, be admissible if they relate to the alleged offense? Should Chapter 4 deal with this issue? (2) Should a defendant's plea of not guilty by reason of insanity waive his privilege against self-incrimination regarding inculpatory statements made to a psychiatrist even though his psychiatric examiniation was compelled and even though he also pleaded not guilty? (3) If a defendant calls a psychiatrist as a witness, should the prosecution on a cross-examination be permitted to question the psychiatrist about details of the alleged offense and the defendant's inculpatory statements even though the defense did not go into the details or statements on direct examination? (4) Should Section 4.05 be deleted entirely from the chapter?

The committee next discussed the bifurcated trial provision, Section 4.09. By separating the insanity issue from the guilt or innocence issue, Mr. Cohen explained, this section is designed to permit the trier of facts to focus sharply and separately on each issue in turn. Although only a few states <u>require</u> a bifurcated trial for the insanity defense, many states <u>permit it in</u> the court's discretion. Mr. Cohen concluded by pointing out that Section 4.09(c) leaves to the court's discretion the decision of whether to try the insanity and guilt or innocence issues separately or together.

Mr. Vance objected that a bifurcated trial, at least for offenses requiring a specific intent, would result in complete duplication of evidence. For example, if a defendant pleads not guilty by reason of insanity and not guilty in a murder prosecution, and he is determined sane at a separate hearing, he could

then offer the identical evidence, both during the hearing on guilt or innocence and the presentencing hearing, on the issue of malice. And although Section 4.09(c) permits the state to introduce the verdict of sanity at the hearing on guilt or innocence (and thus probably disprove the defendant's lack-of-malice defense), the trier of facts (and later the court) must hear the same evidence all over again. Mr. Searcy noted that Mr. Vance's objection to the bifurcated trial was shared by many commentators.

Dean Keeton called for a vote on the bifurcated trial issue, but the committee's eventual consensus was to postpone a vote until further reflection on the issue.

Turning to Section 4.[10] and discharge procedure, Mr. Cohen noted that Subsections (b)-(e) were designed to provide a defendant committed under this chapter a remedy, in addition to habeas corpus, for obtaining release from his involuntary hospitalization. After discussion the committee approved in principle Section 4.[10] as an alternative to the Brown-Barlow statewide discharge review board, in case the latter is not created by the legislature.

Judge Barron questioned the desirability of using the word "dangerousness" as a standard for determining whether a patient should be involuntarily hospitalized and (subsequently) discharged. He argued that the term was too vague to provide a meaningful standard for administrators; Mr. Searcy agreed, pointing out that several commentators made the same objection. Mr. Cohen responded that "dangerousness" was no more vague than "ordinary reasonable man," "proximate cause," or "good cause," and courts and juries daily make decisions using these concepts. Mr. Searcy noted that the "dangerousness" standard in Section 4.[10] was identical in substance with the involuntary hospitalization standard in the Texas Mental Health Code. Dean Keeton asked the staff to consider whether the language of the standard in Chapter 4 of the new penal code should be verbatim with the language of the Texas Mental Health Code.

Mr. Searcy asked the committee how intoxication, both alcoholic and drug-induced, should be treated in the new penal code. He recommended that, unlike the Model Penal Code, the intoxication question be treated in Chapter 4 since, if intoxication is either involuntary or pathological, it constitutes a mental disease that may exculpate. The committee agreed that intoxication should be treated in Chapter 4, but Dean Keeton requested a report and draft before the committee decided <u>how</u> to treat it in the new penal code.

Judge Sharpe relieved Dean Keeton as chairman and Judge Sharpe introduced Mr. Searcy who with Mr. Michael Johnson presented the following draft of conforming amendments necessitated by the committee's approval of the corporate criminal liability provisions:

CONFORMING AMENDMENTS FOR CORPORATE
CRIMINAL LIABILITY

Code of Criminal Procedure

CHAPTER SEVENTEEN-A

CORPORATIONS AND ASSOCIATIONS

Art. 17A.01 APPLICATION AND DEFINITIONS

(a) This Chapter sets out some of the procedural rules applicable to the criminal liability of corporations and associations. Where not in conflict with this Chapter, the other Chapters of this Code apply to corporations and associations.

(b) In this Code, unless the context requires a different definition,

(1) "agent" means a director, officer, employee, or other person authorized to act in behalf of a corporation or association;

(2) "association" means a government or governmental subdivision or agency, trust, partnership, or two or more persons having a joint or common economic interest;

(3) "high managerial agent" means

(A) an officer of a corporation or association;

(B) a partner in a partnership; or

(C) an (EACH) agent of a corporation or association who has (HAVING) duties of such responsibility that his conduct may reasonably be assumed to represent the policy of the corporation or association; and

(4) "person," "personal," "he," and "him" include corporation and association.

Art. 17A.02 COMPUTATION OF TIME

(a) In computing a period of days under this Chapter, the first day is excluded and the last day is included.

(b) If the last day of any period is a Saturday, Sunday, or legal holiday, the period is extended to include the next day that is not a Saturday, Sunday, or legal holiday.

Art. 17A.03 ALLEGATION OF NAME

(a) In alleging the name of a defendant corporation, it is sufficient to state in the complaint, indictment, or information

the corporate name, or to state any name or designation by which the corporation is known or may be identified. It is not necessary to allege that the defendant was lawfully incorporated.

(b) In alleging the name of a defendant association, it is sufficient to state in the complaint, indictment, or information the association's name, or to state any name or designation by which the association is known or may be identified, or to state the name or names of one or more members of the association, referring to the unnamed members as "others." It is not necessary to allege the legal form of the association.

Art. 17A.04 SUMMONING CORPORATION OR ASSOCIATION

(a) When a complaint is filed or an indictment or information presented against a corporation or association, the court or clerk shall issue a summons to the corporation or association. The summons shall be in the same form as a capias except that

(1) it shall summon the corporation or association to appear before the court named at the place stated in the summons;

(2) it shall be accompanied by a certified copy of the complaint, indictment, or information; and

(3) it shall provide that the corporation or association appear before the court named at or before 10 (9) a.m. of the Monday next (ON THE FIFTH DAY) after the expiration of twenty days after it is served with summons, except where service is made upon the Secretary of State or Chairman of the State Board of Insurance, in which instance the summons shall provide that the corporation or association appear before the court named at or before 10 (9) a.m. of the Monday next (ON THE TWENTIETH DAY) after the expiration of thirty days after the Secretary of State or Chairman of the State Board of Insurance is served with summons.

(b) No individual (PERSON) may be arrested upon a complaint, indictment, or information (OR SENTENCE) against a corporation or association.

Art. 17A.05 SERVICE ON CORPORATION

(a) Except as provided in Paragraph (d) of this Article, a peace officer shall serve a summons on a corporation by personally delivering a copy of it to the corporation's registered agent for service. However, if a registered agent has not been designated, or cannot with reasonable diligence be found at the registered office, then the peace officer shall serve the summons by personally delivering a copy of it to the president or a vice-president of the corporation (AN OFFICER OR DIRECTOR OF THE CORPORATION; OR AN EMPLOYEE OF SUITABLE AGE AND DISCRETION FOUND AT ANY PLACE WHERE BUSINESS OF THE CORPORATION IS REGULARLY CONDUCTED).

(b) If the peace officer certifies on the return that he diligently but unsuccessfully attempted to effect service under Paragraph (a) of this Article, or if the corporation is a foreign corporation that has no (AND ITS) certificate of authority (HAS BEEN REVOKED), then he shall (MAY) serve the summons on the Secretary of State by personally delivering a copy of it to him, or to the Assistant Secretary of State, or to any clerk in charge of the corporation department of his office. On receipt of the summons copy, the Secretary of State shall immediately forward it by certified or registered mail, return receipt requested, addressed to the defendant corporation at its registered office, or, if it is a foreign corporation, at its principal office in the state or country under whose law it was incorporated.

(c) The Secretary of State shall keep a permanent record of the date and time of receipt and his disposition of each summons served under Paragraph (b) of this Article together with the return receipt.

(d) The method of service on a corporation regulated under the Insurance Code is governed by that code.

Art. 17A.06 SERVICE ON ASSOCIATION

(a) Except as provided in Paragraph (b) of this Article, a peace officer shall serve a summons on an association by personally delivering a copy of it

(1) to any managing official (including any partner if the association is a partnership) at any place where business of the association is regularly conducted; or

(2) if the peace officer certifies on the return that he diligently but unsuccessfully attempted to serve a managing official, to any employee of suitable age and discretion at any place where business of the association is regularly conducted; or

(3) if the peace officer certifies on the return that he diligently but unsuccessfully attempted to serve a managing official or employee of suitable age and discretion, to any member of the association.

(b) The method of service on an association regulated under the Insurance Code is governed by that code.

Art. 17A.07 APPEARANCE

(a) In all criminal actions instituted against a corporation or association, in which original jurisdiction is in a district court, criminal district court, court of domestic relations, county court, county criminal court, or county court-at-law,

(1) appearance is for the purpose of arraignment; and

(2) the corporation or association has ten full days after the day the arraignment takes place and before the day the trial begins to file written pleadings.

(b) In all criminal actions instituted against a corporation or association, in which original jurisdiction is in a justice court or corporation court,

(1) appearance is for the purpose of entering a (AN ORAL) plea; and

(2) ten (FIVE) full days must elapse after the day of appearance before the corporation or association may be tried.

Art. 17A.08 PRESENCE OF CORPORATION OR ASSOCIATION

(a) A defendant corporation or association appears through counsel or its representative.

(b) If a corporation or association does not appear in response to summons, or appears but fails or refuses to plead,

(1) it is deemed to be present in person for all purposes;

(2) the court shall enter a plea of not guilty in its behalf;

(3) the court may authorize discovery procedures requested by the State; and

(4) the court shall proceed with trial, judgment, and sentence.

(c) If, having appeared and entered a plea in response to summons, a corporation or association is absent without good cause at any time during later proceedings,

(1) it is deemed to be present in person for all purposes; and

(2) the court shall proceed with trial, judgment, or sentencing.

Art. 17A.09 PROBATION

(a) A corporation or association charged with an offense whose maximum possible punishment is or includes confinement or a fine exceeding $200 may apply by written motion to the court for probation in case of conviction. The motion must

be verified by a high managerial agent of the corporation or association and must be filed with the court before the trial on the merits begins.

(b) The corporation or association applying for probation shall submit as part of (INCLUDE IN OR WITH) the motion:

(1) a statement of whether or not the corporation or association has been convicted within the past ten years of a felony or of any other criminal offense similar to the present offense in a court of this or another state or of the United States, which conviction has been probated or become final and unappealable;

((2) A STATEMENT OF WHETHER OR NOT A HIGH MANAGERIAL AGENT OF THE CORPORATION HAS BEEN CONVICTED, IN A COURT OF THIS OR ANOTHER STATE OR OF THE UNITED STATES, OF A FELONY OR OF ANY OTHER CRIMINAL OFFENSE SIMILAR TO THE PRESENT OFFENSE COMMITTED WHILE CONDUCTING THE CORPORATION'S AFFAIRS, WHICH CONVICTION HAS BEEN PROBATED OR BECOME FINAL AND UNAPPEALABLE;)

(2) if the statement under Subparagraph (1) of this Paragraph is affirmative, a certified copy of each judgment of conviction and of the complaint, information, or indictment on which it was based; and

(3) any other information reasonably required by the court.

(c) The court may (SHALL) suspend the imposition (OR EXECUTION) of sentence, and place the corporation or association on probation, if

(1) the corporation or association has properly applied for probation under Paragraphs (a) and (b) of this Article;

(2) the corporation or association agrees to comply with the terms of probation prescribed by the court; and

(3) the court believes, after considering the circumstances of the present offense and of any prior conviction disclosed in the motion for probation, that the ends of justice and the best interests of society and of the corporation or association will be served by granting probation.

(d) The court shall design the period and terms of probation to prevent the corporation or association from engaging in similar criminal conduct in the future. The court shall supervise the corporation or association during probation. The clerk of the court shall furnish the corporation or association with a written statement of the period and terms of its probation, and with a written statement of any modifications later made in the period or terms.

(e) The terms of probation may include but are not limited to the requirements that a corporation or association

(1) commit no offense of the same character as the present offense against the law of this or another state or of the United States;

(2) pay all costs of its trial;

(3) pay so much of its fine as the court directs;

(4) make restitution to each victim of its offense; and

(5) report periodically to the court through a high managerial agent on the business affairs and conduct of the corporation or association.

(f) When the court has probable cause to believe that a corporation or association has violated a term of its probation, it shall summon the corporation or association to appear before it in the manner provided in Article 17A.04 of this Code. Service of the summons and the corporation's or association's presence (APPEARANCE) at the hearing are governed by Articles 17A.05, 17A.06, and 17A.08 of this Code. When the corporation or association appears, the court without a jury shall hold a hearing on the alleged violation and after the hearing shall continue, modify, or revoke the probation as the evidence warrants. If the court revokes the probation, it shall immediately pronounce sentence against the corporation or association.

(g) When it is granted probation a corporation or association is entitled to appeal its conviction as in other cases. It is also entitled to appeal the court's refusal to grant probation or the court's revocation of probation in the same manner it appeals the conviction. However, the refusal or revocation may not be set aside on appeal without a clear showing that the court in refusing or revoking probation abused its discretion.

(h) When the period and terms of probation have been satisfactorily completed, the court (ON ITS OWN MOTION) shall enter an order in the minutes of the court discharging the corporation or association from probation, setting aside the judgment of conviction, and dismissing the complaint, information, or indictment against it. After the action (CASE) against the corporation or association is dismissed, the judgment of conviction may not be considered for any purpose except to determine the corporation's or association's entitlement to a future probation.

Art. 16.05 WITNESS PLACED UNDER RULE

The magistrate shall, if requested by the accused or his counsel, or by the prosecutor, have all the witnesses placed in charge of an officer, so that the testimony given by any

one witness shall not be heard by any of the others. However, if the defendant is a corporation or association, it may designate one representative in addition to counsel to assist at the examining trial, which representative may not be placed under the rule.

Art. 29.01 BY OPERATION OF LAW

Criminal actions are continued by operation of law if:

1. An individual defendant (THE ACCUSED) has not been arrested;

2. A defendant corporation or association has not been served with summons; or

3. There is not sufficient time for trial at that term of court.

Art. 36.03 WITNESS PLACED UNDER RULE

At the request of either party, the witnesses on both sides may be sworn and placed in the custody of an officer and removed out of the courtroom to some place where they cannot hear the testimony as delivered by any other witness in the cause. This is termed placing witnesses under the rule. However, if the defendant is a corporation or association it may designate one representative in addition to counsel to aid in the presentation of its case, which representative may not be placed under the rule.

Art. 40.03 GROUNDS FOR NEW TRIAL IN FELONY

New trials, in cases of felony, shall be granted for the following causes, and for no other:

1. Where the defendant is an individual and has been tried in his absence, or has been denied counsel;

2. Where the court has misdirected the jury as to the law, or has committed any other material error calculated to injure the rights of the defendant;

3. Where the verdict has been decided by lot, or in any other manner than by a fair expression of opinion by the jurors;

4. Where a juror has received a bribe to convict, or has been guilty of any other corrupt conduct;

5. Where any material witness of the defendant has, by force, threats or fraud, been prevented from attending the court, or where any written evidence, tending to establish the innocence of the defendant, has been intentionally destroyed or removed so that it could not be produced upon the trial;

6. Where new testimony material to the defendant has been discovered since the trial. A motion for a new trial on this ground shall be governed by the rules which regulate civil suits;

7. Where the jury, after having retired to deliberate upon a case, has received other testimony; or where a juror has conversed with any person in regard to the case; or where any juror at any time during the trial or after retiring for deliberation, may have become so intoxicated as to render it probable his verdict was influenced thereby. The mere drinking of liquor by a juror shall not be sufficient ground for a new trial;

8. Where, from the misconduct of the jury, the court is of opinion that the defendant has not received a fair and impartial trial. It shall be competent to prove such misconduct by the voluntary affidavit of a juror; and the verdict may, in like manner, be sustained by such affidavit; and

9. Where the verdict is contrary to law and evidence. A verdict is not contrary to the law and evidence, within the meaning of this provision, where the defendant is found guilty of an offense of inferior grade to, but of the same nature as, the offense proved.

10. Should the jury assess the death penalty when the State has made known, under the provisions of this Code, that it will not seek the death penalty, the court shall, upon written motion of the defendant, immediately grant a new trial.

Art. 42.15 AS TO FINE

(a) When the defendant is only fined the judgment shall be that the State of Texas recover of the defendant the amount of such fine and all costs of the prosecution, and that the defendant, if present, be committed to jail until such fine and costs are paid; or if the defendant be not present, that a capias forthwith issue, commanding the sheriff to arrest the defendant and commit him to jail until such fine and costs are paid; also, that execution may issue against the property of such defendant for the amount of such fine and costs.

(b) If the defendant is a corporation or association, the judgment shall be that the State of Texas recover of the corporation or association the amount of such fine and all costs of the prosecution and, if the corporation or association does not pay such fine and costs, that execution issue against the corporation or association for the amount of such fine and costs.

Art. 43.01 DISCHARGING JUDGMENT FOR FINE

(a) When the judgment and sentence against an individual defendant is for fine and costs he shall be discharged from the same:

1. When the amount thereof has been fully paid; or

2. When remitted by the proper authority; or

3. When he has remained in custody for the time required by law to satisfy the amount thereof.

(b) (WHEN) The judgment and sentence against a defendant corporation or association (IS) for fine and costs(,IT) shall be discharged (FROM SUIT):

1. When the amount thereof has been fully paid; or

2. When the execution against the corporation or association has been fully satisfied; or

3. When the judgment has been fully satisfied in any other manner.

Business Corporation Act

Art. 7.01. INVOLUNTARY DISSOLUTION

. . .

B. When a corporation is convicted of a criminal offense, or when a high managerial agent is convicted of a criminal offense in the conduct of the affairs of the corporation, the Attorney General may file an action to involuntarily dissolve the corporation in a district court of the county in which the registered office of the corporation is situated or in a district court of Travis County. The court may dissolve the corporation involuntarily if it is established that:

(1) The corporation, (A MAJORITY OF THE BOARD OF DIRECTORS) or a high managerial agent acting in behalf of the corporation, has (, IN CONDUCTING THE CORPORATION'S AFFAIRS INTENTIONALLY) engaged in a persistent course of criminal conduct; and

(2) To prevent future criminal conduct of the same character, the public interest requires such dissolution.

C. Article 7.02 of this Act does not apply to Section B of this Article.

Art. 8.16. REVOCATION OF CERTIFICATE OF AUTHORITY

. . .

B. When a foreign corporation is convicted of a criminal offense, or when a high managerial agent is convicted of a criminal offense committed in the conduct of the affairs of the foreign corporation, the Attorney General may file an action to revoke the certificate of authority of the foreign corporation

to transact business in this state in a district court of the county in which the registered office of the foreign corporation in this State is situated or in a district court of Travis County. The court may revoke the foreign corporation's certificate of authority if it is established that:

(1) The foreign corporation, (A MAJORITY OF THE BOARD OF DIRECTORS) or a high managerial agent in behalf of the foreign corporation, has (, IN CONDUCTING THE FOREIGN CORPORATION'S AFFAIRS, INTENTIONALLY) engaged in a persistent course of criminal conduct; and

(2) To prevent future criminal conduct of the same character, the public interest requires such revocation.

C. Article 7.02 of this Act does not apply to Section B of this Article.

Non-Profit Corporation Act

Art. 1396-7.01. INVOLUNTARY DISSOLUTION (as amended)

. . .

C. When a corporation is convicted of a criminal offense, or when a high managerial agent is convicted of a criminal offense in the conduct of the affairs of the corporation, the Attorney General may file an action to involuntarily dissolve the corporation in a district court of the county in which the registered office of the corporation is situated or in a district court of Travis County. The court may dissolve the corporation involuntarily if it is established that:

(1) The corporation, (A MAJORITY OF THE BOARD OF DIRECTORS) or a high managerial agent acting in behalf of the corporation, has (, IN CONDUCTING THE CORPORATION'S AFFAIRS, INTENTIONALLY) engaged in a persistent course of criminal conduct; and

(2) To prevent future criminal conduct of the same character, the public interest requires such dissolution.

. . .

Art. 1396-8.15. REVOCATION OF CERTIFICATE OF AUTHORITY (as amended)

C. When a foreign corporation is convicted of a criminal offense, or when a high managerial agent is convicted of a criminal offense committed in the conduct of the affairs of the foreign corporation, the Attorney General may file an action to revoke the certificate of authority of the foreign corporation to conduct affairs in this State in a district court of the county in which the registered office of the foreign corporation in this State is situated in a district court of Travis County. The court may revoke the foreign corporation's certificate of authority if it is established that:

(1) The foreign corporation, (A MAJORITY OF THE BOARD OF DIRECTORS) or a high managerial agent acting in behalf of the foreign corporation, has (, IN CONDUCTING THE FOREIGN CORPORATION'S AFFAIRS, INTENTIONALLY) engaged in a persistent course of criminal conduct; and

(2) To prevent future criminal conduct of the same character, the public interest requires such revocation.

. . .

Mr. Searcy began by noting that proposed Chapter Seventeen-A of the Code of Criminal Procedure does not and was not intended to set out all procedural rules applicable to the criminal liability of corporations and associations. Rather, it deals with procedures peculiar to corporations and associations, and then applies to corporations and associations the remaining provisions of the Code of Criminal Procedure not inconsistent with the new chapter. Mr. Searcy also noted that the definitions in Article 17A.01(b) would be revised, and that a definition of "agent" would be added, to conform to the definitions already approved by the committee when it considered Mr. Hamilton's corporate criminal liability draft.

The committee discussed Articles 17A.01, 17A.02, and 17A.03 and approved them as written.

The committee discussed together Articles 17A.04, 17A.05, and 17A.06, dealing with getting a corporation or association into court. Judge Barron argued that procedures for bringing a corporation or association before a criminal court should be as alike as possible to the procedures for bringing it before a civil court. Mr. Gray stated that allowing only 5 days after service for appearance was unreasonable; another committee member suggested 10 days. Mr. Gray also thought that allowing 20 days after service on the Secretary of State might be insufficient. Mr. Johnson pointed out that the staff had considered but rejected the "Monday-next-after-the-expiration-of-20-days" appearance formula of Rule 101 of the Texas Rules of Civil Procedure. Mondays are jury impanelling days, and to require a corporation or association to appear on Monday might result in considerable delay until the jury panels were completed.

Judge Brown noted that the Insurance Code made special provisions for serving process on corporations and associations it regulated. Finally, Mr. Hamilton suggested that Paragraph (a) of Article 17A.04 did not belong at the beginning of the article but at its end; the committee agreed.

After additional discussion the committee voted to direct the staff to revise Articles 17A.04-17A.06 to conform the service rules as closely as possible to those set out in the rules of civil procedure, Business Corporation Act, and Insurance Code.

Mr. Gray recommended substituting "a" for "an oral" in Article 17A.07(b)(1), and the committee agreed. "Ten" was also substituted for "five" in Paragraph (b)(2) of that article. With these changes the committee approved Article 17A.07.

The committee approved Article 17A.08 as written.

Mr. Conner urged that the probation article, 17A.09, apply only to county-level and district-level courts; this would make it consistent with the present misdemeanor probation article, 42.13. The committee agreed and directed the staff to make the necessary revision.

The committee next discussed at some length Paragraph (b) of Article 17A.09. Mr. Gray argued that a large corporation would often be unable to supply information about prior convictions of its high managerial agents. Mr. Hamilton countered by pointing out how easy it was under present law to dissolve a corporation and reincorporate under a different name the next day. This permits convicted high managerial agents to escape the consequences of their crimes by simply creating a new corporation. Nevertheless, the committee voted unanimously to eliminate Paragraph (b)(2).

Judge Brown suggested limiting to 10 the number of years for which a corporation or association is responsible for informing the court of a prior conviction. Otherwise, details on convictions 50 years old conceivably could be required. The committee agreed to insert this limitation.

The committee then considered Paragraph (c). Judge Brown pointed out that courts could not under present law suspend execution of a sentence, but only its imposition; he recommended deleting "or execution" to make this article consistent with present law. The committee agreed.

Judge Brown also objected to the word "shall" in that paragraph. Mr. Searcy argued that Subparagraph (3) provided the court with all the discretion it needed either to grant or deny probation; in fact, the vague concepts of "the ends of justice" and "the best interest of society and of the corporation or association" were selected for this purpose. Mr. Searcy added that he didn't object to substituting "may" for "shall," and the committee agreed on this substitution.

The committee approved as written Paragraph (e).

Mr. Searcy pointed out that the phrase "presence at the hearing" should be substituted for "appearance" in the fifth line of Paragraph (f); with this change the committee approved the paragraph as written. The committee also approved Paragraphs (g) and (h) as written.

The committee considered proposed amendments to Articles 16.05, 29.01, 36.03, 40.03, 42.15, and 43.01. With one exception these amendments were approved as written. At Mr. Gray's

recommendation, the committee agreed that the introductory clause of Article 43.01(b) should be revised to read:

> The judgment and sentence against a defendant corporation or association for fine and costs shall be discharged: . . .

Mr. Searcy explained that, pursuant to the committee's decision at its November 3, 1967 meeting, the staff had transferred from the new penal code to the Business Corporation Act and Non-Profit Corporation Act the provisions drafted by Mr. Hamilton permitting involuntary dissolution of a corporation convicted of a persistent course of criminal conduct. These provisions were added to Articles 7.01 (domestic corporations) and 8.16 (foreign corporations) of the Business Corporation Act and Articles 1396-7.01 (domestic corporations) and 1396-8.15 (foreign corporations) of the Non-Profit Corporation Act. Mr. Searcy also called the committee's attention to a change in wording in the draft to conform it to Mr. Hamilton's proposal: Subsection (1) in all four articles should read "The corporation, or a high managerial agent acting in behalf of the corporation, has engaged in a persistent course of criminal conduct; . . ." The committee voted unanimously to delete "intentionally" from the same subdivision of each article, and then approved the amendments as revised.

Judge Sharpe adjourned the meeting at 12 noon.

PENAL CODE REVISION PROJECT

Summary of Minutes

The State Bar Committee on Revision of the Penal Code met at the Lila B. Etter Alumni Center, Austin, Texas, on Friday, June 21, 1968, beginning at 9 a.m.

The committee considered the report on sexual offenses prepared by Dean Page Keeton, reporter, and Michael T. Johnson, revisor. The following draft sections were approved and formally revised by the staff. The drafts proposed by the reporter, showing changes made by the committee, are reproduced in the body of the minutes.

> NOTE: The drafts set out in these minutes are tentative only and do not necessarily represent the final decision of the State Bar of Texas Penal Code Revision Committee on any of the areas covered. The drafts do not represent the views of the State Bar of Texas or of the Texas Legislature. Because of their tentative nature, none of the drafts may be quoted or cited without the project director's prior written permission.

ARTICLE 213. SEXUAL OFFENSES

Sec. 213.0. DEFINITIONS.

In this article, unless the context requires a different definition,

(1) "deviate sexual intercourse" means any contact between the genitals of one person and the mouth or anus of another person;

(2) "serious bodily injury" means physical pain, illness, or any impairment of physical condition that creates a substantial risk of death or that causes serious permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ;

(3) "sexual contact" means any touching of the anus or any part of the genitals of another person, or of the breast of a female 10 years or older, with the intent of arousing or gratifying the sexual desire of any person; and

(4) "sexual intercourse" means any penetration of the female sex organ by the male sex organ.

Sec. 213.1. RAPE.

(a) A male commits rape if he has sexual intercourse with a female not his wife without the female's consent.

(b) The intercourse is without the female's consent under one or more of the following circumstances only:

(1) he compels her to submit or participate by force that overcomes such earnest resistance as might reasonably be expected under the circumstances;

(2) he compels her to submit or participate by any threat that would prevent resistance by a woman of ordinary resolution;

(3) she has not given express or implied consent and he knows she is unconscious or physically unable to resist;

(4) he knows that as a result of mental disease or defect she is at the time of the intercourse incapable of appraising the nature of her conduct;

(5) she has not given express or implied consent and he knows that she is unaware that intercourse is being committed;

(6) he knows that she submits or participates because she erroneously believes that he is her husband;

(7) he has intentionally impaired her power to appraise or control her conduct by administering any substance without her knowledge.

(c) Rape is a felony of the second degree.

Sec. 213.2. AGGRAVATED RAPE.

(a) A male commits aggravated rape if he commits rape as defined in Section 213.1 or rape of a child as defined in Section 213.8, and

(1) he causes serious bodily injury to another in the course of the [criminal transaction];

(2) he compels submission to the rape by express or implied threat of death, serious bodily injury, extreme pain, or kidnapping to be imminently inflicted on anyone; or

(3) the female is an inmate of a hospital licensed by the State Department of Health and he knows that as a result of mental disease or defect she is at the time of the intercourse incapable of appraising the nature of her conduct.

(b) Aggravated rape is a felony of the first degree.

Sec. 213.3. SEXUAL ABUSE.

(a) A person commits sexual abuse if, without the other person's consent and with the intent of arousing or gratifying the sexual desire of any person,

(1) the actor engages in deviate sexual intercourse with the other person, not his spouse, whether the other person is of the same or opposite sex; or

(2) the actor compels the other person to engage in sexual intercourse or deviate sexual intercourse with a third person, whether the other person is of the same sex as or opposite sex from the third person.

(b) The intercourse is without the other person's consent under one or more of the following circumstances only:

(1) the actor compels the other person to submit or participate by force that overcomes such earnest resistance as might be reasonably expected under the circumstances;

(2) the actor compels the other person to submit or participate by any threat that would prevent resistance by a person of ordinary resolution;

(3) the other person has not given express or implied consent and the actor knows the other person is unconscious or physically unable to resist;

(4) the actor knows that as a result of mental disease or defect the other person is at the time of the deviate sexual intercourse incapable of appraising the nature of the conduct;

(5) the other person has not given express or implied consent and the actor knows the other person is unaware that deviate sexual intercourse is being committed;

(6) the actor knows that the other person submits or participates because of the erroneous belief that he is the other person's spouse;

(7) the actor has intentionally impaired the other person's power to appraise or control the other person's conduct by administering any substance without the other person's knowledge.

(c) Sexual abuse is a felony of the second degree.

Sec. 213.4. AGGRAVATED SEXUAL ABUSE.

(a) A person commits aggravated sexual abuse if he commits sexual abuse as defined in Section 213.3 or sexual abuse of a child as defined in Section 213.9, and

(1) he causes serious bodily injury to another in the course of the [criminal transaction];

(2) he compels submission to the sexual abuse by express or implied threat of death, serious bodily injury, extreme pain, or kidnapping to be imminently inflicted on anyone; or

(3) the other person is an inmate of a hospital licensed by the State Department of Health and the actor knows that as a result of mental disease or defect the other person is at the time of the sexual intercourse or deviate sexual intercourse incapable of appraising the nature of the conduct.

(b) Aggravated sexual abuse is a felony of the first degree.

Sec. 213.5. HOMOSEXUALITY.

(a) A person commits an offense if he engages in deviate sexual intercourse with another person of the same sex.

(b) An offense under this section is a gross misdemeanor.

Sec. 213.6. PUBLIC INDECENCY.

(a) A person commits public indecency if he engages in any of the following acts when he knows a person is likely to be present who is likely to be offended or alarmed by his act:

(1) an act of sexual intercourse;

(2) an act of deviate sexual intercourse;

(3) an act of sexual contact;

(4) any act involving contact between the person's mouth or genitals and the genitals or anus of an animal or fowl.

(b) Public indecency is a gross misdemeanor.

Sec. 213.7. INDECENT EXPOSURE.

(a) A person commits indecent exposure if he exposes his anus or any part of his genitals, when he knows a person is likely to be present who is likely to be offended or alarmed by his act;

(1) with the intent of arousing or gratifying the sexual desire of any person; or

(2) with knowledge his conduct is likely to offend or alarm any person.

(b) Indecent exposure is a petty misdemeanor.

Sec. 213.8. RAPE OF A CHILD.

(a) A male commits rape of a child if he has sexual intercourse with a female not his wife, and

(1) she is younger than 16 years and he is at least 2 years older than she; or

(2) she is younger than 12 years.

(b) It is an affirmative defense to prosecution that the female was at the time of the alleged offense 12 years or older and had, prior to the time of the alleged offense, engaged promiscuously in sexual intercourse or deviate sexual intercourse.

(c) Rape of a child under Subsection (a)(1) is a felony of the third degree; rape of a child under Subsection (a)(2) is a felony of the first degree.

Sec. 213.9. SEXUAL ABUSE OF A CHILD.

(a) A person commits sexual abuse of a child if he engages in deviate sexual intercourse with a child, not his spouse, whether the child is of the same or opposite sex, and

(1) the child is younger than 16 years and the actor is at least 2 years older than the child; or

(2) the child is younger than 12 years.

(b) It is an affirmative defense to prosecution that the child was at the time of the alleged offense 12 years or older and had, prior to the time of the alleged

offense, engaged promiscuously in sexual intercourse or deviate sexual intercourse.

(c) Sexual abuse of a child under Subsection (a)(1) is a felony of the third degree; sexual abuse of a child under Subsection (a)(2) is a felony of the first degree.

Sec. 213.10. INDECENCY WITH A CHILD.

(a) A person commits indecency with a child if the child is not his spouse and, without the child's consent,

(1) the person engages in sexual contact with the child; or

(2) the person exposes his anus or any part of his genitals, knowing the child is present,

(A) with the intent of arousing or gratifying the sexual desire of any person; or

(B) with knowledge his conduct is likely to offend or alarm any person.

(b) The sexual contact or exposure is without the child's consent if

(1) the child is younger than 16 years and the actor is at least 2 years older than the child; or

(2) the child is younger than 12 years.

(c) It is an affirmative defense to prosecution that the child was at the time of the alleged offense 12 years or older and had, prior to the time of the alleged offense, engaged promiscuously in

(1) sexual intercourse;

(2) deviate sexual intercourse;

(3) sexual contact;

(4) indecent exposure as defined in Section 213.7.

(d) Indecency with a child is a gross misdemeanor.

Sec. 213.11. GENERAL PROVISIONS.

(a) Whenever in this article the criminality of conduct depends on a child's being younger than 16 years, it is an affirmative defense that the actor reasonably believed the child to be 16 years or older. However, when criminality depends on the child's being younger than 12 years, it is no defense that the actor did not know the child to be younger than 12 years, or reasonably believed the child to be 12 years or older.

(b) The exclusion of conduct with a spouse from the definitions of offenses in Sections 213.1-213.4 extends to the conduct of persons while cohabiting, regardless of the legal status of their relationship and of whether they hold themselves out as husband and wife. [When the definition of an offense excludes conduct with a spouse or conduct by a woman, this does not preclude conviction of a spouse or woman as a principal or accomplice in a sexual act that he or she causes another person, not within the exclusion, to perform.]

(c) No prosecution may be instituted or maintained under this article unless the alleged offense was brought to the notice of a law enforcement officer within 1 month after its occurrence or, where the alleged victim was younger than 16 years or incompetent or unable to make complaint, within 1 month after a parent, guardian, or other competent person specially interested in the victim who did not commit or participate in the commission of the offense learns of it.

(d) A person may not be convicted of an offense under Sections 213.1-213.5 upon the uncorroborated testimony of the alleged victim unless the victim made an outcry at the first reasonable opportunity. Corroboration may be circumstantial.

MINUTES OF THE MEETING OF
THE TEXAS STATE BAR COMMITTEE
ON REVISION OF THE PENAL CODE
FRIDAY, JUNE 21, 1968

Present: Committee Members Mr. James E. Barlow; Judge Archie S. Brown; Hume Cofer; Emmett Colvin; Samuel Daugherty; Newton Gresham; Judge T. Gilbert Sharpe; Travis Shelton; Carol Vance.

Law Enforcement Advisory Committee Glen Conner; Beverly Laws for R. A. Miles.

Advisory Committee on Corrections Dr. George Killinger; Mr. Bill Anderson.

Staff Bill Reid, project director; Mrs. Ione Stumberg.

Texas Legislative Council Staff Seth S. Searcy III, chief revisor; Paul Echols, Allen Herrington, Michael Johnson, and Miss Linda West, revisors.

Consultant Dr. George Parker, Professor of Psychology, University of Texas at Austin.

Reporter Harvey Wingo, SMU Law School.

The Texas State Bar Committee on Revision of the Penal Code met on Friday, June 21, 1968, at the Lila B. Etter Alumni Center, Austin, Texas, at 9 a.m., to consider Dean Page Keeton's report on sex offenses.

Judge T. Gilbert Sharpe served as chairman for the meeting. He explained that Dean Keeton had expressed his regrets that he was unable to attend because of pressing law school duties. Bill Reid, project director, gave a brief review on the status of the sexual offenses drafts. Some of the definitions and the provisions on forcible rape were presented to and approved by the committee at its meeting on June 12, 1967. The reporter

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for forcible sex offenses was Joel Finer. As Professor Finer was on leave of absence this year, Dean Keeton assumed the responsibility for drafting the balance of the sex offenses. Mr. Michael Johnson of the legislative council staff assisted Dean Keeton in the preparation of the present report. Mr. Johnson conducted the research and prepared the drafts in consultation with Dean Keeton.

Mr. Johnson presented the report to the committee.

NOTE: To reflect action taken by the committee on the drafts submitted, the following sections show additions by the committee underlined and deletions in brackets and capitals. The discussion and reasons for changes appear in the text.

ARTICLE 213. SEXUAL OFFENSES

Sec. 213.0. DEFINITIONS

In this article, unless the context requires a different definition,

(1) "deviate sexual intercourse" means any contact between the genitals of one person and the mouth or anus of another person;

[(2) "INDECENT EXPOSURE" MEANS EXPOSURE OF THE ANUS OR ANY PART OF THE GENITALS:

(A) WITH THE INTENT OF AROUSING OR GRATIFYING THE SEXUAL DESIRE OF ANY PERSON; OR

(B) WITH KNOWLEDGE HIS CONDUCT IS LIKELY TO OFFEND OR ALARM ANY PERSON;]

(2) "serious bodily injury" means physical pain, illness, or any impairment of physical condition that creates a substantial risk of death or that causes serious permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ;

(3) "sexual contact" means any touching of the anus or any part of the genitals of another person, or of the breast of a female 10 years or older, with the intent of arousing or gratifying the sexual desire of any person; and

(4) "sexual intercourse" means any penetration of the female sex organ by the male sex organ.

Sec. 213.1. RAPE.

(a) A male commits rape if he has sexual intercourse with a female not his wife without the female's consent.

(b) The intercourse is without the female's consent [ONLY] under <u>one or more</u> [ANY] of the following circumstances <u>only</u>:

(1) he compels her to submit or participate by force that overcomes such earnest resistance as might reasonably be expected under the circumstances;

(2) he compels her to submit or participate by any threat that would prevent resistance by a woman of ordinary resolution;

(3) she has not given express or implied consent and he knows she is unconscious or physically unable to resist;

(4) he knows that as a result of mental disease or defect she is at the time of the intercourse incapable of appraising the nature of her conduct;

(5) she has not given express or implied consent and he knows that she is unaware the intercourse is being committed;

(6) he knows that she submits or participates because she erroneously believes that he is her husband;

(7) he has intentionally impaired her power to appraise or control her conduct by administering any substance without her knowledge [ANY SUBSTANCE].

(c) Rape is a felony of the second degree.

Sec. 213.2. AGGRAVATED RAPE.

(a) A male commits aggravated rape if he commits rape as defined in Section 213.1 or rape of a child as defined in Section 213.8, and

(1) he causes serious bodily injury to another in the course of the criminal transaction [COMMITTING THE RAPE, OR PRIOR TO OR DURING FLIGHT AFTER COMMITTING THE RAPE]; [OR]

(2) he compels submission to the rape by express or implied threat of death, serious bodily injury, extreme pain, or kidnapping to be imminently inflicted on anyone; or

(3) the female is an inmate of a hospital licensed by the State Department of Health and he knows that as a result of mental disease or defect she is at the time of the intercourse incapable of appraising the nature of her conduct.

(b) Aggravated rape is a felony of the first degree.

Sec. 213.3. SEXUAL ABUSE.

(a) A person commits sexual abuse if, without the other person's consent and with the intent of arousing or gratifying the sexual desire of any person,

(1) the actor engages in deviate sexual intercourse with the other person, not his spouse, whether the other person is of the same or opposite sex; or

(2) the actor compels the other person to engage in sexual intercourse or deviate sexual intercourse with a third person, whether the other person is of the same sex as or opposite sex from the third person.

(b) The intercourse is without the other person's consent [ONLY] under one or more [ANY] of the following circumstances only:

(1) the actor compels the other person to submit or participate by force that overcomes such earnest resistance as might be reasonably expected under the circumstances;

(2) the actor compels the other person to submit or participate by any threat that would prevent resistance by a person of ordinary resolution;

(3) the other person has not given express or implied consent and the actor knows the other person is unconscious or physically unable to resist;

(4) the actor knows that as a result of mental disease or defect the other person is at the time of the deviate sexual intercourse incapable of appraising the nature of the conduct;

(5) the other person has not given express or implied consent and the actor knows the other person is unaware that deviate sexual intercourse is being committed;

(6) the actor knows that the other person submits or participates because of the erroneous belief that he is the other person's spouse;

(7) the actor has intentionally impaired the other person's power to appraise or control the other person's conduct by administering any substance without the other person's knowledge [ANY SUBSTANCE].

(c) Sexual abuse is a felony of the second degree.

Sec. 213.4. AGGRAVATED SEXUAL ABUSE.

(a) A person commits aggravated sexual abuse if he commits sexual abuse as defined in Section 213.3 or sexual abuse of a child as defined in Section 213.9, and

(1) he causes serious bodily injury to another in the course of the criminal transaction [COMMITTING THE SEXUAL ABUSE, OR PRIOR TO OR DURING FLIGHT AFTER COMMITTING THE SEXUAL ABUSE; OR];

(2) he compels submission to the sexual abuse by express or implied threat of death, serious bodily injury, extreme pain, or kidnapping to be imminently inflicted on anyone; or

(3) the other person is an inmate of a hospital licensed by the State Department of Health and the actor knows that as a result of mental disease or defect the other person is at the time of the sexual intercourse or deviate sexual intercourse incapable of appraising the nature of the conduct.

(b) Aggravatedsexual abuse is a felony of the first degree.

Sec. 213.5. PUBLIC INDECENCY.

(a) A person commits public indecency if he engages in any of the following acts when he knows a person is likely to be present who is likely to be offended or alarmed by his act:

(1) an act of sexual intercourse;

(2) an act of deviate sexual intercourse;

(3) an act of sexual contact;

(4) any act involving contact between the person's mouth or genitals and the genitals or anus of an animal or fowl.

Sec. 213.6. INDECENT EXPOSURE.

(a) A person commits indecent exposure if he exposes his anus or any part of his genitals, when he knows a

person is likely to be present who is likely to be offended or alarmed by his act,

(1) with the intent of arousing or gratifying the sexual desire of any person; or

(2) with knowledge his conduct is likely to offend or alarm any person.

(b) Indecent exposure is a petty misdemeanor.

Sec. 213.7. RAPE OF A CHILD.

(a) A male commits rape of a child if he has sexual intercourse with a female not his wife, and

(1) she is younger than 16 years and he is at least 2[4] years older than she; or

(2) she is younger than 12 years.

(b) It is an affirmative defense to prosecution that the female was at the time of the alleged offense 12 years or older and [UNDER SUBSECTION (a)(1) THAT THE ALLEGED VICTIM] had, prior to the time of the alleged offense [CHARGED], engaged promiscuously in sexual intercourse or deviate sexual intercourse.

(c) Rape of a child under Subsection (a)(1) is a felony of the third degree; rape of a child under Subsection (a)(2) is a felony of the first [SECOND] degree.

Sec. 213.8. SEXUAL ABUSE OF A CHILD.

(a) A person commits sexual abuse of a child if he engages in deviate sexual intercourse with a child, not his spouse, whether the child is of the same or opposite sex, and [WITHOUT THE CHILD'S CONSENT]

[(1) HE ENGAGES IN DEVIATE SEXUAL INTERCOURSE WITH THE CHILD, NOT HIS SPOUSE, WHETHER THE CHILD IS OF THE SAME OR OPPOSITE SEX.]

[(b) THE INTERCOURSE IS WITHOUT THE CHILD'S CONSENT IF]

(1) the child is younger than 16 years and the actor [HE] is at least 2 [4] years older than the child; or

(2) the child is younger than 12 years.

(b) It is an affirmative defense to prosecution that the child was at the time of the alleged offense 12 years or older and [UNDER SUBSECTION(b)(1) THAT THE ALLEGED VICTIM] had, prior to the time of the alleged offense [CHARGED], engaged promiscuously in sexual intercourse or deviate sexual intercourse.

(c) Sexual abuse of a child under Subsection (a)(1) is a felony of the third [SECOND] degree; sexual abuse of a child under Subsection (a)(2) is a felony of the first degree.

Sec. 213.9. INDECENCY WITH A CHILD.

(a) A person commits indecency with a child if the child is not his spouse and, without the child's consent,

(1) the person [HE] engages in sexual contact with the child; or

(2) the person exposes his anus or any part of his genitals, [COMMITS AN ACT OF INDECENT EXPOSURE] knowing the child is present, [AND]

(A) with the intent of arousing or gratifying the sexual desire of any person; or

(B) with knowledge his conduct is likely to offend or alarm any person.

(b) The sexual contact or exposure is without the child's consent if

(1) the child is younger than 16 years and the actor [HE] is at least 2 years older than the child; or

(2) the child is younger than 12 years.

(c) It is an affirmative defense to prosecution that the child was at the time of the alleged offense 12 years or older and [UNDER SUBSECTION (a)(1) THAT THE ALLEGED VICTIM] had, prior to the time of the alleged offense [CHARGED] engaged promiscuously in

(1) sexual intercourse;

(2) deviate sexual intercourse;

(3) sexual contact;

(4) indecent exposure as defined in Section 213.6.

(d) Indecency with a child is a gross misdemeanor.

Sec. 213.10. GENERAL PROVISIONS.

(a) Whenever in this article the criminality of conduct depends on a child's being younger than

16[12] years, it is an affirmative [NO] defense that the actor reasonably believed [DID NOT KNOW] the child to be 16 years or older [YOUNGER THAN 12 YEARS, OR REASONABLY BELIEVED THE CHILD TO BE 12 YEARS OR OLDER]. However, when criminality depends on the child's being younger than 12 [16] years, it is no [AN AFFIRMATIVE] defense that the actor did not know [REASONABLY BELIEVED] the child to be younger than 12 years [16 YEARS OR OLDER], or reasonably believed the child to be 12 years or older.

(b) The exclusion of [WHENEVER IN THIS ARTICLE THE DEFINITION OF AN OFFENSE EXCLUDES] conduct with a spouse from the definitions of offenses in Sections 213.1-213.4 [THE EXCLUSION] extends to the conduct of persons while cohabiting, regardless of the legal status of their relationship and of whether they hold themselves out as husband and wife. [WHEN THE DEFINITION OF AN OFFENSE EXCLUDES CONDUCT WITH A SPOUSE OR CONDUCT BY A WOMAN, THIS DOES NOT PRECLUDE CONVICTION OF A SPOUSE OR WOMAN AS A PRINCIPAL OR ACCOMPLICE IN A SEXUAL ACT THAT HE OR SHE CAUSES ANOTHER PERSON, NOT WITHIN THE EXCLUSION, TO PERFORM.]

(c) No prosecution may be instituted or maintained under this article unless the alleged offense was brought to the notice of a law enforcement officer [PUBLIC AUTHORITY] within 1 [3] month[s] after its occurrence

or, where the alleged victim was younger than 16 years or incompetent or unable to make complaint, within 1 [3] month[S] after a parent, guardian, or other competent person specially interested in the victim who did not commit or participate in the commission of the offense learns of it.

(d) A person may not be convicted of an [A FELONY] offense under Sections 213.1-213.4 [OF THIS ARTICLE] upon the uncorroborated testimony of the alleged victim unless the victim [HAS] made an outcry at the first reasonable opportunity. Corroboration may be circumstantial.

Mr. Johnson began by discussing the definitions. He explained that the definitions of "deviate sexual intercourse," "serious bodily injury," and "sexual intercourse," had been approved in prior reports.

He noted that he had started with definitions of "public place" and "indecent exposure," but resolved to deal with these concepts in the substantive offenses themselves rather than as definitions, and that they would be discussed later in the meeting.

Mr. Johnson then discussed the definition of "sexual intercourse," Section 213.0(4). He explained that the definition is not intended to change present Texas law. It was adopted by the committee last year and originally read "sexual intercourse has its usual meaning and occurs upon any penetration of the female sex organ by the male sex organ." Mr. Johnson said that the words "has its ordinary meaning" add nothing to the definition and might cause confusion. Mr. Johnson also noted that he had substituted the word "means" for "occurs upon." The committee unanimously approved the definition of "sexual intercourse" as proposed.

Mr. Johnson then presented Section 213.1, Rape. He noted that the only change here was insertion of the word "only" in Subsection (b) to make clear that the listing is exclusive. The committee agreed that the word "only" should be used to emphasize the exclusiveness

of the listing but there was some question about its location. The point was also made that the word "any" was not completely clear and it was suggested that the words "one or more" be substituted for "any." The committee accepted the following reformulation: "the intercourse is without the female's consent [ONLY] under [ANY] one or more of the following circumstances only . . ."

Mr. Johnson noted that Section 213.1(b)(5) reads "she has not given express or implied consent and he knows that she is unaware that intercourse is being committed; . . ." The underlined words were inserted at the suggestion of the reporters to resolve a possible conflict with Subsection (b)(3) concerning intercourse with a woman who is unconscious or physically unable to resist. This change makes it clear that if the woman has given express or implied consent, the fact that she is unaware of it when the intercourse is being committed does not make it an offense. Mr. Barlow mentioned his famous chiropractor case where the chiropractor told the woman he was giving her treatment and proceeded to have intercourse with her; the woman believed that this was treatment. Mr. Barlow noted that this could also occur where a burglar enters the house and has intercourse with the sleeping woman, or could occur in circumstances where voluntary social companions are together and the woman becomes so drunk that she doesn't know what is going on. Mr. Johnson remarked that Subdivision (5) was designed to take care of the doctor's examination situation. The committee unanimously approved the proposed change.

Mr. Johnson presented the next change in the original draft. Section 213.1(b)(7) read: "he has impaired her power to appraise or control her conduct by administering without her knowledge [A DRUG, ALCOHOL, OR SIMILAR] any substance [WITH THE INTENT OF PREVENTING RESISTANCE]; . . . ." Mr. Johnson explained that the proposed change omitted the listing "alcohol, drugs, or a similar substance" because of a possible ejusdem generis problem. Phrased this way, "similar substance" might be interpreted to mean a substance similar to a drug or alcohol rather than a substance having a similar effect. Thus gas and cantharides might be excluded.

Judge Sharpe questioned the placement of the words "any substance" and he recommended that they be inserted afer the word "administering;" the committee agreed. Mr. Johnson explained that he also recommended deleting the words "with the intent of preventing resistance"

to avoid questions about whether the intent was to prevent resistance or to enhance the desire on the part of the woman. On this point Mr. Cofer stated that the intent element is not as clear as it is in the other sections and that this should be dealt with. Mr. Johnson said this could be achieved by inserting the word "intentionally" before "impaired." With these changes the committee approved Subdivision (7) to read as follows: "he has intentionally impaired her power to appraise or control her conduct by administering any substance without her knowledge; . . . ."

Mr. Barlow questioned the desirability of including Section 213.1(b)(2) dealing with threats. He suggested that it duplicated its counterpart in aggravated rape, Section 213.2(a)(2). Mr. Barlow could not imagine a circumstance where a woman of ordinary resolution would submit unless the threat was of the type covered in aggravated rape. Mr. Johnson said that Section 213.1(b)(2) might cover the situation where a widow with five children is compelled to submit by her boss on threat of firing her. The committee was of varying opinions on whether this would constitute rape by threat. Mr. Vance asked what would be the difference between the case where a person says if you don't submit I will kill you and the doctor who gives his woman patient a hypodermic and then takes advantage of her. He recommended making all rapes first degree felonies.

Judge Brown stated that he thought one of the most reprehensible things that he could imagine is the man who knows that a woman is insane and takes advantage of her. He said that he thought that many judges and juries would feel frustrated if they could not give a person who had done this more than 15 years for committing rape in those circumstances.

Mr. Gresham noted that a very good reason for distinguishing rape and aggravated rape was that normally anything falling under the aggravated rape category would be susceptible to direct proof that the offense did in fact occur. He said that there were many rape cases in which the jury has to look at the prosecutrix and the defendent and make a hunch judgment as to who is telling the truth. Mr. Gresham said that in his opinion this had led to miscarriages of justice. Mr. Johnson said that from his reading of numerous rape cases, it seemed that Texas juries, particularly in rural communities, are inclined to place the burden of proof on the defendent immediately upon the injection

of the word "sex" in the case. Juries often will give somebody 5 years for murder and 25 years for rape.

Mr. Vance said that our discussion goes to the heart of what we are doing in the revision, and that the difference seems to be that some are arguing for giving the judge a broad sentencing range to cover all cases of rape, while others are arguing for specific categories within which the different factual situations will fall.

Mr. Barlow moved to abolish aggravated rape and punish all rape as a first degree felony. Mr. Vance seconded the motion. In discussing the motion Mr. Johnson noted that studies show that approximately 70% of all rape cases involve voluntary social companions. Mr. Vance said that in practice the police send 9 out of 10 complainants home and the grand jury will not indict more than half of those. And then half of those convicted are given probation. Mr. Vance admitted the existence of many phony rape complaints, but this should not detract from the seriousness of forcible rape.

Mr. Daugherty said that he had discussed the matter of rape with his wife and in her opinion men regard rape as a much more serious offense than women do except in cases involving extreme violence. Mr. Johnson agreed that men look upon rape as always a very serious offense although there are many cases where the woman is walking around the next day and, while her feelings may be badly hurt and there may even be some psychological damage, generally it is not like the lasting damage resulting from assault or attempted murder. Mr. Johnson said the legislature has an obligation in defining penal offenses to separate the situations where there is serious bodily injury to the woman from the situations where there is an overreaching or a little bit of force or a little bit of coercion, but no serious bodily injury inflicted.

Mr. Barlow said that we have conflicting theories of concern here. In his opinion what should be done is to set up a broad framework in which to allow the judge and jury to consider the various aggravating and mitigating circumstances in each case; this best could be done by making all rapes felonies of the first degree. Mr. Daugherty disagreed, arguing that the new code needs rational distinctions both to accommodate the myriad varieties of conduct and to give the prosecutor some discretion in dealing with specific conduct. Certainly

the analogous distinctions created in the homicide area were necessary and desirable. Judge Brown said it all boils down to whether two black eyes are more serious than deep psychological damage to a woman.

Mr. Cofer inquired whether there is any way to measure this psychological damage. Dr. George Parker, Associate Professor of Psychology, replied that he felt some women would be very seriously offended and injured in rape cases, but that there would be great individual differences. Thus, although it would not be impossible to diagnose and measure the extent of psychological damage, in many cases the measurement would be imprecise. Mr. Cofer suggested adding to the aggravated rape section a category of serious psychological damage; however, he feared that it would be impossible to establish.

Mr. Gresham said he was unwilling to give judges unlimited discretion in sentencing. If we abolish aggravated rape judges will be able to give the same treatment to the man who compels submission through a threat of loss of job and the man who takes a pistol and holds it to a woman's head to force her to submit and then pistol-whips the victim into unconsciousness.

Dr. Killinger related an interesting study conducted on disparity in sentencing. The researchers made up a single fact situation and a presentence investigation report and sent them to various district judges around the United States. The judges gave from 6 months to 15 years on the same fact situation and presentence report! The most relevant variable was the background of the judge: the southern, Methodist, and Baptist judges were generally inclined to severe penalties while the New England and Catholic judges usually awarded less severe penalties. Dr. Killinger also mentioned that parole boards are more likely to parole a murderer earlier than a rapist.

Mr. Daugherty mentioned that there is so much disparity in federal sentences that the federal judicial conference is trying to set guidelines for the federal districts judges.

Judge Sharpe called for a vote on the motion to abolish aggravated rape and make all rape a felony of the first degree. The motion failed 5 to 2.

Mr. Johnson directed the discussion to Section 213.2, Aggravated Rape. He proposed to change the

word "anyone" to "another" so Subsection (a)(1) would read "he causes serious bodily injury to another . . . ." This change will avoid enhancing the rape penalty for the person who commits rape and then breaks his own leg. Mr. Johnson said he was also proposing a new phrase to cover the whole rape transaction. As originally proposed Subdivision (1) read "he causes serious bodily injury to anyone in the course of the rape." It is extremely difficult to define the entire criminal transaction or episode, and Mr. Johnson suggested that we note this and use whatever phrase is adopted for the jeopardy provisions on which we are now working.

Judge Brown said that he did not believe that anybody on the committee disagreed with the proposition and that we should cover violence in preparation of the rape, during the rape, and immediately after the rape, and the committee directed the staff to redraft the subdivision to accomplish this purpose.

Judge Brown moved to add to Aggravated Rape a Subdivision (3) reading, "that she is an inmate of a state mental institution and he knows that as a result of mental disease or defect she is incapable of appraising the nature of her conduct." He explained that what he was doing was taking Section 213.1(b)(4) and inserting it in aggravated rape and adding that provision that she be an inmate in a state institution. Mr. Daugherty questioned the limitation to a state mental institution. Judge Brown replied that he was anticipating the reaction of the legislature, which is always solicitous of women in the state mental institutions, but that he had no quarrel with removing the state limitation. Judge Brown said that the problem is that women in mental institutions are very easily overreached, and catching anyone abusing these women is extremely difficult.

Dr. Killinger suggested using the phrase "in an institution for treatment of mental disease or defect." Judge Brown agreed to accept Dr. Killinger's phrase.

The committee unanimously approved Judge Brown's amendment.

The committee next discussed Section 213.3, Sexual Abuse. Mr. Johnson explained that this offense is essentially forcible sodomy. Judge Brown observed that the committee is in virgin territory. (Laughter)

Mr. Barlow moved to add to this offense relations with an animal. Judge Brown explained that the reporters had determined to cover this in offenses relating to cruelty to animals.

Mr. Johnson explained that bestiality was omitted because he had not found a case reported in the last 20 years involving sexual intercourse with animals.

Carol Vance noted that some of the people involved in such acts are sent to mental institutions while most others plead guilty. He said that not long ago they had one case tried to a jury where the husband forced the wife to have relations with the family's Great Dane. In another case a man was charged with committing oral sodomy on a mule. These situations need to be covered because, for example, in the mule case the act was performed in view of children.

Mr. Johnson replied that public acts would be covered and Judge Brown inquired whether relations with an animal could be covered under a statute dealing with lewd and lascivious conduct. Mr. Searcy suggested that such acts might be covered under public indecency, but Judge Brown disagreed, saying the public indecency section as drafted would not reach the case of the man and the mule because the man did not expose himself.

Mr. Johnson resumed his explanation of the sections on sexual abuse and aggravated sexual abuse. He explained that these provisions correspond almost exactly with the rape and aggravated rape provisions. The consensual elements found in the rape provisions are identical with those in Section 213.1(b) except for minors and changes to cover homosexual as well as heterosexual conduct. In Section 213.3(a) the words "and with the intent of arousing or gratifying the sexual desire of any person" were relocated from the definition of "deviate sexual intercourse;" this was not intended to change the substance, but merely to relocate the element of culpability for clarity.

Mr. Johnson noted that Section 213.3(a)(1) covers the situation where the actor engages in deviate sexual intercourse with a nonconsenting person not his spouse whether the person is of the same or the opposite sex. Subsection (a)(2) covers the situation where the actor compels two other people to perform sexual intercourse or deviate sexual intercourse. This is intended to catch the person who is aroused or gratified by observing other people perform the act. Mr. Johnson explained that this is not covered in the M.P.C. or the revisions of other states, but it needs to be covered.

Judge Sharpe questioned whether this sort of conduct could not be covered in our general provisions concerning principals and accessories. Mr. Johnson said compelling two <u>non-consenting</u> people would not be covered.

Mr. Gresham asked if it were true that what these sections do is exclude from the penal law consenting adults engaging in homosexual relations in private. Mr. Johnson said this was true and that conduct with a spouse is also excluded. Mr. Barlow said this was a fundamental issue the committee should resolve now and that he was opposed to legalizing homosexuality. Mr. Searcy emphasized that our solicitation provision would catch the homosexual soliciting another person to engage in deviate sexual intercourse. Mr. Barlow said that you would have every deviate in the United States coming to Texas and he didn't want to open Texas to homosexuals by legalizing it. Judge Brown noted that on the other hand, sending a homosexual to prison is more like a reward than punishment.

Mr. Cofer asked what the other states are doing. Mr. Johnson explained that Illinois has actually enacted provisions similar to those proposed, and several other states are proposing that homosexual conduct between consenting adults not be covered in the penal law. He said that he had not found any commentary about problems in Illinois because of the new law. Mr. Vance said he had talked to the district attorney of Chicago, who mentioned finding colonies of homosexuals in hotels. Mr. Vance said that he is opposed to homosexuality on moral grounds but, in reply to Judge Brown's comment that the law rewards homosexuals by sending them to the penitentiary, he said he didn't object to reducing the punishment.

Mr. Glen Conner said he would like to express the opinion of police officers with whom he had discussed the problem. Mr. Conner reported that the general consensus is that this would be difficult to deal with under solicitation because you would be dealing with the solicitation of a legal act. Mr. Conner noted that in England the police have had a very difficult time in dealing with prostitution from the standpoint of prohibiting merely solicitation. Mr. Conner said that the general consensus of the police officers with whom he has spoken is that the act itself should be made an offense. The reason for this is that the act itself is so destructive of moral fiber and so insidious--especially regarding the young.

Mr. Johnson inquired whether the committee also wanted to cover heterosexual deviate sexual intercourse. Mr. Conner, Judge Brown, and the rest of the committee agreed that they did not want to deal with consensual heterosexual deviate sexual intercourse. Mr. Gresham

announced that he had changed his thinking and if homosexuality is made a simple misdemeanor he would go along with it. Mr. Vance recommended making it a gross misdemeanor.

Mr. Johnson objected to giving a person a year in jail for a consensual act conducted in private between two adults; three months is sufficient for this type of conduct.

Mr. Searcy outlined a novel alternative proposed by an Englishman after the Wolfenden report was released recognizing the very real problem of the public believing that what is not condemned by penal law is thereby approved. He said the alternative to making consensual sodomy an offense is to condemn it (without a penalty) in the penal code. Mr. Daugherty noted that the prohibition against remarriage within one year after divorce for cruelty is similar in that there is no penalty for violation. Mr. Searcy said he appreciated a legislature's embarrassment when confronted with the assertion that it is approving homosexual conduct by taking it out of the criminal law; the alternative, however, provides a rebuttal to this assertion.

Mr. Daugherty asked Dr. George Parker whether there is any validity to the law enforcement view that between ages 16 and 21 young males are more inclined to become involved in homosexual acts. Dr. Parker responded that there is certainly some truth to the law enforcement view. For example, psychologists have found at the University of Texas that some students who are away from home for the first time in their lives and living in dormitories suddenly experience feelings and interpersonal attractions they never felt before. But they may have the same experience anytime they come in contact with large groups of males, as in the service.

Dr. Parker said there are essentially two arguments supporting penal sanctions. One is that there is something wrong with this conduct--it is morally, basically sinful conduct, it is unnatural. The other argument is that if we don't have some kind of legal stipulation, with or without teeth, it is going to lead to a massive breakdown of moral fiber and we will be surrounded by male homosexuals because a lot of the youngsters are going to be "turned on" by this. He doesn't think there are any good data to substantiate this argument. We can talk about how we feel about it but there are no data to back anyone up. There are some data to back up a parallel situation, however. For a long

time there has been a proscription, with in many cases heavy penal sanctions, against pornographic literature. The justification usually runs that if youngsters see these things it will turn them into raging sexual monsters and we'll really have our hands full. In Denmark recently the ban on pornographic literature was lifted. What happened was that sales of this sort of literature shot up enormously for a couple of weeks and then very rapidly tapered off so that now there is very little market for pornographic literature in Denmark. People are no longer interested in it because it is no longer illegal. Dr. Parker said that he is not altogether sure that we can make much headway by having legal sanctions against something that he is not sure is a legal problem.

Judge Brown asked how the representative from Polk County could go back home and explain why he endorsed homosexuality. Mr. Johnson suggested in reply that the committee raise the age in the sections dealing with children to 20 or 21 and at the same time draft a section punishing homosexuality in case the legislature insist upon it. Mr. Travis Shelton agreed.

Dr. Killinger said he was probably the only one at the meeting who lived through the McCarthy era in Washington and who saw great injustices done because homosexual activities in private were illegal. Many good people were hurt by the laws although they had made a good adjustment with their problem and were living productive lives.

Mr. Gresham moved that the draftsmen prepare an alternative section making homosexuality between adults in private a gross misdemeanor.

Mr. Cofer moved to amend Mr. Gresham's motion to express the committee's recommendation for inclusion of the section; Mr. Vance seconded the motion.

Judge Brown asked Dr. Parker whether it is true that the prognosis for curing confirmed homosexuals is generally bad. Dr. Parker agreed that in a large majority of cases the prognosis is grim.

Judge Sharpe called for a vote on the motion to include in the new code a section prohibiting homosexual conduct between consenting adults in private and classifying it a gross misdemeanor. The motion carried 5 to 4.

Mr. Johnson asked if there was further discussion on Section 213.3, Sexual Abuse. He said the section would incorporate the same changes that were made

in Section 213.1. Judge Sharpe called for a vote on Section 213.3 with the changes and the committee unanimously approved it.

Mr. Johnson then presented 213.4, Aggravated Sexual Abuse. He asked if the committee wanted the same changes in this section as were made in the aggravated rape section 213.2. The committee agreed and approved Section 213.4.

Mr. Johnson next directed the discussion to Section 213.5, Sexual Assault. He explained that he included this section because a similar one was included in the Model Penal Code. Nevertheless, he recommended, as the reporters had recommended, that this section not be included. The reason for the recommendations is that Texas does not now cover this type of conduct as a sex offense, but as a species of assault. Moreover, the section would duplicate the offensive touching provision of our proposed assault section, 211.1(c). Mr. Travis Shelton moved that we eliminate Section 213.5, Sexual Assault, as recommended by the reporters. His motion was adopted unanimously.

Mr. Johnson then presented Section 213.6, Public Indecency. He explained that this section prohibits sexual acts committed in public. Mr. Cofer noted that the penalty classification would have to be raised to gross since the committee so ranked private homosexuality, for example.

Mr. Daugherty asked whether this was meant to cover some of the conduct now covered by Texas vagrancy law dealing with lewd or obscene acts in a public place. He also asked about including evidentiary safeguards in this area. He recalled that a couple of federal cases hold that the uncorroborated testimony of one nonparticipating witness to a lewd act is insufficient, but Texas law is otherwise and should be changed to prevent widespread abuse.

Judge Brown said that the main thing that bothers him about the indecent exposure is the definition. Judge Brown said we don't want to make it so that you can't even go into a public restroom.

Mr. Johnson read the definition of "indecent exposure" in Section 213.0(2): "exposure of the anus or any part of the genitals (A) with the intent of gratifying or arousing the sexual desire of any person; or (B) with knowledge his conduct is likely to offend or alarm

any person." Mr. Johnson noted that he had initially also defined "public place," but the reporters rejected any attempt to define "public place," preferring to incorporate the concept of publicness in the offense itself. By doing this it is possible to make publicness depend on the audience rather than the location.

Mr. Johnson noted that the proposed definition of "indecent exposure" is broader than that adopted by most other jurisdictions. Many have adopted a definition requiring exposure of the genitals with the intent of arousing or gratifying the sexual desire of the person and with knowledge that the conduct is likely to offend or harm any person. This places a difficult proof burden on the prosecution and also limits the exposure to the genitals.

Carol Vance recommended that the committee consider changing the penalties in the public indecency section. He moved to punish violations of Subsections (a)(1)-(3) as gross misdemeanors and of (a)(4) as a petty misdemeanor. The motion was adopted unanimously.

Mr. Johnson inquired whether this vote indicated that the committee approved the publicness concept embodied in Section 213.6.

Mr. Conner questioned whether the prohibition of an act of sexual intercourse in public required that the actor know a third person is present. Mr. Johnson said this was discussed at the reporters' meeting and the conclusion was that we are not so much concerned with the nature of the place but the presence of people who might be offended. Mr. Conner said that in some instances on public parking lots people are very embarrassed to look into the car next to them and witness an act of sexual intercourse.

Mr. Searcy said he thought the parking lot situation would probably be covered because people are likely to be present there. Mr. Johnson proposed to include a "likely to be present" provision in Section 213.6. When he originally drafted it, the section read "when he knows a person is likely to be present who is likely to be offended or alarmed by his act," the idea being to cover the situation where a person knows that another person is likely to come by, rather than to require that the actor know that a person is actually present.

Mr. Searcy asked whether anyone favored trying to come up with an exclusive list of places that will

always be public. The unanimous response was "no." Mr. Cofer moved to adopt Mr. Johnson's suggested phrase so the section reads, "A person commits public indecency if he engages in any of the following acts when he knows a person is likely to be present who is likely to be offended or alarmed by his act . . . ." The committee unanimously adopted Section 213.6, Public Indecency, with the approved changes.

Mr. Conners noted that bestiality was omitted and Mr. Vance moved to include a prohibition against sexual activities with animals; his motion was seconded.

Mr. Gresham and Judge Brown questioned the usefulness of trying to cover private conduct with animals, but agreed to include bestiality in the public indecency section and make it a gross misdemeanor.

Mr. Searcy inquired whether the term "bestiality" has a commonly accepted meaning. Several members of the committee said that they did not think it did. Judge Brown noted that the provision should cover both animals and fowl, and the reporter was directed to draft a bestiality offense.

Section 213.7, Rape of a Child, was next considered. Mr. Johnson explained that this section deals with what is commonly known as statutory rape. Probably its most controversial feature is lowering the age of consent to 16 years, but that 16 is as high or higher than the age used by most of the states that have recently revised their penal codes. The section also introduces an age differential so if the girl is 12 years or older but younger than 16, the boy must be at least 4 years older than she for there to be an offense. The theory of the age differential is to protect against overreaching of innocent young girls by experienced older men. This is the proper concern of the penal law, not the 16 year old boy who has intercourse with the 15 year old girl, often at her suggestion.

Mr. Shelton disagreed with the four year age differential. He noted that in most of these cases it is the girl who suffers by getting pregnant and the boy shouldn't get off so easy. Mr. Shelton didn't believe the committee should condone a 17 year old boy having intercourse with a 15 year old girl on the ground they are two kids doing what they want.

Mr. Barlow said he was most troubled about lowering the age of consent to 16. Mr. Gresham then asked Mr.

Shelton if he wanted to reduce the age differential, and Mr. Shelton replied that he saw no justification for any age differential. Mr. Vance agreed, pointing out that operation of the juvenile laws made an age differential unnecessary.

Judge Brown observed that a four year age differential may be too much. For example, he thought a 17 year old high school boy could very easily overreach a 13 year old junior high school girl.

Mr. Johnson said he would have no serious objection to modifying the age differential and that he had picked four years primarily because it was the Model Penal Code's suggestion.

Mr. Daugherty pointed out that girls 15 and 16 usually are more knowledgeable about sex than boys of the same age.

Mr. Johnson said it was extremely difficult for him to find the element of criminality where two kids are essentially experimenting. On the other hand, there is obvious culpability in the overreaching situation where the boy is older than the girl and on the basis of his age and experience influences her to participate in sexual intercourse.

Judge Brown moved to reduce the four year age differential to two years and adopt Section 213.7(a) as written; the motion carried 5 to 3.

Mr. Colvin moved to revise the present Texas law which provides a defendant in a statutory rape case a complete defense if the girl is over 15 and is of unchaste character; "unchastity" is established by a single prior act of sexual intercourse, even with the defendant.

Mr. Johnson noted that this rule would be changed by Section 213.7(b) which provides an affirmative defense to prosecution if the female had engaged <u>promiscuously</u> in sexual intercourse or deviate sexual intercourse. The requirement of promiscuity requires proof of more than one prior act of intercourse with more than one partner. Judge Brown moved the adoption of Section 213.7(b) as written and his motion carried unanimously.

In regard to Section 213.7(c), the penalty provision, Carol Vance recommended that rape of a child younger than 12 be a felony of the first degree. The motion

was seconded and unanimously carried. The effect of the motion is to make the second clause of Subsection (c) read: "rape of a child under Subsection (a)(2) is a felony of the first degree."

Bill Reid asked whether the committee approved the first clause of Subsection (c), making rape of a child between 12 and 16 a felony of the third degree; the committee agreed.

The committee recessed for lunch at 12:20 p.m.

The committee was called to order at 1:30 p.m. and Mr. Johnson presented Section 213.8, Sexual Abuse of a Child. He explained that the reporters recommended deleting Section 213.8(a)(2), reading: "he causes the child to engage in sexual intercourse or deviate sexual intercourse with a third person, whether the child is of the same or opposite sex from the third person," because they felt it was covered under the forcible rape section since force would be involved. In addition, the committee voted at the last meeting to include an offense dealing with enticing juveniles into immoral conduct.

Mr. Shelton asked what the definition of a child is. Mr. Johnson explained that we have not provided a definition of the child except as it is expressed in the definition of the offense. He pointed out that the ages are set out in each of the provisions dealing with children, and explained that the way it is drafted the child has to be under a certain age before it becomes an offense.

Mr. Barlow pointed out that the age differential in Section 213.8(b)(1) should be lowered to two years in order to conform with the rape of a child change. The committee was in agreement with this suggestion and directed Mr. Johnson to make the change.

In response to a question about whether Sections 213.7 and 213.8 were exclusive regarding intercourse offenses with children, Mr. Johnson replied they were not since if force is involved Sections 213.1-213.4 apply.

Mr. Shelton questioned whether Subsection (c) could be interpreted to apply to a child younger than 12 since its reference to Subsection (b)(1) adopted the language "younger than 16 years," which of course includes someone younger than 12. The committee agreed

this argument could be made and Judge Brown recommended rewording Subsection (c) to read "It is an affirmative defense to prosecution if the child is 12 years or older and [UNDER SUBSECTION (a)(1)] the alleged victim had, prior to the time of the offense charged, engaged promiscuously in sexual intercourse or deviate sexual intercourse." The committee unanimously approved this change and directed the staff to make a similar change in the related section, 213.7.

Judge Brown said there might be some problem with the exclusive listing of the circumstances under which there is no consent in the rape and aggravated rape and the sexual abuse and aggravated sexual abuse sections. He stated that, as Section 213.2 is written when a girl under 16 consents to sexual intercourse but the male also beats her up and inflicts serious bodily injury he may not be guilty of aggravated rape.

To take care of this problem Mr. Searcy suggested rewording Sections 213.2(a) and 213.4(a) to read "A male commits aggravated rape (aggravated sexual abuse) if he commits rape (sexual abuse) as defined in 213.1 or 213.7 (or 213.8). The committee approved this rewording in principle.

Mr. Shelton suggested making sexual abuse of a child a felony of the first degree if the child is under 12.

Judge Brown said his objection to this suggestion is that sodomy has never been the equivalent in punishment to rape. Judge Brown moved that the committee instead make sexual abuse and rape of a child between 12 and 16 a felony of the third degree and of a child under 12 a felony of the second degree. The committee adopted the motion.

The committee next considered Section 213.9, Indecency with a Child. Mr. Johnson explained that this section is designed to cover sexual contact or fondling with a child or indecent exposure to a child. Mr. Johnson noted that the reporters recommended requiring knowledge that the child is present rather than just an act of indecent exposure "in the presence of the child," to constitute indecent exposure.

Judge Sharpe recommended conforming Section 213.9(b)(1) to the age differential changes in Sections 213.7 and 213.8 and the committee unanimously approved the change.

Mr. Shelton moved that Subsection (b) should also be conformed to the affirmative defense changes in Sections 213.7 and 213.8. The committee agreed.

The committee next approved the proposed gross misdemeanor penalty in Subsection (c).

Bill Reid asked whether the staff could proceed on the assumption that an affirmative defense places the burden of injecting the issue on the defendant and when some evidence of the defense is in the record the burden of negating the defense beyond a reasonable doubt is on the prosecution. After some general discussion the committee agreed this assumption is correct.

The discussion then proceeded to Section 213.10, General Provisions. Mr. Johnson explained that Subsection (a) is new to Texas law and in fact until 1960 no state allowed mistake of age as a defense to statutory rape. Since 1960 when California allowed it by court decision, several states have permitted the defense of mistake of age. Subsection (a) provides that if the girl is younger than 12 the boy mistakes her age at his peril. If the girl is between 12 and 16, and the boy can convince the jury he reasonably believed her to be 16 or older, he has a defense. Mr. Johnson justified this defense on the ground that in many cases today it is extremely difficult to tell a girl's age when she is made up and dressed up to look older and more sophisticated. He also suggested that a jury will look very suspiciously at a defendant's claim that he believed the girl was 16 or older. Mr. Colvin agreed with this point since prosecutors always dress prosecutrix in pigtails and a pinafore. Judge Brown noted that this is known as "laundering" the girl.

Mr. Shelton was bothered about the formulation of Subsection (a) for the same reason he was bothered about Section 213.8(c) before it was reworded by the committee. Judge Brown suggested reversing the order of the two sentences to deal with the problem and the committee agreed with this approach.

Mr. Johnson then took up Section 213.10(b). He explained that, as originally drafted, this subsection included as an affirmative defense the fact that a child had been married, but the reporters recommended its deletion. The rationale for this defense is that, since girls may marry at 14 and thus acquire experience and sexual sophistication, the likelihood of their being overreached is considerably lessened and they don't need the special protection of the criminal law.

Judge Brown explained that the reporters' reason for recommending deletion was that a young girl might have run off and gotten married, but on the way to the honeymoon in the local motel, the parents caught

up with her and subsequently got an annullment. In these circumstances she should not lose the protection of the law designed for females too young to really know what they are doing.

Judge Sharpe posed the question of deleting Subsection (b) and the committee voted unanimously to delete it.

The committee next considered Subsection (c). Mr. Johnson explained that this provision is designed to cover the situation where a man and a woman are in fact cohabiting, regardless of the legal status of their relationship, and to prevent the woman from suddenly abandoning the relationship and shouting "rape" when her lover is less than gentle. Her remedy should not be the criminal law because she can always move out.

Mr. Shelton asked what the definition of "cohabiting" is. Mr. Johnson replied that he was depending upon the already well-developed case law to define and apply the word. He pointed out that Subsection (c) only requires cohabiting and not a holding out as husband and wife.

Some dissatisfaction was voiced by the committee members with the word "cohabiting" and there were various alternative suggestions like "living together" or "living together as man and wife." Mr. Searcy argued that this was exactly what "cohabiting" means.

Mr. Daugherty inquired whether this subsection applies to a child between 12 and 16 living with a man. Mr. Searcy replied it was not intended, but that it should be restricted by referring to Sections 213.1-213.4 by name.

Mr. Vance inquired whether the subsection would include the mistress of a man who is still living with his wife. Mr. Shelton thought it would because of the phrase "regardless of the legal status of their relationship."

Mr. Shelton asked whether the subsection would prevent prosecution of a man for rape who, after living with a woman for awhile, leaves her and six months later comes back and rapes her. Mr. Johnson replied that he drafted it to apply only while they are cohabiting. Mr. Shelton recommended inserting the word "while" in the second sentence, between "persons" and "cohabiting;" and after considerable discussion the committee agreed to this insertion.

Mr. Johnson then went on to discuss the second sentence in Section 213.10(c). It provides that "when the definition of an offense excludes conduct with a spouse or conduct by a woman, this does not preclude conviction of a spouse or a woman as an accomplice or principal in a sexual act that he or she causes another person, not within the exclusion, to perform."

Mr. Vance said that this is the law at present and if we come up with a good statement of the law of principals we won't need this provision.

Mr. Searcy recommended bracketing the provision and waiting until we get our draft of the law of principals and then deciding whether we need a special provision like the second sentence of Subsection (c). The committee unanimously adopted this recommendation.

Section 213.10(d) was next discussed. Mr. Johnson explained that this subsection probably doesn't change Texas law but rather codifies it. It means if the woman cannot make up her mind within three months whether she has been raped, there will be no prosecution. Mr. Reid observed that this gives the girl time to tell whether or not she is pregnant.

Judge Sharpe observed that this is a notice requirement rather than a statute of limitations. Mr. Johnson agreed and pointed out that a complaint does not have to be sworn out within three months but that the girl must notify some public authority within that time. Mr. Vance noted that he wouldn't mind reducing the time within which she has to make an outcry to 24 hours.

Mr. Johnson said that he would like to see the time reduced from three months to one month. Mr. Colvin and Judge Brown moved to reduce the notice period to one month. Judge Sharpe submitted the motion to a vote and the committee unanimously adopted it.

The discussion then focused on the meaning of the term "public authority."

Miss Linda West stated that in the offenses against public administration that she had defined "peace officer" as any person who can make an arrest or who has a duty to keep the peace or investigate offenses; this includes judges and district attorneys.

The committee favored this concept and directed the reporter to substitute it for "public authority." With these changes the committee approved Subsection (d) as written.

The committee next considered Section 213.10(e). This imposes a corroboration requirement unless the victim has made an outcry at the first reasonable opportunity.

Mr. Barlow moved to delete Subsection (e), but his motion failed for lack of a second.

Judge Sharpe asked whether it might be argued that the effect of Subsection (e) would be to reduce the offense from a felony to a misdemeanor if the testimony is not corroborated. The committee agreed this was not a plausible interpretation because the language bars conviction of the offense. Nevertheless, to prevent even this assertion Mr. Johnson suggested referring to the sections defining felonies in the first sentence.

Mr. Vance objected to applying Subsection (e) to offenses against children; Judge Brown agreed. Mr. Johnson said this was an oversight on his part and that this subsection was meant to apply only to Sections 213.1-213.4.

Mr. Daugherty asked Judge Brown what the effect of this subsection would be. He asked whether the Judge would tell the jury in his charge that they had to find the prosecutrix made an outcry at the first reasonable opportunity or that her story was otherwise corroborated by the evidence. Judge Brown replied the judge should so charge.

Mr. Glenn Conner observed that he had heard of cases of very serious rape where corroboration was extremely difficult to obtain. For example, a married woman attacked in her bedroom at night might submit to protect her child. There would be no evidence of force nor that the rapist, rather than her husband, had sexual intercourse with her.

The issue was raised as to when an insane woman would have a reasonable opportunity to make an outcry. Judge Brown said that in his opinion she would not have an opportunity until she had been restored.

Judge Sharpe asked whether the committee wanted to delete Subsection (e). The vote for deletion was three in favor and five opposed to deletion. Judge Sharpe interpreted this as a vote to leave the section in with the understanding that it shall not apply to offenses involving children or misdemeanors.

The discussion then went to Subsection (f). This provision would require an instruction to the jury to weigh a prosecutrix's testimony carefully in view of the difficulty of determining the truth with respect to alleged sexual activity. Mr. Johnson explained that he inserted this provision in his original draft and it is bracketed here because the reporters recommended that it be deleted. He inserted it primarily for discussion and it is derived from the M.P.C. He said that he did not have a strong feeling that it was necessary but would like to have the committee consider it.

Judge Brown noted that the majority of the states prohibit such comment and that he would recommend that we leave this provision out of the code. Judge Brown noted that this would be a radical change in the Texas law and that at present you would get reversed immediately if you did make such a comment.

Mr. Barlow said he would be willing to leave it in if the committee would compromise and also provide that the judge should instruct the jury that a man charged with rape has the most to lose in case he testifies in one of these cases.

Judge Sharpe posed the question to the committee as to whether there was any objection to deleting Subsection (f) from the draft. The committee had no objection to the deletion.

The discussion then went to Section 213.11, Examination of Victim or Complaining Witness. Mr. Johnson said that this provision would probably spark more controversy than anything that we have discussed. He noted that the reason for including the complaining witness here is that on occasion the victim will be a young child, and in this case the mother is really the complaining witness and she is allowed to testify to what her child told her even though the child is so young that she can't testify.

Mr. Johnson said he would like to discuss Subsection (a) first. This section would allow the defendant in a felony prosecution to file a written motion to show good cause, and the motion, if granted by the court, would order the alleged victim or complaining witness to submit to an examination by psychiatrist or other expert, which is intended to include psychologists, etc. The theory behind this, which is supported by a pretty good body of writing, is that this is an area peculiarly subject to fabrication by hysterical women.

Mr. Daugherty posed the example of tipping your hat to a woman on the elevator and her thinking that you have made a pass at her. Mr. Cofer posed the question whether even the experts could tell in these circumstances. Mr. Barlow said that he would go along with the provision if you would allow the prosecutor to be examined for taking the case and the defense counsel to be examined for assuming the defense. (laughter)

Judge Brown noted that we have now required outcry and corroboration in felony cases, and he believed that it might minimize the necessity of this provision. Mr. Johnson replied that while those provisions might help some, if the woman decides to fabricate she can say that it occurred last night rather than last week.

Judge Brown said that at the reporters' meeting there was considerable discussion on this. People are not as enlightened as we think and in the eyes of a lot of people going to a psychiatrist is almost as bad as being raped. If a rape victim knows that as soon as she makes a complaint that she is going to have to also undergo a psychiatric examination against her will, it will reduce the prosecutor's work a great deal because most of the women would just keep quiet rather than going through this ordeal.

Mr. Daugherty posed the question, "What is this psychiatrist going to do? What is he going to testify to?" Mr. Johnson replied that the defendant is going to have to show good cause in order to obtain this mental examination and if he can show that this woman has a history of mental problems or hallucinations or is a pathological liar and brings in a rape complaint every week, then it would be very useful to have a psychological examination of the witness.

Mr. Daugherty mentioned that he had recently heard of a federal case on this point at a recent institute which he and Mr. Colvin had attended. In that case there were three men charged with rape and the court held that the trial court should have submitted the complaining witness to an examination.

Mr. Colvin said he would like to present a case that has worried him very much and in which he was involved. "A 13 year old girl accused my client of rape. She was found in his home, and made an outcry when the officers came to the door, and in the medical examination male spermatoza were found. I asked that she be examined. I didn't have any authority to do

this and I was refused. However, at the examining trial, the judge did accord me the privilege of going over the same ground several times. We were fortunate enough to get her to break down after an hour and a half of cross examination. At that time she admitted it was a lie. She had had intercourse the night before with another man and the reason that she brought charges was because my client would not take her to an Elvis Presley movie that she had seen the day before. Now what if a case like that gets to court, and the trial judge does not permit you to go over the same ground so many times to break the girl down. She was one of the best liars I have ever seen. I think that that one case alone is sufficient to sustain Mr. Wigmore in his opinion that this should be done. I feel very strongly that this corroboration should be required."

Mr. Vance said that it was all very well to quote Mr. Wigmore on something like this but that great people on evidence often get quoted out of context. He would be very happy to accept their rules as a body and have them apply across the board but just to take one idea or another causes real problems. He believes that if we accept this provision where a person who complains has to be examined by a psychiatrist, then the next step would be to commit them to a hospital so they could be properly observed. This would be ridiculous. We already have a protection whereby the psychiatrist can be invited to observe the woman testify and then hypothetical questions can be posed to him as to his conclusions based upon her background and watching her testify.

Mr. Colvin asked how a defense attorney can even talk to the victim. Most of the time victims are instructed not to talk to anybody. Mr. Vance replied that this is where depositions come in. You can take depositions for good cause. Mr. Colvin said that the good cause is what bothers him and that's why he wants the next provision where you don't have to have good cause to get such an examination.

Mr. Barlow pointed out that we would be asking the rape victim to do something that Mr. Barlow wouldn't want to do himself.

Mr. Colvin said that he thought when you are considering putting a man away for several years that this minor inconvenience to the alleged victim is inconsequential.

Judge Sharpe directed attention to Subsection (d) which states: "The examining expert shall be available to the state and the defendant for consultation, and may be called as a witness at the time of trial by either party." This means that the state may call the psychiatrist in to bolster the testimony of the victim.

Judge Brown replied that that was apparently so. Mr. Vance pointed out that bolstering violates every rule of evidence of which he is aware.

Mr. Daugherty again asked what the psychiatrist could testify about; he asked whether the psychiatrist would be testifying to his opinion on whether she is telling the truth or not. Judge Brown said that he thought it would probably mean the psychiatrist could come in and say, "I examined this girl, she is a very well adjusted and apparently truthful girl."

Mr. Johnson said that he drafted this in order to make the section a two-edged sword that the defendant would not want to use in every circumstance.

Mr. Vance posed the circumstance where the psychiatrist examines a girl. The girl has been raped. She comes in. She's going to be examined. Anyone walking down the street can have all sorts of personality disorders that can be brought out by the psychiatrist. Chances are the psychiatrist is not going to say he thinks she's lying or he thinks she's telling the truth. He would say, "Well, she could possibly be telling the truth, then again, she could possibly be lying. I found this, I found that." Then you'd be lining up all her personality disorders and maybe she <u>is</u> crazy but maybe she was also raped.

Mr. Conner said that he knew of several cases in which the police themselves, in connection with the district attorney's office, had used a polygraph and concluded after the examination that the girls were lying. In one case a girl admitted that she was lying and in another case the circumstances of the case and the results of the polygraph examination led the police to believe that there was no substance to her charge.

Mr. Shelton said that he was afraid that we are about to punish many innocent victims in order to try to exclude a few isolated cases. "I just do not feel rape victims should be subjected to a compulsory psychiatric examination in order to protect the isolated instance."

Mr. Cofer said that the purpose of this provision would be to find the truth and that he did not believe that it would achieve it. Mr. Barlow moved that the whole provision, Section 213.11, be deleted.

Professor Parker of the psychology department was asked to comment on this provision. Dr. Parker said that he was in agreement with the objections raised by several members of the committee to instituting this procedure as a matter of course in all rape cases. He said that he thought he probably would be personally offended if he were put in a position of being forced to go to a psychiatrist for examination. One of the reasons is that he might feel it was irrelevant. However, he did believe that in some cases the testimony of an expert might be valuable in helping to make an assessment. It may be that a psychiatrist could indicate that there is some kind of a psychotic process involved with the particular girl or, on the basis of some other examinations, that she tends to fabricate and lie and make up stories. He does not think that this should be confused in any sense with the kind of situation where a psychiatrist can find something wrong with any of us. However, he feels this is beside the point. He assumed that a jury and a court would be able to separate the wheat from the chaff and use the information concerning the defendant which is useful and valid and relevant to the question. However, he said he could imagine some situations where the testimony of a psychiatrist could be valuable in helping to decide whether the girl is in fact psychotic and therefore quite likely to be making something up. He also noted that it would be very useless in a lot of other cases. For this reason, he believes that the suggestion that all victims of rape should be cleared or checked out beforehand by a psychiatrist is undesirable, and he would not want to see that as a routine procedure. However, he emphasized that the testimony which an expert could offer is not all "palm reading" and there would be much valuable information which could be offered on the basis of some very good tests and on the basis of some very good interview sessions.

Mr. Colvin suggested that perhaps any possible abuse of this examination could be cured by adopting Subsection (a) and deleting Subsection (b). This would permit the court to order an examination if it finds good cause while the defendant would not be able to insist upon an examination as provided in Subsection (b).

Judge Sharpe said that he had tried many cases where the complaining victims and even some of the witnesses were very clearly crazy and he would have liked to have had them examined. However, he thought that this might just clutter up our law.

Mr. Daugherty said that he thought that the case law from the federal courts would assist in this regard. As Mr. Daugherty remembered it, the case involved a girl whom the defendants charged as a nymphomaniac. One of the circuit courts said that this girl should have been examined because she had a history of mental problems.

Mr. Vance questioned whether the possibility of abuse could be cured by restricting this to a showing of good cause. In many cases, defense attorneys who are defending these cases don't like to be subject to the charge of providing an inadequate defense and being an incompetent counsel. So all the lawyers who are handling rape cases are going to be making this motion and argue strongly for it. He believes that this would be opening up Pandora's box.

Mr. Parker said he would like to make an additional point in this matter. He said that he thought that probably the people gathered on this committee are in the best position to determine whether a psychiatrist's testimony has been valuable in the past. This really belongs in here if it is a question of facilitating something and for no other reason.

Mr. Daugherty said that he thought that testimony from a psychiatrist might be helpful in cases where there is a history of psychological maladjustment on the part of the prosecutrix. But in the ordinary run-of-the-mill case, he wouldn't think it would be helpful.

Mr. Shelton said that having been a prosecutor and being familiar with the workings of the grand jury, he knows that the typical victim who comes to the prosecutor's office is subjected to a pretty good screening right there. Then her appearance before the grand jury is another pretty good test as to whether she is a pathological liar or not. These screens are sufficient protection for these isolated cases and we should not go overboard and subject all rape victims to this possible mandatory examination by a psychiatrist.

Judge Sharpe posed the question to the committee, "How many are in favor of the motion to delete the whole section?" The committee voted five to two in favor of deleting the whole section.

Mr. Johnson said there was one more issue which he would like to discuss. He said that he believed that the committee had passed upon the matter previously but he wanted to reaffirm its prior decision that the code will not include any provision on fornication. Mr. Johnson said that he discussed the matter in his report and had eliminated it.

Judge Shelton asked whether adultery remained in the code. Mr. Johnson explained that the gross cases of adultery would be prosecuted under the bigamous cohabitation provisions.

Mr. Conner reported that he had talked to a number of police officers at length about the sex crimes area in general. He reported that he found no particular opposition to the general idea of omitting adultery and fornication from the penal code except the kind of thing that is dealt with in several states under a kind of notorious cohabitation provision. Mr. Conner cited a case of which he was personally aware while living in an apartment in Chicago. The neighbor was a man who was divorced and who had at least four girlfriends whom he rotated night by night and brought to the apartment. Because the apartment walls were very thin, you could hear nearly everything that was going on, and everyone in the apartment building was aware of these offensive relationships. Mr. Conner said he was personally concerned and upset over this type of conduct and the influence it had on his children. Now, the police quite frequently have this problem arise and are expected to take some action. The police in Texas are concerned with some sort of statute which can be used to help protect decent people from having this sort of behavior flaunted in their faces.

Judge Sharpe said that we might be able to work out something called aggravated fornication.

Mr. Searcy suggested that perhaps the type of situation which Mr. Conner cited could be handled under the public indecency provisions. Mr. Conner said that he did not believe this would be satisfactory if the activity went on in the gentleman's own bedroom and no one saw it. There was just general knowledge as to what was going on. Mr. Conner said he was just

concerned that the police should have some way to deal with this situation where it upsets the community or neighborhood. The only other alternative might be a civil action to get the people evicted as a nuisance but most often people don't have the money to go through a civil action of this type. Another alternative would be to take the man out and shoot him, but we certainly want to discourage such self-help.

Mr. Vance said he was also concerned about the situation where parents come to him and say, "My 17 year old daughter is here in college and she has just moved in with her boyfriend and they have been living together in this apartment for a month and they're not married." What can the prosecutor do in this instance?

Mr. Daugherty offered the suggestion that they should have done more about training their girl to act properly when she was young. Mr. Vance said that he agreed that that was true in most crimes.

While the committee remained in basic agreement on the proposition which it had adopted before, that consensual heterosexual relations between adults in private should not be dealt with in the code, there was sympathy with the law enforcement position that some statute is needed to keep the open and notorious relationships from upsetting the whole community. However, no motion was made and no decision was made on this point.

The chairman adjourned the meeting at 3:30 p.m.

PENAL CODE REVISION PROJECT

Summary of Minutes

The State Bar Committee on Revision of the Penal Code met at the State Bar of Texas headquarters, Austin, Texas, on Friday, October 25, 1968, beginning at 9 a.m.

The committee considered the report on offenses against public administration prepared by James Barlow, Judge Archie Brown, and Judge A.A. Semaan, reporters, and Linda West, revisor. The following draft sections were approved by the committee and formally revised by the staff. The drafts proposed by the reporters, showing changes made by the committee, are reproduced in the body of the minutes.

> NOTE: The drafts set out in these minutes are tentative only and do not necessarily represent the final decision of the State Bar of Texas Penal Code Revision Committee on any of the areas covered. The drafts do not represent the views of the State Bar of Texas or of the Texas Legislature. Because of their tentative nature, none of the drafts may be quoted or cited without the project director's prior written permission.

TITLE 6. OFFENSES AGAINST PUBLIC ADMINISTRATION

Sec. 235.0. TITLE DEFINITIONS.

In this title ,unless the context requires a different definition,

(1) "agency" includes authority, board, bureau, commission, committee, council, department, district, division, and office;

(2) "benefit" means anything reasonably regarded as economic gain or advantage, including benefit to any other person in whose welfare the beneficiary is interested, but not an advantage promised generally to a group or class of voters as a consequence of public measures that a candidate engages to support or oppose;

(3) "bodily injury" means physical pain, illness, or any impairment of physical condition;

(4) "custody" means under arrest by a peace officer or under restraint by a public servant pursuant to an order of a court;

(5) "deadly weapon" means any firearm, or other weapon, device, instrument, material, or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is capable of producing death or serious bodily injury;

(6) "escape" means unauthorized departure from custody or failure to return to custody following temporary leave for a specific purpose or limited period, but does not include a violation of conditions of probation or parole;

(7) "government" means the state, a county, municipality, political subdivision, and any branch or agency of the state, a county, municipality, or political subdivision;

(8) "governmental function" includes any activity that a public servant is lawfully authorized to undertake on behalf of government;

(9) "governmental record" means anything

(A) belonging to, received, or kept by government for information; or

(B) required by law to be kept by others for information of government;

(10) "harm" means anything reasonably regarded as loss, disadvantage, or injury, including harm to another person in whose welfare the person affected is interested;

(11) "law" means the constitution or a statute of this state or the United States, a municipal ordinance, an order of the county commissioners court, or a rule authorized by and lawfully adopted under a statute;

(12) "oath" includes affirmation;

(13) "official proceeding" means any type of administrative, executive, legislative, or judicial proceeding that may be conducted before a public servant authorized by law to take statements under oath;

(14) "party official" means a person who holds any position or office in a political party, whether by election, appointment, or employment;

(15) "penal institution" means any place designated by law for the confinement of persons arrested for, charged with, or convicted of an offense;

(16) "public servant" means a person elected, selected, appointed, employed, or otherwise designated as one of the following even if he has not yet qualified for office or assumed his duties:

(A) an officer, employee, or agent of government;

(B) a juror or grand juror;

(C) an arbitrator, referee, or other person who is authorized by law or private written agreement to hear or determine a cause or controversy;

(D) an attorney at law or notary public when he is participating in performing a governmental function;

(E) a candidate for nomination or election to public office; or

(F) a person who is performing a governmental function under claim of right although he is not legally qualified to do so;

(17) "serious bodily injury" means bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ;

(18) "statement" means any representation of fact;

(19) "swear" includes affirm; and

(20) "rule" includes regulation.

ARTICLE 240. BRIBERY AND CORRUPT INFLUENCE

Sec. 240.1. BRIBERY.

(a) A person, corporation, or association commits bribery if he offers, confers, or agrees to confer any benefit upon a public servant, party official, or voter

(1) with intent to influence the public servant or party official in the exercise of his official powers or the performance of his official duties; or

(2) with intent to influence the voter not to vote or to vote in a particular manner.

(b) A public servant or party official commits bribery if he solicits, accepts, or agrees to accept any benefit on the representation or understanding that he will be influenced in the exercise of his official powers or the performance of his official duties.

(c) A voter commits bribery if he accepts or agrees to accept any benefit on the representation or understanding that he will not vote or will vote in a particular manner.

(d) Bribery is a felony of the third degree.

Sec. 240.2. THREATS AND OTHER IMPROPER INFLUENCE.

(a) A person, corporation, or association commits an offense if

(1) he threatens harm to a public servant with intent to influence him in the exercise of his official powers or the performance of his official duties;

(2) he threatens harm to a voter with intent to influence him not to vote or to vote in a particular manner; or

(3) he privately addresses a representation, entreaty, argument, or other communication to any public servant who exercises or will exercise official discretion in a judicial or administrative proceeding with intent to influence the outcome of the proceeding on the basis of considerations other than those authorized by law.

(b) An offense under this section is a gross misdemeanor unless the threat if carried out would be a felony, in which event the offense is a felony of the third degree.

Sec. 240.3. TAMPERING WITH WITNESSES.

(a) A person, corporation, or association commits an offense if he offers, confers, or agrees to confer any benefit upon a witness or prospective witness in an official proceeding, or threatens harm to a witness or prospective witness in an official proceeding, with intent to influence the witness

(1) to testify falsely;

(2) to withhold any testimony, information, document, or thing;

(3) to elude legal process summoning him to testify or supply evidence; or

(4) to absent himself from an official proceeding to which he has been legally summoned.

(b) A witness or prospective witness in an official proceeding commits an offense if he solicits, accepts, or agrees to accept any benefit on the representation or understanding that he will do any of the things specified in Subsection (a).

(c) An offense under this section is a felony of the third degree.

Sec. 240.4. COMPENSATION FOR PAST OFFICIAL BEHAVIOR.

(a) A person, corporation, or association commits an offense if he offers, confers, or agrees to confer

any benefit upon a public servant as compensation for the public servant's having exercised his official powers or performed his official duties in favor of the actor or another.

(b) A public servant commits an offense if he solicits, accepts, or agrees to accept any benefit as compensation for having exercised his official powers or performed his official duties in favor of another.

(c) An offense under this section is a gross misdemeanor.

Sec. 240.5. RETALIATION FOR PAST OFFICIAL ACTION.

(a) A person, corporation, or association commits an offense if he harms a public servant or former public servant by any unlawful act in retaliation for anything the public servant did in his official capacity.

(b) An offense under this section is a gross misdemeanor.

[Sec. 240.6. GIFTS TO PUBLIC SERVANTS BY PERSONS SUBJECT TO THEIR JURISDICTION.

(a) A public servant in an agency exercising regulatory functions or conducting inspections or investigations commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows to be subject to regulation, inspection, or investigation by the public servant or his agency.

(b) A public servant in an agency having custody of prisoners commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows to be subject to custody by the public servant or his agency.

(c) A public servant in an agency carrying on civil or criminal litigation on behalf of government commits an offense if he solicits, accepts, or agrees to accept any benefit from a person against whom the public servant knows litigation is pending or contemplated by the public servant or his agency.

(d) A public servant who exercises discretion in connection with contracts, purchases, payments, claims, or other pecuniary transactions of government commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows is interested in or likely to become interested in any contract, purchase, payment, claim, or transaction involving the exercise of his discretion.

(e) A public servant who has judicial or administrative authority, or who is employed by or in a tribunal having judicial or administrative authority, or who participates in the enforcement of the tribunal's decisions, commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows is interested in or likely to become interested in any matter before the public servant or the tribunal.

(f) A public servant who is a member of or employed by the legislature or by an agency of the legislature commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows to be interested in any matter pending before or contemplated by the legislature or an agency of the legislature.

(g) An offense under this section is a gross misdemeanor.

Sec. 240.7. OFFERING BENEFITS.

(a) A person, corporation, or association commits an offense if he confers, offers, or agrees to confer any benefit upon a public servant that he knows the public servant is prohibited from accepting.

(b) An offense under this section is a gross misdemeanor.

Sec. 240.8. EXCEPTIONS.

Sections 240.6 and 240.7 do not apply to

(1) a fee prescribed by law to be received by a public servant, or any other benefit to which the public servant is lawfully entitled;

(2) a gift or other benefit conferred on account of kinship or a personal, professional, or business relationship independent of the official status of the recipient;

(3) a trivial benefit incidental to personal, professional or business contacts, which benefit involves no substantial risk of undermining official impartiality; or

(4) a contribution made under the election laws for the political campaign of an elective public servant when he is a candidate for nomination or election to public office.]

STAFF NOTE: The committee tentatively approved the sections on gifts subject to reconsideration at a later date.

ARTICLE 241. PERJURY AND SUBORNATION

Sec. 241.1. PERJURY.

(a) A person, corporation, or association commits perjury if, with intent to deceive and with knowledge of the statement's meaning,

(1) he makes a false statement under oath, or swears to the truth of a false statement previously made; and

(2) the statement is required or authorized by law to be made under oath.

(b) Perjury is a gross misdemeanor.

Sec. 241.2. AGGRAVATED PERJURY.

(a) A person, corporation, or association commits aggravated perjury if he commits perjury as defined in Section 241.1, and

(1) the false statement is made during or in connection with an official proceeding; and

(2) the false statement is material.

(b) Aggravated perjury is a felony of the third degree.

[Sec. 241.3. SUBORNATION.

(a) A person, corporation, or association commits subornation if he intentionally induces another to commit perjury or aggravated perjury.

(b) Subornation is a gross misdemeanor unless the perjury suborned is aggravated perjury, in which event subornation is a felony of the third degree.]

STAFF NOTE: The committee voted to retain subornation only if the conduct is not covered by the solicitation, conspiracy, or complicity drafts.

Sec. 241.4. MATERIALITY.

(a) A statement is material, regardless of the admissibility of the statement under rules of evidence, if it could have affected the course or outcome of the official proceeding.

(b) It is no defense to prosecution for aggravated perjury that the declarant mistakenly believed the statement to be immaterial.

(c) Whether a statement is material in a given factual situation is a question of law.

Sec. 241.5. RETRACTION.

It is an affirmative defense to a prosecution for aggravated perjury that the declarant retracted his false statement

(1) before completion of the testimony at the official proceeding; and

(2) before it became manifest that the falsity of the statement would be exposed.

Sec. 241.6. INCONSISTENT STATEMENTS.

An indictment or information for perjury or aggravated perjury that alleges that the offender has made statements under oath, both of which cannot be true, need not allege which statement is false. At the trial the prosecution need not prove which statement is false.

Sec. 241.7. IRREGULARITIES NO DEFENSE.

(a) It is no defense to prosecution for perjury or aggravated perjury that the oath was administered or taken in an irregular manner, or that there was some irregularity in the appointment or qualification of the person who administered the oath.

(b) It is no defense to prosecution for perjury or aggravated perjury that a document was not sworn to if the document contains a recital that it was made under oath, the declarant was aware of the recital when he signed the document, and the document contains the signed jurat of a public servant authorized to administer oaths.

ARTICLE 242. FALSE ALARMS AND OTHER FALSIFICATIONS IN OFFICIAL MATTERS

Sec. 242.1. FALSE ALARMS TO AGENCIES OF PUBLIC SAFETY.

(a) A person commits an offense if he knowingly causes a false alarm of fire or other emergency to be transmitted to or within an official or volunteer fire department or any other agency of government that deals with emergencies involving danger to life or property.

(b) Except as provided in Subsection (c), an offense under this section is a gross misdemeanor.

(c) An offense under this section is a felony of the fourth degree if the false alarm results in

(1) bodily injury to anyone; or

(2) property damage of $200 or more.

Sec. 242.2. FICTITIOUS REPORTS TO PEACE OFFICER.

(a) A person commits an offense if

(1) he reports to a peace officer an offense or other incident within the officer's concern knowing that the offense or incident did not occur; or

(2) he makes a report to a peace officer relating to an offense or incident within the officer's concern knowing that he has no information relating to the offense or incident.

(b) An offense under this section is a simple misdemeanor.

Sec. 242.3. TAMPERING WITH OR FABRICATING PHYSICAL EVIDENCE.

(a) A person, corporation, or association commits an offense if, knowing that an official proceeding or investigation is pending or in progress,

(1) he alters, destroys, or conceals any record, document, or thing with intent to impair its verity or availability as evidence in the official proceeding or investigation; or

(2) he makes, presents, or uses any record, document, or thing with knowledge of its falsity and with intent to affect the course or outcome of the official proceeding or investigation.

(b) An offense under this section is a gross misdemeanor.

Sec. 242.4. TAMPERING WITH GOVERNMENTAL RECORDS.

(a) A person, corporation, or association commits an offense if

(1) he knowingly makes a false entry in, or false alteration of, a governmental record;

(2) he makes, presents, or uses any record, document, or thing with knowledge of its falsity and with intent that it be taken as a genuine governmental record; or

(3) he intentionally destroys, conceals, removes, or otherwise impairs the verity or availability of a governmental record.

(b) This section does not apply to lawful destruction of governmental records.

(c) An offense under this section is a gross misdemeanor unless the actor's intent is to defraud or harm another, in which event the offense is a felony of the fourth degree.

Sec. 242.5. IMPERSONATING A PEACE OFFICER.

(a) A person commits an offense if he impersonates a peace officer with intent to deceive another.

(b) An offense under this section is a gross misdemeanor.

Sec. 242.6. IMPERSONATING A PUBLIC SERVANT.

(a) A person commits an offense if he impersonates a public servant, other than a peace officer, with intent to induce another to submit to his pretended official authority or to rely upon his pretended official acts.

(b) An offense under this section is a simple misdemeanor.

ARTICLE 243. OBSTRUCTING GOVERNMENTAL FUNCTIONS

Sec. 243.1. OBSTRUCTING ADMINISTRATION OF LAW OR OTHER GOVERNMENTAL FUNCTIONS.

(a) A person, corporation, or association commits an offense if he intentionally obstructs, impairs, or hinders the administration of law or the performance of a governmental function by force, physical interference or obstacle.

(b) An offense under this section is a gross misdemeanor.

Sec. 243.2. RESISTING ARREST.

(a) A person commits an offense if he intentionally prevents or obstructs a person he knows is a peace officer, or a person he knows is directed by a peace officer, from effecting an arrest of the actor or another

(1) by using force against a peace officer or another; or

(2) by using any other means creating a substantial risk of causing bodily injury to a peace officer or another.

(b) It is an affirmative defense to prosecution under this section that, prior to any resistance by the actor, the peace officer used unnecessary force to effect the arrest.

(c) Except as provided in Subsection (b), it is no defense to prosecution under this section that the arrest was unlawful.

(d) An offense under this section is a gross misdemeanor unless the actor used a deadly weapon to resist the arrest,

in which event the offense is a felony of the fourth degree.

Sec. 243.3. EVADING ARREST.

(a) A person commits an offense if he intentionally flees from a person he knows is a peace officer who he knows is attempting to arrest him.

(b) An offense under this section is a simple misdemeanor.

Sec. 243.4. HINDERING APPREHENSION OR PROSECUTION.

(a) A person, corporation, or association commits an offense if, with intent to hinder the arrest, prosecution, conviction, or punishment of another for an offense,

(1) he harbors or conceals the other;

(2) he provides or aids in providing the other with any means of avoiding arrest or effecting escape; or

(3) he warns the other of impending discovery or apprehension.

(b) It is an affirmative defense to prosecution under Subsection (a)(3) that the warning was given in connection with an effort to bring another into compliance with the law.

(c) An offense under this section is a gross misdemeanor unless the person aided was subject to arrest, prosecution, conviction, or punishment for a felony, in which event the offense is a felony of the fourth degree.

Sec. 243.5. COMPOUNDING.

(a) A person, corporation, or association commits an offense if he solicits, accepts, or agrees to accept any benefit in consideration of refraining from reporting to a peace officer the commission or suspected commission of an offense.

(b) A complaining witness commits an offense if he solicits, accepts, or agrees to accept any benefit in consideration of abstaining from, discontinuing, or delaying the prosecution of another for an offense.

(c) It is an affirmative defense to prosecution under this section that the benefit did not exceed an amount the actor believed to be due the injured party as restitution or indemnification for economic loss caused by the offense.

(d) An offense under this section is a gross misdemeanor.

Sec. 243.6. BARRATRY.

(a) A person, corporation, or association commits barratry if, with intent to obtain a benefit for himself or to harm another,

(1) he institutes any suit or claim in which he knows he has no interest;

(2) he institutes any suit or claim that he knows is false; or

(3) he solicits employment to prosecute or defend a suit or to collect a claim.

(b) Barratry is a gross misdemeanor.

ARTICLE 244. ESCAPE AND BAIL JUMPING

Sec. 244.1. ESCAPE.

(a) A person arrested for, charged with, or convicted of an offense commits an offense if he escapes from custody.

(b) Except as provided in Subsection (c), an offense under this section is a gross misdemeanor.

(c) An offense under this section is a felony of the fourth degree

(1) if the actor was charged with or convicted of a felony;

(2) if the actor was confined in a penal institution; or

(3) if the actor used or threatened to use a deadly weapon to effect his escape.

Sec. 244.2. PERMITTING OR FACILITATING ESCAPE.

(a) A public servant commits an offense if he recklessly permits or facilitates the escape of another.

(b) A person commits an offense if he knowingly causes or facilitates the escape of another.

(c) This section applies only to permitting, causing, or facilitating the escape of another who is in custody pursuant to

(1) arrest;

(2) a charge or conviction of an offense;

(3) an allegation or adjudication of delinquency; or

(4) a statutory procedure authorizing involuntary commitment for mental illness, alcoholism, or drug addiction.

(d) Except as provided in Subsection (e), an offense under this section is a gross misdemeanor.

(e) An offense under this section is a felony of the fourth degree

(1) if the person in custody was charged with or convicted of a felony;

(2) if the person in custody was confined in a penal institution;

(3) if the actor used or threatened to use a deadly weapon to effect the escape; or

(4) if the actor was a public servant and intentionally permitted or facilitated the escape.

Sec. 244.3. EFFECT OF UNLAWFUL CUSTODY.

It is no defense to prosecution under Sections 244.1 or 244.2 that the custody was unlawful.

Sec. 244.4. IMPLEMENTS FOR ESCAPE.

(a) A person commits an offense if, with intent to facilitate escape, he introduces into a penal institution, or provides an inmate with, a deadly weapon or anything which may be useful for escape.

(b) An offense under this section is a gross misdemeanor, unless the actor introduced or provided a deadly weapon, in which event the offense is a felony of the fourth degree.

Sec. 244.5. BAIL JUMPING AND FAILURE TO APPEAR.

(a) A person released from custody by court order, with or without bail, on condition that he will subsequently appear at a specified time and place, commits an offense if, without lawful excuse, he fails to appear at that time and place.

(b) This section does not apply

(1) to a person charged with or convicted of an offense punishable by fine only; or

(2) to an appearance required as an incident of probation or parole.

(c) Except as provided in Subsection (d), an offense under this section is a gross misdemeanor.

(d) An offense under this section is a felony of the fourth degree if the offense for which the actor's appearance was required is classified as a felony and he knowingly failed to appear.

ARTICLE 245. ABUSE OF OFFICE

Sec. 245.1. OFFICIAL MISCONDUCT.

(a) A public servant commits an offense if, with intent to obtain a benefit for himself or to harm another,

(1) he knowingly commits an act relating to his office or employment that constitutes an unauthorized exercise of his official powers;

(2) he knowingly commits an act under color of his office or employment that exceeds his official powers;

(3) he knowingly refrains from performing a duty that is imposed on him by law or that is clearly inherent in the nature of his office or employment; or

(4) he knowingly violates a law relating to his office or employment.

(b) An offense under this section is a gross misdemeanor.

Sec. 245.2. OFFICIAL OPPRESSION.

(a) A public servant acting under color of his office or employment commits an offense if

(1) he intentionally subjects another to mistreatment or to arrest, detention, search, seizure, dispossession, assessment, or lien that he knows is unlawful; or

(2) he intentionally denies or impedes another in the exercise or enjoyment of any right, privilege, power, or immunity, knowing his denial or impediment is unlawful.

(b) An offense under this section is a gross misdemeanor.

Sec. 245.3. MISUSE OF OFFICAL INFORMATION.

(a) A public servant commits an offense if, in reliance on information to which he has access in his official capacity and which has not been made public,

(1) he acquires or aids another to acquire a pecuniary interest in any property, transaction, or enterprise that may be affected by the information; or

(2) he speculates or aids another to speculate on the basis of the information.

(b) An offense under this section is a felony of the fourth degree.

MINUTES OF THE MEETING OF THE
TEXAS STATE BAR COMMITTEE ON REVISION
OF THE PENAL CODE

Friday, October 25, 1968

Present: Committee Members Dean Page Keeton, Chairman; James Barlow; Samuel Biery; Judge Archie S. Brown; Hume Cofer; Emmett Colvin; Samuel Daugherty; George Gray; Judge Truman E. Roberts; Judge T. Gilbert Sharpe; Carol Vance.

Law Enforcement Advisory Committee Glen Conner; J.A. Knigge for Mr. Herman Short; Beverly Laws for R.A. Miles.

Advisory Committee on Corrections Luster P. Gollaher; Dr. George Killinger; Bill Thompson.

Staff Bill Reid, project director.

Texas Legislative Council Staff Seth S. Searcy III, chief revisor; Allen Herrington, Linda West, Maelissa Watson-Elmer, revisors.

Reporters Robert Dawson; Mike Rosenthal.

Guest Terry Weeks.

The Texas State Bar Committee on Revision of the Penal Code met on Friday, October 25, 1968, at the State Bar of Texas headquarters in Austin, Texas, at 9 a.m., to consider the report on offenses against public administration.

Dean Page Keeton called the meeting to order and turned the meeting over to Judge Brown, reporter. Judge Brown presented the report to the committee.

> NOTE: To reflect action taken by the committee on the drafts submitted, the following sections show additions by the committee underlined and deletions in brackets and capitals. The discussions and reasons for changes appear in the text.

Judge Brown explained that the committee previously considered the proposals on bribery and perjury, but that in continuing with the remainder of the report the reporters found it necessary to make changes in those sections. However, Judge Brown felt that it would be better to proceed through the new material and then point out the changes that were made in bribery and

perjury at the end of the report. The legislative council staff was directed to make corporations and associations liable for appropriate offenses.

Judge Brown presented Section 242.1 to the committee.

> Sec. 242.1. FALSE ALARMS TO AGENCIES OF PUBLIC SAFETY.
>
> (a) A person commits an offense if he knowingly causes a false alarm of fire or other emergency to be transmitted to or within an official or volunteer fire department or any other agency of government that deals with emergencies involving danger to life or property.
>
> (b) Except as provided in Subsection (c), an offense under this section is a gross misdemeanor.
>
> (c) An offense under this section is a felony of the fourth degree if the false alarm results in
>
> (1) bodily injury to anyone; or
>
> (2) property damage of $200 or more.

Dean Keeton questioned the use of the word "emergency." He suggested substituting "highly dangerous event." Judge Brown said that the term "emergency" had been construed in Texas law. Mr. Maloney asked if "emergency" should be defined. Dean Keeton said he did not know how to define it except in terms of events highly dangerous and likely to result in either serious bodily injury or substantial property damage. Judge Brown said that it should be not only highly dangerous but imminently dangerous because the time element is also important. The committee decided not to define the term.

George Gray asked why both official and volunteer agencies were covered. Judge Brown explained that there are both official and volunteer fire departments and the reporters wanted to make sure both kinds were included.

Dean Keeton questioned whether "agency" included county agencies. Mr. Searcy said that "government" included

county agencies and that the term "agency of government" was to be read together.

Mr. Conner asked if this section applied to false alarms to private agencies, such as ambulances. Judge Brown said "no." Dean Keeton said that private agencies should not be covered in this code because it deals with diversion of governmental resources.

STAFF NOTE: Dean Keeton directed the staff to consider a section on false alarms to private ambulances, wrecker services, and any other private enterprises dealing with emergencies to be included elsewhere in the code.

Judge Roberts questioned the gross misdemeanor penalty. Judge Brown suggested incorporating present law by making it a gross misdemeanor unless injuries resulted in which case the offense would be a felony of the fourth degree. Bill Reid referred to the comments and said that an injury might result from a true as well as a false alarm. Dean Keeton said that because some dangerous conduct results in the course of dealing with actual emergencies doesn't mean that a person who unnecessarily causes such conduct should not be punished. Mr. Searcy suggested making the offense a felony in all cases since the sentencing provision previously considered by the committee would allow the judge to reduce a felony to a misdemeanor. Mr. Conner pointed out that if the offense were a felony even the most minor false alarm would have to have the grand jury's attention.

Dean Keeton called for a vote on the section with the penalty section change to make it a fourth degree felony if bodily injury resulted. The committee voted 7 to 2 to approve the section as changed. Carol Vance suggested making property damage an aggravating factor. The committee voted to include property damage if the damage were substantial enough, using the same value standard that will make theft a felony. The committee approved this change.

Sec. 242.2. FALSE INCRIMINATION.

[(a) A PERSON COMMITS AN OFFENSE IF HE KNOWINGLY GIVES FALSE INFORMATION TO A LAW ENFORCEMENT OFFICER WITH INTENT TO INCRIMINATE ANOTHER.

(b) AN OFFENSE UNDER THIS SECTION IS A GROSS MISDEMEANOR.]

Dean Keeton asked if this sort of activity ought to be made a crime. He said the conduct was covered by at least two torts--defamation and malicious prosecution. Judge Brown pointed out that most of the other states have not included this offense in their revision. Carol Vance said that the statute might be helpful when someone comes in with a complaint which the police or the district attorney do not know whether to believe or not. The officer could say, "Look at this statute. Do you still want to proceed?"

Mr. Cofer said he thought that the need for protection from this sort of thing was less than the need for people to cooperate with law enforcement personnel. Mr. Cofer moved that this section be deleted. Judge Sharpe seconded the motion, saying in some instances people were afraid to tell what they knew whether it was true or not and that the harm done by the statute would outweigh any good that might be done by retaining it. Judge Brown agreed that there were people who feared retaliation even when they had valid information and stated that in San Antonio people were encouraged to call anonymously to report suspicious activities. Mr. Barlow said that he did not see the necessity of the section because in most instances the person signs a complaint so that he will be guilty of perjury if the complaint is false. He also said that it was impractical to file on complaining witnesses.

Dean Keeton asked for a vote on Mr. Cofer's motion to strike the section. The committee voted 8 to 3 to delete it.

Sec. 242.2. FICTITIOUS REPORTS TO <u>PEACE</u> [LAW ENFORCEMENT] OFFICER.

(a) A person commits an offense if

(1) he reports to a <u>peace</u> [LAW ENFORCEMENT] officer an offense or other incident within the officer's concern knowing the offense or incident did not occur; or

(2) he makes a report to a <u>peace</u> [LAW ENFORCEMENT] officer relating to an offense or incident within the officer's concern knowing that he has no information relating to the offense or incident.

(b) An offense under this section is a simple misdemeanor.

Mr. Daugherty asked if this section was meant to cover the situation where a person reports a car stolen in order to get the car back even though it was not stolen. Judge Brown said it was. Judge Roberts added that the section was to protect the police from wild goose chases.

Mr. Conner was concerned because the word "false" was not included in this section. He asked if a person who gave false information about an incident which did occur would be covered. Judge Brown said that he would possibly be covered by Subsection (a)(2) but that the reporters drafted this section with the previous section in mind. Since the committee deleted the false incrimination offense there would be a gap but if the committee amends this statute to include false information about the perpetrator of an offense then they have voted the previous section back in.

Mr. Vance asked about Subsection (a)(2) and its requirement that the actor know he has no information. He said it was pretty restricted. Judge Sharpe said that if the informant had even hearsay information he ought not to be covered by this section. Judge Brown agreed that if a person acted in good faith on hearsay information he should not be guilty of an offense. He said that the section is not intended to restrict people who have or believe they have information but is to punish people who knowingly give fictitious information to police officers.

Mr. Conner said one problem in police service is people filing false complaints against police officers. He said the investigation of these complaints was a tremendous waste of time and money. He asked whether a report of an incident would cover this sort of thing. Judge Brown said it would.

Dean Keeton said that he was a little concerned about the use of the term "incident." Judge Brown said that it was used to include the reports of suicide and other incidents which were not offenses.

The committee approved this section by a voice vote.

Sec. 242.3. TAMPERING WITH OR FABRICATING PHYSICAL EVIDENCE.

(a) A person, corporation, or association commits an offense

if, knowing that an official proceeding or investigation is pending or in progress,

(1) he alters, destroys, or conceals [OR REMOVES] any record, document, or thing with intent to impair its verity or availability as evidence in the official proceeding or investigation; or

(2) he makes, presents, or uses any record, document, or thing with knowledge of its falsity and with intent to affect the course or outcome of the official proceeding or investigation.

(b) An offense under this section is a gross misdemeanor.

Mr. Maloney questioned the use of the word "removes" in Subsection (a)(1). Dean Keeton said he thought that "conceals" would cover everything that needed to be covered. Mr. Maloney asked if he had a paper which was incriminating to his client in his file, would he be guilty of concealing evidence? Mr. Maloney added suppose this document had self-incriminatory matter that could not be reached by subpoena. Mr. Maloney said the statute would violate the fifth amendment. Mr. Searcy said he didn't think courts would construe the statute to cover privileged communications. Judge Brown suggested adding a subdivision similar to that in the compounding statute saying that the section does not apply to an attorney acting in proper representation of his client. Dean Keeton said that the intent requirement, to impair the availability or verity of the evidence, would be tough to prove. He said that obviously you had to show that the thing is admissible evidence. Mr. Maloney said that most lawyers would impair the availability of evidence as a matter of course. Dean Keeton said the problem of lawyers could be solved separately.

Mr. Biery asked where this sort of thing would come under in the administration of justice and in what kind of cases and how frequently. Judge Roberts said it would come up in corporate crimes or commercial crimes where people destroy corporate records. Judge Roberts said that also it would apply to civil suits. Judge Roberts said he saw more application in civil suits than in criminal actions.

Judge Sharpe said he didn't object to Subsection (a)(2) but that he had several objections to Subsection (a)(1). He said he knew many cases where lawyers would not make evidence available. Dean Keeton said that it could be easily disposed of by voting out "or remove." Judge Sharpe said that there was a constitutional question especially where it concerns lawyers. Dean Keeton said this section's validity is not destroyed in situations where the constitutional question would not be reached. Judge Brown said he wasn't being facetious when he suggested exempting an attorney acting in proper representation of his client. Mr. Colvin said it might diminish the effectiveness of Subsection (a)(1) to add the exception and he said he though it would apply whether it was spelled out or not. Dean Keeton recommended approving the section with the deletion of the word "remove." The committee voted 7 to 2 to approve the section as amended.

Dean Keeton said a general provision might be drafted about information coming to someone in a privileged manner. Judge Roberts said that existed whether drafted or not. Mr. Cofer said he didn't want to be in a position of violating the statute and then relying on the constitutional defense. Bill Reid said that the objection applied to three or four sections in the proposal. Mr. Darrouzet wrote a letter in connection with section on hindering prosecution which brought up the same objection in connection with that offense. The committee directed the legislative council staff to make a study of exempting lawyers as to privileged information that might be included in the sections to which the objection applied.

STAFF NOTE: The staff's preliminary research indicates that the justification section on execution of public duty will take care of the problem.

Sec. 242.4. TAMPERING WITH <u>GOVERNMENTAL</u> [PUBLIC] RECORDS.

(a) A person, <u>corporation</u>, <u>or</u> <u>association</u> commits an offense if

(1) he knowingly makes a false entry in, or false alteration of, a <u>governmental</u> [PUBLIC] record;

(2) he makes, presents, or uses any record, document, or thing with knowledge of its falsity and with intent that it be taken as a genuine <u>governmental</u> [PUBLIC] record; or

(3) he intentionally destroys, conceals, removes, or otherwise impairs the verity or availability of a governmental [PUBLIC] record.

(b) This section does not apply to lawful destruction of governmental [PUBLIC] records.

(c) An offense under this section is a gross misdemeanor unless the actor's intent is to defraud or harm [INJURE] another, in which event the offense is a felony of the fourth degree.

Mr. Daugherty asked if this section would cover altering or adding to an indictment or information. Judge Brown said it would apply only if the alteration or information were false. Judge Brown read the definition of public record: "'public record' means anything

(A) belonging to, received, or kept by government for information; or

(B) required by law to be kept by others for information of government."

Mr. Daugherty said the term "public record" seems to mean that it would be available to the public but as it is defined it is broader than that. Judge Brown said the definition was intended to be broader than the generally understood meaning of public record. Mr. Searcy suggested changing the term so as not to have confusion. Judge Brown recommended changing it to "governmental record." The committee approved this section by a voice vote, which incorporated the change to "governmental record." Dean Keeton questioned the use of the term "injure" in the penalty section. He asked if "injure" were defined. He said we have defined "harm" and we have defined "bodily injury." Judge Brown said that he thought "harm" would be a better term to use since it had been defined. The committee approved changing "injure" to "harm."

Sec. 242.5. IMPERSONATING A PEACE OFFICER.

(a) A person commits an offense if he impersonates a peace officer with intent to deceive another.

(b) An offense under this section is a gross misdemeanor.

Sec. 242.6. IMPERSONATING A PUBLIC SERVANT.

(a) A person commits an offense if he impersonates a public servant, other than a peace officer, with intent to induce another to submit to his pretended official authority or to rely upon his pretended official acts.

(b) An offense under this section is a simple misdemeanor.

Mr. Conner said he thought the impersonation of a peace officer carries with it the possibility of more imposition on other people than the impersonation of any other type of public servant. He said he would like to see the impersonation of a peace officer an offense without any intent requirement. Judge Brown said this statute would cover many things. He pointed out an example in San Antonio where a lawyer had his partner go over during the noon hour and sit on the bench and grant a divorce. Dean Keeton asked why not make it a per se violation. Mr. Maloney said they weren't asking to have an impersonation statute with no intent were they? Some of the committee members said they were. Judge Brown asked about "Car 54, Where Are You?" He said the actors who play the police officers are impersonating police officers. He said the statute had to be limited in some way. Dean Keeton asked if an intent to deceive would protect everyone and still cover Mr. Conner's suggestion. Judge Brown suggested rewording the statute to read "a person commits an offense if he impersonates a public servant with intent to deceive." Mr. Colvin asked what harm there was in a person saying "I'm a juror this week," when he is not a juror. He pointed out that juror was included in the definition of public servant. Judge Brown said if someone walked into a courtroom and pretended he was a juror and got selected for a jury he might be imposing on someone. Dean Keeton suggested leaving this section as it is to apply to public servants generally and then to have a different section applying to peace officers, but having a requirement of intent to deceive. Carol Vance suggested making impersonating a peace officer a gross misdemeanor. He said we should use the term "law enforcement officer" since it is defined in this article and "peace officer" is connected with the code of criminal procedure.

Seth Searcy suggested using the term "peace officer" in the penal code but adding a conforming admendment to the code of criminal procedure and transferring the definition of "law enforcement officer" there as a substitute for the list that is presently included. Dean Keeton said that we should use the term "peace officer" since it is the term that has been used in Texas. Dean Keeton summarized the committee action: it would be a gross misdemeanor to impersonate a peace officer with intent to deceive; and that it would be a simple misdemeanor to impersonate other public servants with the intent set out in the statute. The section as changed was passed unanimously.

Sec. 243.1. OBSTRUCTING ADMINISTRATION OF LAW OR OTHER GOVERNMENTAL FUNCTIONS.

(a) A person, corporation, or association commits an offense if he intentionally obstructs, impairs, or hinders the administration of law or the performance of a governmental function by force, physical interference or obstacle.

(b) An offense under this section is a gross misdemeanor.

Dean Keeton asked if this section would cover disruptive tactics at public institutions of education. Judge Brown said it would. Judge Roberts asked if the section protects state institutions and not S.M.U. and Baylor. Judge Brown said the section covers only governmental functions. Dean Keeton said private institutions might be covered under criminal trespass. He said we should also cover sit-ins, etc., at private institutions.

Dean Keeton questioned the meaning of the term "obstacle." Mr. Daugherty asked if "obstacle" were definite enough. Dean Keeton said he thought it was a pretty good section. He didn't think we could do much better with it. Mr. Colvin moved the adoption of the section as written. The section was approved by a voice vote.

Sec. 243.2. RESISTING ARREST.

(a) A person commits an offense if he intentionally prevents or obstructs a person he knows is a peace [LAW ENFORCEMENT] officer, or a person he knows is directed by a peace [LAW

ENFORCEMENT] officer, from effecting an arrest of the actor or another

(1) by using force against a peace [LAW ENFORCEMENT] officer or another; or

(2) by using any other means creating a substantial risk of causing bodily injury to a peace [LAW ENFORCEMENT] officer or another.

(b) It is an affirmative defense to prosecution under this section that, prior to any resistance by the actor, the peace [LAW ENFORCEMENT] officer used unnecessary force to effect the arrest.

(c) Except as provided in Subsection (b), it is no defense to prosecution under this section that the arrest was unlawful.

(d) An offense under this section is a gross misdemeanor unless the actor used a deadly weapon to resist the arrest, in which event the offense is a felony of the fourth degree.

Mr. Maloney pointed out that the use of deadly weapons under the aggravated assault section was a third degree felony. Bill Reid said that when the aggravated assault section was approved third degree was the lowest degree of felony that had been approved by the committee.

Mr. Colvin asked if this section applied only to legal arrest, and Judge Brown said "no." Judge Brown said that the time to determine whether the arrest is legal or not is in the court and not out on the street corner. Judge Brown said that we are interested in governmental functions and their performance in good faith, and in the protection of the peace officer. Mr. Colvin asked if the peace officer was a peace officer when acting illegally. Judge Brown said he was as long as he was acting under the color of his office. Judge Brown pointed out that we do preserve the right to defend one's self against excessive force used by the peace officer. Mr. Barlow said that with radio-controlled automobiles the officer in the field is in no position in many instances to test the validity of the arrest. Mr. Searcy said that he thought it would be clearer if there was an additional

subsection stating that it is no defense to prosecution that the arrest is unlawful. Mr. Searcy said that under present law a person resisting unlawful arrest can kill the peace officer. Mr. Daugherty asked if the person killed the officer while resisting an unlawful arrest, would he be guilty of murder? In other words, do we retain the defense of unlawful arrest in the case of murder? Dean Keeton said that he agreed that the person should not be allowed to resist an unlawful arrest by force, but that a person resisting an unlawful arrest in violation of this statute should not be guilty of murder. Mr. Daugherty said unlawful arrest could still be a defense under the homicide statute although it is not a defense under this statute. Mr. Searcy said that the unlawful arrest might be considered provocation, therefore reducing the homicide from murder to manslaughter but he wasn't sure about it. Mr. Searcy said this problem would be dealt with in the justification area. Dean Keeton asked for a vote on the question of doing away with the absolute privilege to resist an unlawful arrest. The committee approved the principle of making unlawful arrest no defense to resisting arrest. Carol Vance moved approval of this section as written with the addition of Subsection (c): "It is no defense to prosecution that the arrest is unlawful." The section was approved unanimously.

Sec. 243.3. EVADING ARREST.

(a) A person commits an offense if he intentionally flees from a person he knows is a peace officer who he knows is attempting to arrest him.

(b) An offense under this section is a simple misdemeanor.

Mr. Conner asked that a section be added to deal with the problem of someone escaping before he is arrested. Judge Brown said that was covered in the escape statute. Mr. Conner said it wasn't if the man was never in custody. He said that flight from arrest was a source of much of the force used by police officers. He said a person is encouraged to run because there is no additional penalty if he is caught. Dean Keeton asked if flight from arrest should be a crime. Mr. Vance said we should not put a premium on speediness. Sgt. Knigge brought up the problem of automobile chases when a person fails to stop when signaled to do so by a patrolman in a patrol car. The committee voted 9 to 1 to draft a statute making flight from arrest a crime.

[SEC. 243.3. REFUSING TO AID A LAW ENFORCEMENT OFFICER.

(a) A PERSON COMMITS AN OFFENSE IF, WHEN COMMANDED BY A PERSON HE KNOWS IS A LAW ENFORCEMENT OFFICER, HE REFUSES OR FAILS TO AID THE LAW ENFORCEMENT OFFICER

(1) IN EFFECTING OR SECURING THE ARREST OF ANOTHER; OR

(2) IN PREVENTING THE COMMISSION OF AN OFFENSE BY ANOTHER.

(b) AN OFFENSE UNDER THIS SECTION IS A PETTY MISDEMEANOR.]

Mr. Daugherty said that this statute means that a person is not subjecting himself to much of a penalty because he is a coward and refuses to aid an officer. Dean Keeton said he thought the section was pretty tough and he was doubtful about it. Judge Brown said it continued the present law. Mr. Conner said that it was grounded in the ancient Anglo-Saxon practice. Dean Keeton said he was disturbed about a private citizen accepting an order from an officer regardless of peril to life or limb. Mr. Gray said he shouldn't have to expose himself to serious bodily injury or death. Dean Keeton said a private citizen doesn't know how to do that sort of job; he isn't trained or qualified to do it. Judge Sharpe said he thought this statute put an unusual burden on people. Mr. Conner said that there should be an obligation, imposed by legal sanction, on citizens to help enforce the law. He said that removing an obligation imposed by legal sanction encourages the lack of involvement which everyone deplores. Mr. Gray said he might agree if the volunteer were reimbursed for any physical or property injury. Judge Roberts asked if we were going to say that people have no obligation to help enforce the law? Dean Keeton said "no," we're talking about criminal penalties for not aiding a peace officer. Mr. Barlow said he thought it would be a mistake to delete this section from the code. He said there ought to be something in the law that puts the obligation on the side of helping law enforcement officers. Mr. Searcy pointed out that citizens would have an obligation to aid in law enforcement because we are not repealing the code of criminal procedure articles which impose the duty, only the penal sanction. Citizens have the obligation to aid as they have the duty to vote, but no one suggests that not voting be made a crime. Judge Roberts moved that the section be adopted. The motion was seconded, but the committee voted 5 to 4 to delete the section.

Sec. 243.4. HINDERING APPREHENSION OR PROSECUTION.

(a) A person, corporation, or association commits an offense if, with intent to hinder the arrest, prosecution, conviction, or punishment of another for an offense

(1) he harbors or conceals the other;

(2) he provides or aids in providing the other with any means of avoiding arrest or effecting escape; or

[(3) HE CONCEALS OR DESTROYS EVIDENCE OF THE OFFENSE, OR TAMPERS WITH A WITNESS, INFORMANT, DOCUMENT, OR OTHER SOURCE OF INFORMATION, REGARDLESS OF ITS ADMISSIBILITY AS EVIDENCE;]

(3) [(4)] he warns the other of impending discovery or apprehension. [;OR]

[(5) HE VOLUNTEERS FALSE INFORMATION TO A LAW ENFORCEMENT OFFICER.]

(b) It is an affirmative defense to prosecution under Subsection (a)(3) [(4)] that the warning was given in connection with an effort to bring another into compliance with the law.

(c) An offense under this section is a gross misdemeanor unless the person aided was subject to arrest, prosecution, conviction, or punishment for a felony, in which event the offense is a felony of the fourth degree.

Judge Brown explained that the purpose of this section is to take the place of the present law of accessory after the fact. Miss West said that Mr. Darrouzet had written a letter in which he had objected to Subdivision (3). He had the same objection to this subdivision that was raised earlier to the tampering with evidence section: its application to privileged information. Mr. Maloney said the present law exempted attorneys.

Mr. Maloney said this section would do away with classification of principal, accomplice, and accessory. Judge Brown said "yes," the principle offense is complete when the accessory enters the picture and therefore it makes as much sense to make it a separate offense because his motive is to obstruct justice.

Mr. Barlow pointed out this section does not include the family exception included in present law. Judge Roberts asked if we weren't going to let the mother hide her son anymore without making her guilty of something. Mr. Searcy said that could be taken into account in the sentencing.

Mr. Colvin asked if the word "tampering" was sufficiently defined. Judge Brown said that we had a separate substantive offense on tampering with witnesses. Mr. Maloney asked why we needed both a separate offense and to include tampering as one method of committing hindering prosecution. Judge Brown explained that this section applies only to someone aiding an offender whereas the tampering with witness section would apply to everyone including the offender. Mr. Maloney asked why have two crimes covering the same action. Judge Brown said this was carried forward from the Model Penal Code and could be removed. Judge Brown pointed out that the Model Penal Code duplicates many offenses. Dean Keeton said he thought Subdivision (3) ought to be omitted, and that Subdivision (5) had already been covered, too. He said he could see the necessity of Subdivisions (1), (2), and (4), but (3) and (5) were covered by other offenses. Mr. Barlow moved that the committee strike Subdivisions (3) and (5). The committee approved the section by a voice vote with the deletions.

Sec. 243.5. COMPOUNDING.

(a) A person, corporation, or association commits an offense if he solicits, accepts, or agrees to accept any benefit in consideration of refraining from reporting to a peace [LAW ENFORCEMENT] officer the commission or suspected commission of an offense.

(b) A complaining witness commits an offense if he solicits, accepts, or agrees to accept any benefit in consideration of abstaining from, discontinuing, or delaying the prosecution of another for an offense.

[(C) THIS SECTION DOES NOT APPLY TO AN ATTORNEY AT LAW ACTING IN PROPER REPRESENTATION OF A CLIENT.]

(c) It is an affirmative defense to prosecution under this section that the benefit did not exceed an amount the actor believed to be due to the injured party as restitution or indemnification for economic loss caused by the offense. [IF THE OFFENSE IS CLASSIFIED AS A MISDEMEANOR.]

(d) An offense under this section is a gross [SIMPLE] misdemeanor.

Dean Keeton asked if the main difference between the present law and the proposed section was the affirmative defense. Judge Brown said it was. He explained that this section recognizes what everyone does anyway. Mr. Daugherty asked why this section was limited to compromising misdemeanors. Dean Keeton said the difference was that you didn't want to allow compromises or restitutions to be a defense to a serious crime. Mr. Barlow pointed out that the only thing the defense applies to is compounding; it is not a defense to murder, arson, or any of the other serious crimes. Judge Brown said people should be discouraged from compounding in case of serious crime. Dean Keeton pointed out that the offender would still be subject to prosecution for the major crime.

Dean Keeton said that he thought the word "actor" in Subsection (d) should be changed to "injured party." Dean Keeton said he thought the victim ought to be allowed to make almost any kind of proposition in order to get restitution for his injuries. Mr. Daugherty pointed out that the district attorney was not made a party to the agreement and that he could still prosecute the offender if he felt that it was necessary. Judge Brown asked if it was a consensus of the committee that the affirmative defense should be included as long as it was made clear tht the amount due as restitution was what the injured party believed to be due or which was due to the injured party as damages. Dean Keeton said "yes." Mr. Searcy pointed out that "actor" is used consistently to mean the person whose conduct is in question, usually as constituting an offense. Mr. Reid suggested rewording Subsection (d) to read, "It is an affirmative defense to prosecution under this section that the benefit did not exceed an amount which the actor believed to be due to the injured party as restitution or indemnification. . . ." Dean

Keeton asked that the section be approved subject to redrafting Subsection (d) to extend the affirmative defense to felonies and misdemeanors and to make sure the benefit goes to the victim of the offense. Dean Keeton also asked if the committee agreed the offense should be a gross misdemeanor. It was also pointed out that the attorney exemption in Subsection (c) would be covered by a general provision. The committee approved this section as changed.

Sec. 243.6. BARRATRY.

(a) A person, corporation, or association commits barratry if, with intent to obtain a benefit for himself or to harm another, ?

(1) he institutes any ?? suit or claim in which he knows he has no interest;

(2) he institutes any [FALSE] suit or claim that he knows is false; or

(3) he solicits (employment) → $? to prosecute or defend a suit or to collect a claim.

(b) Barratry is a gross [SIMPLE] misdemeanor.

Judge Brown explained that the barratry section was primarily a formal revision of the present Texas barratry statute. Judge Sharpe objected to Subsection (a)(2) which he said was vague. He suggested inserting "knowingly institutes any false suit or claim." Judge Brown suggested inserting in Subsection (a)(1) "he institutes any suit or claim in which he knows he has no interest," and in Subsection (a)(2) "he institutes any suit or claim which he knows is false." Dean Keeton said that the point was we didn't want to convict someone unless he knows he doesn't have an interest in the suit or claim, or he knows the suit or claim is false. Mr. Barlow suggested raising the penalty to a gross misdemeanor to make it conform to the change in the compounding statute. Dean Keeton asked all those in favor of the barratry statute as redrafted to say "aye" and it was approved.

Sec. 244.1. ESCAPE.

(a) A person arrested for, charged with, or convicted of an

offense commits an offense if he escapes from custody.

(b) Except as provided in Subsection (c), an offense under this section is a gross misdemeanor.

(c) An offense under this section is a felony of the fourth degree

[(1) IF THE ACTOR WAS CONFINED IN A PENAL INSTITUTION ON A CHARGE OF COMMITTING A FELONY OR FOLLOWING CONVICTION FOR ANY OFFENSE: OR]

(1) if the actor was charged with or convicted of a felony;

(2) if the actor was confined in a penal institution; or

(3) if the actor used or threatened to use a deadly weapon to effect his escape.

Dean Keeton asked if the definition of "custody" included the case where the officer says "I arrest you" and a person never submits to the arrest, but runs away: Is he guilty of escape? Dean Keeton suggested changing the definition to read "'custody' means under arrest or under restraint pursuant to an order of the court." Mr. Searcy asked if we should also define "arrest." There was some discussion as to whether the words "custody" and "arrest" should be used or should be defined at all, as the U.S. Supreme Court has defined them. Mr. Vance pointed out the supreme court was using the terms in the context of search and seizure and confessions. Dean Keeton said he thought we ought to have a Texas definition of "arrest." Mr. Reid pointed out that the term was defined in the code of criminal procedure. Mr. Cofer said our definition could differ from the definition of "arrest" for the purposes of confession.

Judge Roberts asked that the penalty section be discussed. He pointed out that the definition of "penal institution" does not cover a person being transferred from one penal institution to another. Dean Keeton said that escape would be a gross misdemeanor, because he escaped from the officer's custody. Dean Keeton said that one aggravating factor should be the fact that the person escaping was a convicted felon regardless of where he was escaping from and that another should be that the escape was from a penal institution. Dean Keeton

summarized the changes in the penalty section: the aggravating factors would be escape by a person charged with or convicted of a felony; escape from a penal institution; and use of a deadly weapon in effecting escape. The committee approved this section as changed.

Sec. 244.2. PERMITTING OR FACILITATING ESCAPE.

(a) A public servant [RESPONSIBLE FOR MAINTAINING CUSTODY OF ANOTHER] commits an offense if he recklessly permits or facilitates the escape of [THE] another.

(b) A person commits an offense if he knowingly causes or facilitates the escape of another.

(c) This section applies only to permitting, causing, or facilitating the escape of another who is in custody pursuant to

(1) arrest;

(2) a charge or conviction of an offense;

(3) an allegation or adjudication of delinquency; or

(4) a statutory procedure authorizing involuntary commitment for mental illness, alcholism, or drug addiction.

(d) Except as provided in Subsection (e), an offense under this section is a gross misdemeanor.

(e) An offense under this section is a felony of the fourth degree

[(1) IF THE PERSON IN CUSTODY WAS CONFINED IN A PENAL INSTITUTION ON A CHARGE OF COMMITTING A FELONY OR FOLLOWING CONVICTION FOR ANY OFFENSE:]

(1) if the person in custody was charged with or convicted of a felony;

(2) if the person in custody was confined in a penal institution;

(3) if the actor used or threatened to use a deadly weapon to effect the escape; or

(4) if the actor was a public servant [RESPONSIBLE FOR MAINTAINING CUSTODY OF ANOTHER] and intentionally permitted or facilitated the escape.

Dr. Killinger objected to the phrase "responsible for maintaining custody of another." He thought the section should apply to all public servants regardless of whether they were particularly responsible for maintaining a prisoner in custody. Dr. Killinger explained that many people worked with the institution who are not responsible for maintaining the custody of prisoners but that they have a better opportunity to facilitate escapes than a member of the general public. The motion was made to delete the phrase "responsible for maintaining custody of another" from Subsection (a) and Subsection (e)(4). Mr. Cofer asked if it should be limited to employees of the institution because the definition of public servant is very broad. The committee voted to delete the phrase and not to limit public servant to custodial employees.

Judge Brown noted the conflict between this section and the proposed kidnapping statute which was already approved by the committee. The kidnapping statute applies to removing from one place to another any person against his will for the purpose of interfering with performance of any governmental or political function. Dean Keeton said there was no reason to retain Subdivision (d) of the kidnapping statute as we had drafted a separate statute on interference with child custody which was the reason Subdivision (d) was included in the first place. The committee voted to delete Subdivision (d) from Section 212.1, Kidnapping. The section on facilitating escape was approved with the understanding that the penalty section would be conformed to the changes made in the escape statute.

Sec. 244.3. EFFECT OF UNLAWFUL CUSTODY.

It is no defense to prosecution under Sections 244.1 or 244.2 that the custody was unlawful.

Judge Brown said that lawfulness of custody should be decided in the courts and not by some mama with a hacksaw. Judge Roberts moved for the adoption of this section. The section was approved.

Sec. 244.4. IMPLEMENTS FOR ESCAPE.

(a) A person commits an offense if, with intent to facilitate escape, he introduces into a penal institution, or provides an inmate with, a deadly weapon or anything which may be useful for escape.

(b) An offense under this section is a gross misdemeanor, unless the actor introduced or provided a deadly weapon, in which event the offense is a felony of the fourth degree.

The question was raised whether introduction of firearms into a penitentiary should not carry a higher penalty. The committee voted to make it a fourth degree felony if the implement introduced into a penal facility was a deadly weapon. This section was approved with this change.

Sec. 244.5. BAIL JUMPING AND FAILURE TO APPEAR.

(a) A person released from custody by court order, with or without bail, on condition that he will subsequently appear at a specified time and place, commits an offense if, without lawful excuse, he fails to appear at that time and place.

(b) This section does not apply

(1) to a person charged with or convicted of an offense punishable by fine only; or

(2) to an appearance required as an incident of probation or parole.

(c) Except as provided in Subsection (d), an offense under this section is a gross misdemeanor.

(d) An offense under this section is a felony of the fourth degree if the offense for which the actor's appearance is required is classified as a felony and he knowingly failed to appear.

Judge Brown explained that appearance required as an incident of probation or parole is excluded because there are administrative sanctions to prevent that sort of failure to appear. Mr. Colvin asked why the fine was excluded. Judge Brown said to exclude traffic tickets and that sort of thing because there is a promise to appear and failure to appear is already a misdemeanor under the traffic act. Mr. Colvin asked if that offense would remain and Judge Brown said that it would. Mr. Reid pointed out that the present law required a bail bond forfeiture and does not apply to personal recognizance and one theory behind this statute is to encourage the use of personal recognizance bonds. Judge Roberts said he would much rather have this statute than the present statute. Mr. Daugherty said the federal statute which was similar to this was very effective in getting people to appear. Carol Vance said he thought the statute would be very helpful. Judge Roberts moved the adoption of the statute and it was unanimously adopted.

STAFF NOTE: Mr. Conner called Bill Reid after the meeting and pointed out an apparent inconsistency in the bail jumping provision and the traffic offense. A person who is given a citation by a traffic officer and signs a promise to appear will be guilty of an offense if he fails to appear even though the offense is one punishable by fine only. However a promise to a judge to appear will have no sanction in a case where the offense is punishable by fine only. Mr. Conner suggested possibly reconsidering this section and making it a petty misdemeanor if a person fails to appear in connection with a petty misdemeanor.

Sec. 245.1. OFFICIAL MISCONDUCT.

(a) A public servant commits an offense if, with intent to obtain a benefit for himself or to harm another,

(1) he knowingly commits an act relating to his office or employment that constitutes an unauthorized exercise of his official powers;

(2) he knowingly commits an act under color of his office or employment that exceeds his official power;

(3) he knowingly refrains from performing a duty that is imposed on him by law or that is clearly inherent in the nature of his office or employment; or

(4) he knowingly violates a law relating to his office or employment.

(b) An offense under this section is a gross misdemeanor.

Mr. Daugherty asked if the intent to harm another included an intent to harm the public in general. Judge Brown said "no," it meant to harm an individual. Dean Keeton asked what the difference was betwen "authorized exercise" in Subsection (a)(1) and "exceeding powers" in Subsection (a)(2). Judge Brown explained that "unauthorized exercise" means the public servant has the power. Subdivision (2) applies to the public servant who attempts to exercise the power which he does not have, like a justice of the peace granting a divorce. The section was then approved unanimously.

Sec. 245.2. OFFICIAL OPPRESSION.

(a) A public servant acting under color of his office or employment commits an offense if

(1) he intentionally subjects another to mistreatment or to arrest, detention, search, seizure, dispossession, assessment, or lien that he knows is unlawful; or

(2) he intentionally denies or impedes another in exercise or enjoyment of any right, privilege, power, or immunity, knowing that his <u>denial or impediment</u> [CONDUCT] is unlawful.

(b) An offense under this section is a <u>gross misdemeanor</u> [FELONY OF THE FOURTH DEGREE].

Mr. Maloney asked if the court of criminal appeals reverses a case because of the denial of due process, has the district attorney violated this statute? Judge Brown said the district attorney had to have known that his conduct was unlawful at the time. Mr. Searcy asked about the fourth degree felony penalty. The committee voted to reduce the penalty to a gross misdemeanor. Carol Vance asked what Subsection (a)(2) applied to. Mr. Searcy pointed out that one example would be a public servant denying a voter the right to vote or refusing to register the voter. Dean Keeton asked if "knowing his conduct is unlawful" doesn't mean that he has to know that his denial and impediment is unlawful. Judge Brown agreed that it did and that the conduct does not necessarily have to be criminal but can also be unlawful. Mr. Searcy suggested substituting for the word "conduct," "knowing that his denial and impediment is unlawful." Judge Brown said that he thought that was better language. Dean Keeton asked for a vote on this section. The section was approved by a vote of 5 to 2.

Sec. 245.3. MISUSE OF OFFICIAL INFORMATION.

(a) A public servant commits an offense if, in reliance on information to which he has access in his official capacity and which has not been made public,

(1) he acquires or aids another to acquire a pecuniary interest in any property, transaction, or enterprise that may be affected by the information; or

(2) he speculates or aids another to speculate on the basis of the information.

(b) An offense under this section is a felony of the fourth degree.

Dean Keeton asked if this phrase "which has not been made public" was clear. Judge Brown said this statute was directed at misuse of insider information. Dean Keeton asked if that meant information which was not generally known. Mr. Daugherty said that many records which are open to the public are not generally known to the public. Mr. Cofer said that was still information which was made public. Dean Keeton said he thought this section ought to apply to any information that has not been made generally available to the public by some publication. Judge Brown

said this section was designed to cover confidential information. This section is not designed to cover the misuse of information which is available to the public even if the public does not bother to look into it. Dean Keeton said after the information has been made public the public servant ought to be able to take advantage of it also. Mr. Cofer said if he has access to the information in his official capacity maybe he should be disqualified from making any profit from this information. Dean Keeton said that was pretty rough. Dean Keeton said he thought the statute should be left as it is. Judge Sharpe said if the information were equally available to the public servant and to the public, the public servant should not be penalized for using the information. Judge Sharpe moved to adopt the section as written. The section was approved by a voice vote.

Sec. 240.1. BRIBERY.

(a) A person, corporation, or association commits bribery if he offers, confers, or agrees to confer any benefit on a public servant, party official, or voter

(1) with intent to influence the public servant or party official in the exercise of his official powers or the performance of his official duties; or

(2) with intent to influence the voter not to vote or to vote in a particular manner.

(b) A public servant or party official commits bribery if he solicits, accepts, or agrees to accept any benefit on the representation or understanding that he will be influenced in the exercise of his official powers or the performance of his official duties.

(c) A voter commits bribery if he accepts or agrees to accept any benefit on the representation or understanding that he will not vote or will vote in a particular manner.

(d) Bribery is a felony of the third degree.

The committee proceeded to consider the changes made by the reporters in the bribery and perjury drafts as previously approved by the committee. Judge Brown explained that in Section 240.1 the reporters had inserted the terms "party official" and "voters." The inclusion was approved unanimously by the committee.

Sec. 240.2. THREATS AND OTHER IMPROPER INFLUENCES.

(a) A person, corporation, or association commits an offense if

(1) he threatens harm to a public servant [OR PARTY OFFICIAL] with intent to influence him in the exercise of his official powers or the performance of his official duties;

(2) he threatens harm to a voter with intent to influence him not to vote or to vote in a particular manner; or

(3) he privately addresses a representation, entreaty, argument, or other communication to any public servant who exercises or will exercise official discretion in a judicial or administrative proceeding with intent to influence the outcome of the proceeding on the basis of considerations other than those authorized by law.

(b) An offense under this section is a gross misdemeanor unless the threat if carried out would be a felony, in which event the offense is a felony of the third degree.

Judge Brown explained that the same changes had been made in Section 240.2--in other words, party officials and voters were added to this section. Mr. Vance moved to delete party officials from Section 240.2. He said party officials were constantly threatened at political meetings and that was not too serious and possibly in some cases the threats were imaginary. Mr. Vance said that bribery was serious, but that there was hardly ever a precinct meeting where someone doesn't claim that someone else threatened him, and the definition of "harm" is so broad that it could include almost everything. Judge

Brown said voters were also covered by the section, and threats against voters were the only threats covered by present Texas law. "Harm" was broader than present law because present law prohibits intimidation of voters. Carol Vance said he thought a voter on an election day ought to be protected. Mr. Cofer said that voters should be included. The committee voted to delete party official and retain voters in the section.

Sec. 240.3. TAMPERING WITH WITNESSES.

(a) A person, corporation, or association commits an offense if he offers, confers, or agrees to confer any benefit upon a witness or prospective witness in an official proceeding, or threatens harm to a witness or prospective witness in an official proceeding, with intent to influence the witness

(1) to testify falsely;

(2) to withhold any testimony, information, document, or thing;

(3) to elude legal process summoning him to testify or supply evidence; or

(4) to absent himself from an official proceeding to which he has been legally summoned;

[(5) TO REFRAIN FROM REPORTING TO A LAW ENFORCEMENT OFFICER THE COMMISSION OR SUSPECTED COMMISSION OF AN OFFENSE; OR

(6) TO ABSTAIN FROM, DISCONTINUE, OR DELAY THE PROSECUTION OF ANOTHER FOR AN OFFENSE.]

(b) A witness or prospective witness in an official proceeding commits an offense if he solicits, accepts, or agrees to accept any benefit on the representation or understanding that he will do any of the things specified in Subsection (a).

(c) An offense under this section is a felony of the third degree.

Judge Brown explained that Subsections (a)(5) and (6) were no longer necessary because they are adequately covered by the compounding statutes. The committee voted to delete Subsections (a)(5) and (6) from Section 240.3. Mr. Maloney asked if this offense would still be a felony of the third degree. Bill Reid pointed out that at the time the section was approved we didn't have a fourth degree felony. Judge Brown said we would have to review penalties here in general session. Bill Reid noted that when the committee considered homicide, assault, kidnapping, bribery, and perjury, third degree felony was the lowest and these penalties will have to be reconsidered when the penal code is completed. Bill Reid suggested that the staff make a chart of where these offenses have been specifically assigned so they can be reviewed at a later date.

Judge Brown explained that Section 240.4 had not been changed. The section was approved as formally revised by the legislative council staff.

Sec. 240.5. RETALIATION FOR PAST OFFICIAL ACTION.

(a) A person, corporation, or association commits an offense if he harms a public servant or former public servant by any unlawful act in retaliation for anything the public servant did in his official capacity.

(b) An offense under this section is a gross misdemeanor.

Judge Brown explained that Section 240.5 was included in this draft although similar conduct was presently covered by the assault section previously approved by the committee. Judge Brown recommended approving this section and deleting the section from the assault statute which aggravates an assault when it is committed on a public officer or employee. Mr. Cofer asked if this section covered a former public servant. Judge Brown agreed that this section should read "if he harms a public servant or former public servant." Judge Brown said it was more logical to include this sort of conduct here than in the assault statute because you really are worried about obstruction of justice. Dean Keeton said that justification for this statute is that unlawful acts will cover things other than criminal conduct. Mr. Maloney said that he was against making the assault aggravated simply because a public servant was involved. If the public servant is injured it will be an aggravated assault anyway. The committee voted to delete the section from the assault statute and to include Section 240.5 as written.

Sec. 240.6. GIFTS TO PUBLIC SERVANTS BY PERSONS SUBJECT TO THEIR JURISDICTION.

(a) A public servant in an agency exercising regulatory functions or conducting inspections or investigations commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows to be subject to regulation, inspection, or investigation by the public servant or his agency.

(b) A public servant in an agency having custody of prisoners commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows to be subject to custody by the public servant or his agency.

(c) A public servant in an agency carrying on civil or criminal litigation on behalf of government commits an offense if he solicits, accepts, or agrees to accept any benefit from a person against whom the public servant knows litigation is pending or contemplated by the public servant or his agency.

(d) A public servant who exercises discretion in connection with contracts, purchases, payments, claims or other pecuniary transactions of government commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows is interested in or likely to become interested in any contract, purchase, payment, claim, or transaction involving the exercise of his discretion.

(e) A public servant who has judicial or administrative authority, or who is employed by or in a tribunal having judicial or administrative authority, or who participates in the enforcement of the tribunal's decisions, commits an offense if he solicits, accepts, or agrees to accept any benefit

from a person the public servant knows is interested in or likely to become interested in any matter before the public servant or the tribunal.

(f) A public servant who is a member of or employed by the legislature or by an agency of the legislature commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows to be interested in any matter pending before or contemplated by the legislature or an agency of the legislature.

(g) An offense under this section is a gross misdemeanor.

Sec. 240.7. OFFERING BENEFITS.

(a) A person, corporation, or association commits an offense if he confers, offers, or agrees to confer any benefit upon a public servant that he knows the public servant is prohibited from accepting.

(b) An offense under this section is a gross misdemeanor.

Sec. 240.8. EXCEPTIONS.

Sections 240.6 and 240.7 do not apply to

(1) a fee prescribed by law to be received by a public servant, or any other benefit to which the public servant is lawfully entitled;

(2) a gift or other benefit conferred on account of kinship or a personal, professional, or business relationship independent of the official status of the recipient;

(3) a trivial benefit incidental to personal, professional, or business contacts, which benefit involves no substantial risk of undermining official impartiality; or

(4) a contribution made under the election laws for the political campaign of an elective public servant when he is a candidate for nomination or election to public office.

Judge Brown explained that the change made by the reporters in Section 240.6 was to delete the intent requirement. The committee had approved this section with the phrase "with intent to influence the public servant and the exercise of his official powers or the performance of his official duties" in each subsection. Judge Brown explained that this made the gift section the same as the bribery section only with a lower penalty. Dean Keeton said he was a little worried about this section. Mr. Maloney asked if it covered the situation where jailors took money from attorneys and later started running clients to them but with no intent at the time of taking. Judge Brown said "yes." Mr. Searcy said that this is sort of giving something and hoping you'll get the benefit from it. Mr. Reid said it was really a code of ethics. Mr. Searcy said it is aimed at preventing the appearance of corruption. Dean Keeton asked for a straw vote on the section with the understanding that the committee could reconsider it later. The straw vote was 7 to 2 to leave it in.

Sec. 241.1. PERJURY.

(a) A person, corporation, or association commits perjury if, with intent to deceive and with knowledge of the statement's meaning,

(1) he makes a false statement under oath, or swears to the truth of a false statement previously made; and

(2) the statement is required or authorized by law to be made under oath.

(b) Perjury is a gross misdemeanor.

Sec. 241.2. AGGRAVATED PERJURY.

(a) A person, corporation, or association commits aggravated perjury if he commits perjury as defined in Section 241.1, and

(1) the false statement is made during or in connection with an official proceeding; and

(2) the false statement is material.

(b) Aggravated perjury is a felony of the third degree.

Judge Brown explained that in the perjury draft the major change was changing the terminology from first degree-second degree perjury to perjury-aggravated perjury. The committee approved the change.

Sec. 241.3. SUBORNATION.

(a) A person, corporation, or association commits subornation if he intentionally induces another to commit perjury or aggravated perjury.

(b) Subornation is a gross misdemeanor, unless the perjury suborned is aggravated perjury, in which event subornation is a felony of the third degree.

Judge Brown raised the question of whether this section is really necessary considering we now have the tampering with witnesses section. Dean Keeton said it would also be covered under solicitation and complicity in the general provisions. Mr. Reid suggested in the status reports we should put subornation in brackets with a note to reconsider it when complicity, conspiracy, and solicitation are completed. The committee approved this suggestion. Judge Brown explained that the remainder of the perjury chapter was substantially the same as approved by the committee and had only been formally revised by the legislative council staff. The committee approved the remainder of the report as written.

Dean Keeton adjourned the meeting at 4:30 p.m.

PENAL CODE REVISION PROJECT

Summary of Minutes

The State Bar Committee on Revision of the Texas Penal Code met at the State Bar of Texas headquarters, Austin, Texas, on Friday, April 25, 1969, beginning at 9 a.m.

The committee considered the report on general principles of justification prepared by Dean Page Keeton, reporter, and Mrs. Ione Stumberg and Mr. Seth Searcy, revisors. The following draft sections were approved by the committee and formally revised by the staff. The drafts proposed by the reporters, showing changes made by the committee, are reproduced in the body of the minutes.

> NOTE: The drafts set out in these minutes are tentative only and do not necessarily represent the final decision of the State Bar of Texas Penal Code Revision Committee on any of the areas covered. The drafts do not represent the views of the State Bar of Texas or of the Texas Legislature. Because of their tentative nature, none of the drafts may be quoted or cited without the project director's prior written permission.

CHAPTER 3. JUSTIFICATION

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 3.01. CHAPTER DEFINITIONS.

In this chapter, unless the context requires a different definition,

(1) "deadly force" means force that is intended or known by the actor to cause, or in the manner of its use or intended use is capable of causing, death or serious bodily injury;

(2) "escape" means unauthorized departure from custody or failure to return to custody following temporary leave for a specific purpose or limited period, but does not include a violation of conditions of probation or parole;

(3) "law" means the constitution or a statute of this state or of the United States, a municipal ordinance, an order of the county commissioners court, or a rule authorized by and lawfully adopted under a statute;

(4) "peace officer" means a public servant who has a duty imposed by law

(A) to maintain public order; or

(B) to make arrests for offenses, whether that duty extends to all offenses or is limited to specific offenses; or

(C) to investigate the commission or suspected commission of offenses;

(5) "penal institution" means a place designated by law for the confinement of persons arrested for, charged with, or convicted of an offense;

(6) "reasonable belief" means a belief the actor is not reckless or negligent in holding under all the circumstances as viewed from his standpoint;

(7) "serious bodily injury" means physical pain, illness, or any impairment of physical condition that creates a substantial risk of death or that causes serious permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ;

(8) "unlawful" means criminal or tortious or both and includes what would be criminal or tortious but for a defense not amounting to justification or privilege.

Sec. 3.02. JUSTIFICATION AN AFFIRMATIVE DEFENSE.

Justification is an affirmative defense to prosecution

for conduct that is justified under this chapter.

[Sections 3.04, Confinement as Justifiable Force, and 3.05, Reckless or Negligent Injury of Innocent Third Person, were not considered by the committee.]

Sec. 3.06. CIVIL REMEDIES UNAFFECTED.

The fact that conduct is justified under this chapter does not abolish or impair any remedy for the conduct that is available in a civil suit.

[Sections 3.21, Necessity, 3.22, Public Duty, and 3.23, Justification for Offenses Against Property, were not considered by the committee.]

SUBCHAPTER C. PROTECTION OF PERSONS

Sec. 3.31. SELF-PROTECTION.

(a) Except as provided in Subsection (b), a person is justified in threatening or using force against another when and to the degree he reasonably believes the force is immediately necessary to protect himself against the other's use or attempted use of unlawful force.

(b) The threat or use of force against another is not justified

(1) to resist an arrest or search that the actor knows is being made by a peace officer, or by a person acting in a peace officer's presence and at his direction, even though the arrest or search is unlawful, unless the resistance is justified under Subsection (c); or

(2) if the actor consented to the exact force used by the other; or

(3) if the actor provoked the other's use or attempted use of unlawful force, unless

(A) the actor abandons the encounter or clearly communicates to the other his intent to do so, or the actor reasonably believes he cannot safely abandon the encounter; and

(B) the other nevertheless continues or threatens the use of unlawful force against the actor.

(c) The threat or use of force to resist an arrest or search is justified

(1) if, before the actor offers any resistance, the peace officer (or person acting at his direction) uses or attempts to use unnecessary force to make the arrest or search; and

(2) when and to the degree the actor reasonably believes the force is immediately necessary to protect himself against the peace officer's (or other person's) use or attempted use of unnecessary force.

Sec. 3.32. DEADLY FORCE.

A person is justified in threatening or using deadly force against another

(1) if he would be justified in threatening or using force against the other under Section 3.31; and

(2) if a reasonable man in the actor's situation would not have retreated; and

(3) when and to the degree he reasonably believes the deadly force is immediately necessary to protect himself against the other's use or attempted use of unlawful deadly force.

Sec. 3.33. PROTECTION OF THIRD PERSON.

A person is justified in threatening or using force or deadly force against another to protect a third person if

(1) under the circumstances as the actor reasonably believes them to be the actor would be justified under Section 3.31 or 3.32 in threatening or using force or deadly force to protect himself against the unlawful force or unlawful deadly force he reasonably believes to be threatening the third person he seeks to protect; and

(2) the actor reasonably believes that his intervention is immediately necessary to protect the third person.

Sec. 3.34. PREVENTION OF SUICIDE OR SELF-INFLICTED INJURY.

A person is justified in threatening or using force, but not deadly force, against another when and to the degree he reasonably believes the force is immediately necessary to prevent the other from committing suicide or inflicting serious bodily injury on himself.

SUBCHAPTER D. PROTECTION OF PROPERTY

Sec. 3.41. PROTECTION OF OWN PROPERTY.

(a) A person in lawful possession of land or tangible, moveable property is justified in threatening or using force, but not deadly force, against another when and to the degree the actor reasonably believes the force is immediately necessary to prevent or terminate the other's trespass on the land or unlawful interference with the property.

(b) A person unlawfully dispossessed of land or tangible, moveable property by another is justified in threatening

or using force, but not deadly force, against the other when and to the degree the actor reasonably believes the force is immediately necessary to reenter the land or recover the property if

(1) the actor threatens or uses the force immediately or in fresh pursuit after the dispossession; and either

(2) the actor reasonably believes the other had no claim of right when he dispossessed the actor; or

(3) the other accomplished the dispossession by using force or fraud against the actor.

Sec. 3.42. PROTECTION OF THIRD PERSON'S PROPERTY.

A person is justified in threatening or using force, but not deadly force, against another to protect land or tangible, moveable property of a third person if

(1) under the circumstances as he reasonably believes them to be the actor would be justified under Section 3.41 in threatening or using the force to protect his own land or property; and

(2) the actor reasonably believes

(A) the third person has requested his protection; or

(B) he has a legal duty to protect the third person's land or property; or

(C) the third person is the actor's spouse, parent, or child, resides with the actor, or is under the actor's care.

[Section 3.43, Use of Device to Protect Property, was not considered by the committee.]

SUBCHAPTER E. LAW ENFORCEMENT

Sec. 3.51. ARREST.

(a) A peace officer, or a person acting in a peace officer's presence and at his direction, is justified in threatening or using force against another when and to the degree the actor reasonably believes the force is immediately necessary to make or assist in making an arrest, or to prevent or assist in preventing escape after arrest, if

(1) the actor reasonably believes the arrest is lawful or, if the arrest is made under a warrant, he reasonably believes the warrant is valid; and

(2) before threatening or using force, the actor manifests his purpose to arrest and identifies himself as a peace officer or as one acting at a peace officer's direction, unless he reasonably believes his purpose and identity are already known by or cannot reasonably be made known to the person to be arrested.

(b) A person other than a peace officer (or one acting at his direction) is justified in threatening or using force against another when and to the degree the actor reasonably believes the force is immediately necessary to make or assist in making a lawful arrest, or to prevent or assist in preventing escape after lawful arrest if, before threatening or using force, the actor manifests his purpose to and the reason for the arrest or believes his purpose and the reason are already known by or cannot reasonably be made known to the person to be arrested.

(c) Only a peace officer is justified in threatening or using deadly force against another when and to the degree

the peace officer reasonably believes the deadly force is immediately necessary to make or assist in making an arrest, or to prevent or assist in preventing escape after arrest, if

(1) the threat or use of force would have been justified under Subsection (a); and

(2) the actor reasonably believes his threat or use of deadly force does not create a substantial risk of injury to an innocent third person; and

(3) the actor reasonably believes the conduct for which arrest is authorized included the use or attempted use of deadly force; and

(4) the actor reasonably believes there is a substantial risk that the person to be arrested will cause death or serious bodily injury to another if the arrest is delayed.

(d) There is no duty to retreat before threatening or using deadly force justified by Subsection (c).

Sec. 3.52. PREVENTION OF ESCAPE FROM PENAL INSTITUTION.

(a) A peace officer, or guard employed by a penal institution, is justified in threatening or using force against a person in the custody of a penal institution when and to the degree the actor reasonably believes the force is necessary to prevent the person's imminent escape from the penal institution or while being transported to or from the penal institution.

(b) A peace officer, or guard employed by a penal institution, is justified in threatening or using deadly force against a convicted felon in the custody of a penal institution

when and to the degree the actor reasonably believes the deadly force is necessary to prevent the convicted felon's imminent escape from the penal institution or while being transported to or from the penal institution. There is no duty to retreat before threatening or using deadly force justified by this subsection.

[Section 3.53, Crime Prevention, was not fully considered by the committee.]

SUBCHAPTER F. SPECIAL RELATIONSHIPS

Sec. 3.61. PARENT-CHILD.

The threat or use of force, but not deadly force, against a child younger than 18 years is justified

(1) if the actor is the child's parent or someone acting in loco parentis to the child; and

(2) when and to the degree the actor reasonably believes the force is necessary to discipline the child or to safeguard or promote his welfare.

Sec. 3.62. TEACHER-STUDENT.

The threat or use of force, but not deadly force, against a person is justified

(1) if the actor is entrusted with the care or supervision of the person for a special purpose; and

(2) when and to the degree the actor reasonably believes the force is necessary to further the special purpose or to maintain discipline in a group.

Sec. 3.63. GUARDIAN-INCOMPETENT.

The threat or use of force, but not deadly force, against a mental incompetent is justified

(1) if the actor is the incompetent's guardian or someone similarly responsbile for the general care and supervision of the incompetent; and

(2) when and to the degree the actor reasonably believes the force is immediately necessary

(A) to safeguard and promote the incompetent's welfare; or

(B) if the incompetent is in an institution for his care and custody, to maintain discipline in the institution.

[Sections 3.64, Doctor-Patient, and 3.65, Common Carrier-Passenger, were not fully considered by the committee.]

MINUTES OF THE MEETING OF THE TEXAS STATE BAR COMMITTEE ON REVISION OF THE PENAL CODE

April 25, 1969

Present: Committee Members Dean Page Keeton, chairman; Judge John Barron; Mr. Samuel Biery; Mr. George Hume Cofer; Mr. Emmett Colvin; Mr. Samuel Daugherty; Mr. George W. Gray; Judge George Kelton; Mr. Frank Maloney; Mr. Travis Shelton; Mr. Terry Townsend; Mr. Carol Vance.

Law Enforcement Advisory Committee Beverley Laws for Chief R. A. Miles; Sgt. J. A. Knigge for Chief Herman Short.

Advisory Committee on Corrections Mr. Bill Thompson.

Staff Bill Reid, project director.

Texas Legislative Council Staff Seth Searcy, chief revisor; Cameron Cunningham, Ken Drew, Maelissa Watson-Elmer, and Linda West, revisors.

Reporters Albert Alschuler, Dean Richard Amandes, Newell Blakely, Robert Dawson, Mike Rosenthal.

Guest Mrs. Ione Stumberg, Sam Robertson.

The Texas State Bar Committee on Revision of the Penal Code met on Friday, April 25, 1969, at the State Bar of Texas headquarters in Austin, Texas, at 9 a.m., to consider the report on General Principles of Justification.

Dean Page Keeton called the meeting to order and began by discussing project financing for the coming year. After noting that the staff expects to complete the revision project in the spring of 1970, the dean emphasized the importance of obtaining adequate financing at this time to conclude the project. To this end, he reported, the committee has requested $15,000 from the state bar for the fiscal year beginning June 1; this leaves a little over $20,000 to be raised elsewhere, and the Texas Criminal Justice Council and several foundations have been requested to provide the balance. Dean Keeton asked the committee members to sound out prospective donors in their cities. Mr. Searcy mentioned that the legislative council's requested budget for completing the penal code project had been omitted from the House version of the appropriations bill but included in the Senate version. Mr. Searcy requested the committee members to boost the council's appropriation request to their senators and representatives.

Dean Keeton asked Mr. Searcy to introduce the justification

report and Mr. Searcy summarized the objectives of the proposed Chapter 3.

He stated that the proposed chapter, for the first time in Texas criminal law, collected in one place and treated comprehensively all general principles of justification. Much existing Texas law, including exact phraseology, is preserved in the new chapter, but the number and types of situations justifying violence are sharply reduced. In particular, few of the occasions justifying homicide under present law are preserved in the new chapter. Mr. Searcy concluded by describing the novel honest-belief-in-necessity-exculpates concept, derived from the M.P.C., which is introduced in the new chapter.

Mr. Daugherty asked whether the new chapter was designed to eliminate the distinction between justifiable and excusable homicide, now present in the Texas Penal Code. Mr. Searcy replied yes, because the distinction had no modern significance. At early common law excusable homicide required a pardon from the crown before defendant was exonerated; justifiable homicide did not. Eventually, granting the pardon became automatic and with this development the distinction between the two types of noncriminal homicide became merely verbal. There is no distinction between the two in present Texas law and, to avoid possible confusion, the term "excusable homicide" will not be preserved in the new code.

The committee then considered the draft sections one by one.

> NOTE: To reflect action taken by the committee on the drafts submitted, the following sections show additions by the committee underlined and deletions in brackets and capitals. The committee's discussion follows each draft section.
>
> Sec. 3.31. SELF-PROTECTION.
>
> (a) Except as provided in Subsection (b), a person is justified in threatening or using force against another when and to the degree he <u>reasonably</u> believes the force is <u>immediately</u> necessary to protect himself against the other's use <u>or</u> <u>attempted</u> <u>use</u> of unlawful force.
>
> (b) The threat or use of force against another is not justified
>
> (1) to resist an arrest or search that the actor knows is being made by a peace officer, or by a person acting in [AT] a peace officer's <u>presence</u> <u>and</u> <u>at</u> <u>his</u> direction,

even though the arrest or search is unlawful, unless the resistance is justified under Subsection (c); or

(2) if the actor consented to the exact [OTHER'S USE OF] force used by the other; or

(3) if the actor provoked the other's use or attempted use of unlawful force, [WAS THE INITIAL AGGRESSOR] unless

(A) the actor abandons [BELIEVES HE CAN SAFELY WITHDRAW FROM] the encounter [AND HE EITHER DOES SO] or clearly communicates to the other his intent to do so, [WITHDRAW] or the actor reasonably believes he cannot safely abandon the encounter; and

(B) the other nevertheless continues or threatens the use of unlawful force against the actor.

(c) The threat or use of force to resist an arrest or search is justified

(1) if, before the actor offers any resistance, the peace officer (or person acting at his direction) uses or attempts to use force that [THE ACTOR BELIEVES] is unnecessary to make the arrest or search; and

(2) when and to the degree the actor reasonably believes the force is immediately necessary to protect himself against the peace officer's (or other person's) use or attempted use of unnecessary force.

Sec. 3.01. CHAPTER DEFINITIONS.

In this chapter, unless the context requires a different definition, . . .

(6) "reasonable belief" means a belief the actor is not reckless or negligent in holding under all the circumstances as viewed from his standpoint; . . .

(8) "unlawful" means conduct constituting an offense or tort or both and includes conduct that would be criminal or tortious [ACTIONABLE] but for a defense not amounting to justification or privilege.

After reading Section 3.31(a), Dean Keeton brought up the belief formulation that is fundamental to the entire proposed chapter: should the actor's honest belief in the necessity to use force exculpate, or should his belief have to be reasonable? The dean favored the honest belief standard because he didn't believe the state should punish a person unless the person both used unnecessary force and knew it was unnecessary when he used it. Judge Kelton questioned whether the juries didn't judge by this standard as a practical matter anyway. Mr. Vance argued for a reasonableness standard under which the defendant's belief must be reasonable under all the circumstances as viewed from his standpoint. Mr. Colvin noted that a reasonableness standard would encourage a jury to judge a defendant according to its own standards. The committee discussed the belief standard issue for several more minutes before deciding to defer a decision on which standard to adopt until discussing the deadly force justification provision.

The committee approved the insertion of "immediately" to modify "necessary" in Subsection (a). Dean Keeton next directed the committee to Section 3.01(8) and the definition of "unlawful." Mr. Vance expressed concern about a court's ability clearly to charge on this definition; he also asked for examples of conduct that is a tort but not a crime. The dean replied that trial courts would have to prepare their charges from the facts--a charge quoting nothing but the definition itself would rarely if ever be adequate--and that there are many varieties of trespass that, although not criminal, are tortious. Moreover, the dean concluded, it would be impossible to draft a general definition of "tort." Mr. Searcy noted that the clause "and includes conduct that would be criminal or actionable but for a defense not amounting to justification or privilege" is necessary to cover, for example, an assault by a maniac: he is not guilty of a crime or a tort because he is not responsible. Mr. Searcy also suggested substituting "tortious" for "actionable," to make the synonymous meaning clearer, and the committee members did not object.

The committee returned to the self-defense section, 3.31, and Mr. Searcy read Subsection (b), which imposes restrictions on the use of force in self-defense.

Subdivision (1) prohibits the use of force to resist an arrest or search by a known peace officer even though the arrest or search is unlawful. Judge Kelton objected to treating the private citizen acting at a peace officer's direction the same as the peace officer; he feared attacks by strangers claiming they were arresting at a peace officer's direction. After discussion the committee agreed to require that the private citizen act in the peace officer's presence before being entitled to the peace officer's protection.

The committee then turned to Subsection (c), which justifies the use of force to resist arrest or search when the peace officer, before any resistance, uses unnecessary force to effect it. Judge Kelton moved to delete the phrase "the actor believes" from Subsection (c)(1); after extended discussion this motion was unanimously adopted. The committee deferred a decision on whether to insert "reasonably" between "actor" and "believes" in Subdivision (2).

Mr. Alschuler recommended including threats, along with force, against which the use of protective force is justified; he later modified his suggestion by substituting "attempts to use" for "threatens." The committee unanimously adopted this suggested change.

Returning to Subsection (b), Dean Keeton pointed out that Subdivision (2) should focus on the exact force the actor consents to, that is, an actor's consent should forfeit self-defense only as to the type and degree of force to which he consented. The committee agreed and Mr. Searcy promised to clarify the subdivision.

Mr. Searcy explained that Subsection (b)(3) restated the Texas law of provoking the difficulty. Mr. Searcy asked whether the provoker--for example, someone committing a felony--should by his provocation forfeit his self-defense right or merely suspend it until he abandons the encounter. After discussing at length the present Texas law of felony murder and imperfect self-defense, the committee voted unanimously to suspend only the provoker's self-defense right until he abandons the encounter, after which the right will revive. Mr. Searcy stated that Subdivision (3)(A) and (B) are designed to effect this policy, but Mr. Alschuler suggested a clarification, which was accepted by the committee, to the effect that the provoker need not abandon the encounter when he reasonably believes he cannot do so safely.

Sec. 3.32. DEADLY FORCE.

A person is justified in threatening or using deadly force against another

(1) if he would be justified in threatening or using force against the other under Section 3.31; <u>and</u>

(2) if <u>a reasonable man in the actor's situation would not have retreated</u> [HE BELIEVES HE CANNOT RETREAT WITH SAFETY]; and

(3) when and to the degree he <u>reasonably</u> believes the deadly force

is immediately necessary to protect himself against the other's use or attempted use of unlawful deadly force.

Sec. 3.01. CHAPTER DEFINITIONS.

In this chapter, unless the context requires a different definition,

(1) "deadly force" means force that is intended or known by the actor to cause, or in the manner of its use or intended use is capable of causing, death or serious bodily injury;

The committee first considered the alternative definitions of "deadly force" in Section 3.01(1). Dean Keeton pointed out that the preferred definition identify deadly force both objectively and subjectively; the alternate definition, on the other hand, is purely subjective, that is, the actor has to intend the force to cause, or know that it created a substantial risk of causing, death or serious bodily injury. Mr. Vance moved that the committee adopt the preferred definition, but the dean argued that its use would impose liability for mistake of fact. The committee postponed choosing between the two definitions until they could be considered in the context of the section justifying the use of deadly force, 3.32.

The committee voted unanimously to require a reasonable belief in necessity to justify the use of deadly force. Mr. Searcy suggested that "reasonable" be inserted to modify "believes" everywhere in the chapter, but the committee deferred decision on this.

On the retreat issue, Section 3.32(2), Dean Keeton proposed phrasing the retreat obligation in terms of whether a reasonable man in the actor's situation would not have retreated before using deadly force; this allows the jury to make a moral judgment about the defendant's conduct. Mr. Alschuler argued that this approach delegates to the jury the entire legislative decision about when retreat ought to be required before killing. Rather, he asserted, the new penal code should affirmatively require retreat, if it can be safely accomplished, or at least forbid the jury's equation of retreat with cowardice. After lengthy discussion the committee voted to adopt the dean's proposed resolution of the retreat issue.

Mr. Searcy asked what ought to be the consequence of failure to retreat. For example, the Illinois code deals explicitly with failure to retreat and punishes the actor for manslaughter; the Michigan code does likewise but the crime is negligent homicide. Mr. Vance recommended that

the new Texas code not deal separately with the question but resolve it in terms of the homicide chapter. The committee agreed.

The alternative definitions of "deadly force" were again discussed with a majority of the committee appearing to favor the preferred, or objective, definition.

Sec. 3.33. PROTECTION OF THIRD PERSON.

A person is justified in threatening or using force or deadly force against another to protect a third person if

(1) under the circumstances as the actor reasonably believes them to be the actor would be justified under Section 3.31 or 3.32 in threatening or using force or deadly force to protect himself against the unlawful force or unlawful deadly force he reasonably believes to be threatening the third person he seeks to protect; and

(2) the actor reasonably believes that his intervention is immediately necessary to protect the third person.

With the addition of "reasonably" to modify "believes," the committee approved this section as written.

The committee recessed for lunch at 11:55 a.m. The committee reconvened at 1:30 p.m. and considered Section 3.34.

Sec. 3.34. PREVENTION OF SUICIDE OR SELF-INFLICTED INJURY.

A person is justified in threatening or using force, but not deadly force, against another when and to the degree he reasonably believes the force is immediately necessary to prevent the other from committing suicide or inflicting serious bodily injury on himself.

Mr. Rosenthal asked whether this section justifies a doctor's forcible surgery on a nonconsenting traffic victim. Mr. Searcy replied that Section 3.64 aimed specifically at the doctor-patient emergency situation and would control.

The committee then approved Section 3.34 as drafted.

Sec. 3.06. CIVIL REMEDIES UNAFFECTED.

The fact that conduct is justified under this chapter does not abolish or impair any remedy for the conduct that is available in a civil suit.

Mr. Searcy said the purpose of this section is to insure that proposed Chapter 3 of the new penal code would not create privileges in the law of torts. The section does not, however, speak to the issue of whether, if the justification created in proposed Chapter 3 is narrower than in current tort privilege--as it will be in many instances--a court may or ought to contract the privilege and thus create liability for conduct heretofore privileged but made unjustifiable by the new penal code. This is a matter for the courts' common-law lawmaking in the tort area and the new penal code should not interfere with it.

The committee approved the section as drafted.

Sec. 3.61. PARENT-CHILD.

The threat or use of force, but not deadly force, against a child younger than 18 years is justified

(1) if the actor is the child's parent or someone acting in loco parentis to the child; and

(2) when and to the degree the actor reasonably believes the force is [IMMEDIATELY] necessary to discipline the child or to safeguard or promote his welfare.

Sec. 3.62. TEACHER-STUDENT.

The threat or use of force, but not deadly force, against a person is justified

(1) if the actor is entrusted with the care or supervision of the person for a special purpose; and

(2) when and to the degree the actor reasonably believes the force is [IMMEDIATELY] necessary to further the special purpose or to maintain discipline in a group.

Mr. Gray recommended deleting "immediately" from both sec-sections on the theory that punishment cannot always immediately

follow commission of the infraction; the committee agreed to these deletions. Mr. Alschuler suggested excepting from Section 3.62 the in loco parentis relationship, which is covered in Section 3.61. Mr. Searcy argued an exception was unnecessary because the sections follow one another and deal explicitly and separately with the two relationships. Mr. Gray asked whether Section 3.62 covers someone having custodial rights. Mr. Searcy replied that the formal custodial relationship is covered by Section 3.63; however, the phrase "care or supervision" in Section 3.62(1) no doubt embraces custody.

> Sec. 3.63. GUARDIAN-INCOMPETENT.
>
> The threat or use of force, but not deadly force, against a mental incompetent is justified
>
> (1) if the actor is the incompetent's guardian or someone similarly responsible for the general care and supervision of the incompetent; and
>
> (2) when and to the degree the actor <u>reasonably</u> believes the force is immediately necessary
>
> (A) to safeguard and promote the incompetent's welfare; or
>
> (B) if the incompetent is in an institution for his care and custody, to maintain discipline in the institution.

Judge Barron recommended inserting "reasonably" to modify "believes" in all three sections. Dean Keeton then questioned whether the belief standard was appropriate for the special relationships area; he suggested altering the basic formulation in this area to read "when and to the degree the force is reasonably necessary . . . ." The dean explained that the issue in this type of case is the reasonableness of the force used and the actor's belief is immaterial. Mr. Searcy argued that the actor does have to form a belief about the appropriateness of the <u>occasion</u> for using force; the word "when" in the standard formulation focuses on the occasion judgment. Moreover, there are advantages to using the same necessity formulation throughout the chapter, and the phrase "when and to the degree the actor reasonably believes the force is necessary" has been approved for all the other sections considered by the committee. The committee did not vote on the dean's recommended change in the formulation, but approved the sections as modified.

Sec. 3.64. DOCTOR-PATIENT.

The threat or use of both force and deadly force against a patient is justified if

(1) the actor is a licensed doctor, or someone acting at the doctor's direction; and

(2) the force or deadly force is used to administer a recognized form of treatment that the actor is licensed to administer and that he reasonably believes is adapted to promoting the physical or mental health of the patient; and

(3) the treatment is administered

(A) with the patient's consent; or

(B) if the patient is not legally competent to consent, with the consent of someone legally competent to consent in his behalf; or

(C) in an emergency [AND THE ACTOR BELIEVES THAT NO ONE COMPETENT TO CONSENT CAN BE CONSULTED AND THAT A REASONABLE PERSON, WISHING] to safeguard the patient's welfare [WOULD CONSENT].

Mr. Daugherty recommended adding the phrase "within a reasonable time" following the word "consulted" in Section 3.64(3)(C). Dean Keeton replied that this requirement is implicit in the emergency concept and that we should let the courts define "emergency" on a case-by-case basis.

Mrs. Watson-Elmer suggested deleting the phrase "or someone acting at the doctor's direction" from Subdivision (1); she feared the use of deadly force by nurses, chiropracters, and others not competent to use it. Mr. Searcy suggested, instead of the deletion, adding the phrase "is licensed to administer" to modify "form of treatment" in Subdivision (2); the committee agreed to this addition.

Mr. Blakely asked whether the section justifies euthanasia. The consensus was no, it does not, because euthanasia is not a "recognized form of treatment."

Dean Keeton urged the inclusion of a new section justifying the use of force or deadly force by anyone when and to the

degree it is immediately necessary to save human life in an emergency. The committee approved this idea and directed the staff to prepare a draft section for later consideration. In analyzing the need for a new section, the staff should consider whether the necessity justification (Section 3.21) might cover the situation, and the new section's relation to Section 3.34, which justifies force to prevent suicide or self-inflicted injury. Finally, the staff should consider whether it is necessary to deal with the consent problem in this chapter rather than in the chapter dealing with consent as a general defense to criminal liability. The committee decided, therefore, to postpone a decision on the need for an content of Section 3.64.

Sec. 3.65. COMMON CARRIER-PASSENGER.

The threat or use of force, but not deadly force, against a passenger in a common carrier, ship, or aircraft is justified

(1) if the actor is responsible for maintaining order in the common carrier, ship, or aircraft or is acting at the direction of someone so responsible; and

(2) when and to the degree the actor <u>reasonably</u> believes the force is immediately necessary to maintain order in the carrier, ship, or aircraft.

Dean Keeton objected that this section was too narrowly framed because it omitted many other responsibility-to-maintain-order situations for which tort law now recognizes a privilege to use force. He gave examples of the innkeeper, meeting chairman, theater owner, and passenger terminal guard. Mr. Searcy suggested that the crime prevention justification may cover all these situations; for example, the title on offenses against public order and decency will make disturbing the peace and disrupting a meeting offenses for the prevention of which force will be justified under Section 3.53. In view of this overlap, Mr. Searcy concluded, Section 3.65 itself may be unnecessary. After further discussion, the committee directed the staff to consider broadening the section to cover other relationships [cf. M.P.C. § 3.08(7)], or omitting it because the crime prevention and property protection justifications will cover all situations.

Sec. 3.51. ARREST.

(a) A peace officer, or a person acting <u>in a peace officer's presence</u> and at his direction, is justified in threatening or using force against another

when and to the degree the actor reasonably believes the force is immediately necessary to make or assist in making an arrest, if

(1) the actor reasonably believes the arrest is lawful or, if the arrest is made under a warrant, he reasonably believes the warrant is valid; and

(2) before threatening or using force, the actor manifests his purpose to arrest and identifies himself as a peace officer or as one acting at a peace officer's direction, unless he reasonably believes his purpose and identity are already known by or cannot reasonably be made known to the person to be arrested.

(b) A person other than a peace officer (or one acting at his direction) is justified in threatening or using force against another when and to the degree the actor reasonably believes the force is immediately necessary to make or assist in making a lawful [AN] arrest [LAWFUL IN FACT AND LAW] if, before threatening or using force, the actor manifests his purpose to and the reason for the arrest or believes his purpose and the reason are already known by or cannot reasonably be made known to the person to be arrested.

(c) Only a peace officer [,OR A PERSON ACTING AT HIS DIRECTION,] is justified in threatening or using deadly force against another when and to the degree the peace officer reasonably [ACTOR] believes the deadly force is immediately necessary to make or assist in making an arrest if

(1) the threat or use of force would have been justified under Subsection (a); and

(2) the actor reasonably believes his threat or use of deadly force does not create a substantial risk of injury to an innocent third person; and

(3) the actor reasonably believes the conduct for which arrest is authorized

included the use or attempted use of deadly force; and

(4) the actor reasonably believes there is a substantial risk that the person to be arrested will cause death or serious bodily injury to another if the arrest is delayed.

(d) There is no duty to retreat before threatening or using deadly force justified by Subsection (c).

Judge Kelton urged that an arrest have to be lawful in fact and law before a peace officer is justified in using force to effect it; Dean Keeton emphasized that this is a major policy issue for the committee. Judge Barron noted that, under present Texas law, a peace officer is justified in using force to effect an arrest under a warrant, although the arrest is unlawful, if the warrant is fair on its face; Section 3.51(a)(1) preserves this law. Mr. Searcy argued that peace officers shouldn't be required to judge the lawfulness of an arrest at their peril since courts often disagree about lawfulness.

Mr. Colvin asked whether Subsection (b) covers arrest by federal officers. Mr. Searcy replied that federal officers come within the definition of "peace officer" in Section 3.01(4), and that Subsection (b) governs citizen arrest. Mr. Alschuler requested that the subsection be rephrased to make clear the arrest must be lawful in fact and in law to justify the private citizen's use of force to effect it.

In connection with Subsection (c), Mr. Searcy asked whether the use of deadly force ought ever to be justified solely to effect arrest; it is not under present law, he pointed out. Dean Keeton summarized the three lines of authority on this issue. Some jurisdictions, like Texas, prohibit the use of deadly force solely to effect arrest. Others, representing the traditional common-law view, permit deadly force to effect arrest for any felony; this view is too extreme, the dean urged. The third line of authority, like Section 3.51(c), strikes a balance between the other two: deadly force is justified to effect arrest for a suspected crime that involved the use of deadly force and the suspect poses a substantial threat of using deadly force again if not apprehended. Mr. Daugherty favored the first view and preservation of existing Texas law. Judge Barron moved to delete the phrase "or a person acting at his direction" so only a peace officer can use deadly force to effect arrest. The committee adopted this motion. Mr. Maloney moved to strike "believes" from Subsection (c)(2). Dean Keeton objected on the ground the peace officer should not have to act at his peril--about whether an innocent person is in the line of fire, for example. After further discussion Mr. Maloney withdrew his motion.

Mr. Alschuler inquired whether Subdivision (3) includes rape. The members offered a variety of opinions and Mr. Reid suggested adding the phrase "or attempted use" (as had been done in other sections to cover the threat of violence situation) and the committee accepted this addition.

Mr. Cofer recommended deleting Subdivision (4) because it does not provide an adequate standard for determining whether deadly force is necessary to effect arrest. Moreover, Subdivision (3), by focusing on the violent nature of the offense for which arrest is authorized, will determine whether the peace officer uses deadly force. Mr. Searcy noted, however, that the peace officer's judgment will in fact be in terms of whether the suspect, if allowed to escape, is likely to cause death or serious bodily injury. Mr. Rosenthal at this point recommended substituting "conduct" for "offense" in Subdivision (3) because, although violent, certain conduct may not technically constitute an offense. Mr. Searcy had no objection to this substitution.

Mr. Colvin inquired of Chief Laws and Sergeant Knigge whether law enforcement needed the right to use deadly force solely to effect arrest. Sergeant Knigge responded that they had gotten along all right without it all these years under the present law. Dean Keeton observed, however, that Chapter 3 severely curtails the present law's justifiable homicide provisions relating to stopping certain fleeing felons. Chief Laws said he approved Section 3.51(c) as drafted.

Judge Kelton urged that the peace officer have to witness the violent crime's commission before being justified in using deadly force to arrest its perpetrator; Mr. Maloney supported this position. The committee discussed this issue at length before Dean Keeton put the section to a vote. The committee voted 7-1, with two abstentions, to adopt the section as written with the insertions, however, of "reasonably" to modify "believes" throughout.

S Sec. 3.52. PREVENTION OF ESCAPE.

(a) A person is justified in threatening or using force or deadly force against another

(1) when and to the degree the actor <u>reasonably</u> believes the force or deadly force is necessary to prevent an arrested person's imminent escape; and

(2) if, under the circumstances as the actor <u>reasonably</u> believes them to be, he would have been justified

under Section 3.51 in threatening or using the force or deadly force to effect the arrest under which the person is restrained.

(b) A peace officer, or guard employed by a penal institution, is justified in threatening or using force against a person in the custody of a penal institution when and to the degree the actor reasonably believes the force is necessary to prevent the person's imminent escape from the penal institution or while being transported to or from the penal institution.

(c) A peace officer, or guard employed by a penal institution, is justified in threatening or using deadly force against a convicted felon in the custody of a penal institution when and to the degree the actor reasonably believes the deadly force is necessary to prevent the convicted felon's imminent escape from the penal institution or while being transported to or from the penal institution. There is no duty to retreat before threatening or using deadly force justified by this subsection.

Mr. Daugherty moved to insert "reasonably" to modify "believes" throughout the section and the committee adopted his motion.

Mr. Alschuler suggested adding "but not deadly force" to Subsection (b); Mr. Searcy replied he thought it unnecessary because Subsection (c) deals explicitly with deadly force.

Mr. Alschuler then asked whether the no-risk-to-innocent-third person restriction ought to be included in Subsection (c). Judge Barron objected to its inclusion, and Dean Keeton pointed out that Section 3.05 would impose criminal liability on a guard who recklessly or negligently killed or injured an innocent third person.

The committee unanimously adopted the section as drafted, with insertions of "reasonably" to modify "believes" throughout.

Sec. 3.53. CRIME PREVENTION.

(a) A person is justified in threatening or using force against another when and to the degree the actor reasonably believes the force is necessary to prevent the

imminent commission of an offense involving or threatening

(1) bodily injury; or

(2) damage to or loss of property; or

(3) breach of the peace.

(b) A peace officer, or a person acting at his direction, is justified in threatening or using deadly force against another when and to the degree the actor reasonably believes the deadly force is necessary to prevent the imminent commission of an offense if

(1) his threat or use of force would have been justified under Subsection (a); and

(2) he reasonably believes there is a substantial risk that the offense if not prevented will cause death or serious bodily injury to another.

(c) A person other than a peace officer or one acting at his direction is justified in threatening or using deadly force when and to the degree the actor reasonably believes the deadly force is necessary to prevent the imminent commission of an offense in his dwelling if

(1) his threat or use of force would have been justified under Subsection (a); and

(2) he reasonably believes his threat or use of deadly force does not create a substantial risk of injury to an innocent third person; and

(3) he reasonably believes there is a substantial risk that the offense if not prevented will cause death or serious bodily injury to another.

(d) For purposes of this section,

(1) "breach of the peace" means a public offense committed by violence

or an offense causing or likely to cause an immediate disturbance of public order;

(2) "dwelling" means a structure or vehicle adapted for the overnight accommodation of persons.

(e) There is no duty to retreat before threatening or using deadly force justified by Subsections (b) and (c).

Mr. Searcy led off by noting that the major issue for decision in this section is whether force should be justified to prevent any offense or only an offense involving bodily injury, damage to or loss of property, or breach of the peace. Dean Keeton responded that force ought to be justified to prevent any offense. Mr. Searcy argued that force ought not be allowed to prevent littering the sidewalk or walking on the grass; Mr. Alschuler added that even the breach of the peace concept is too broad because it justifies force to prevent disorderly conduct and other petty infractions.

Mr. Dawson asked why the section is necessary in light of separate justifications to arrest (for any offense), defend the person, and defend property. The dean tended to agree, but was unsure whether crime prevention justification might not be broader in certain circumstances than arrest or defense justification. Judge Barron moved to delete the entire section as unnecessary, and Mr. Dawson pointed out that private citizens as well as peace officers are justified under Section 3.51 in using force to arrest for <u>any</u> offense.

Mr. Colvin expressed concern that the section may be used to justify stop and frisk. Mr. Dawson replied that fourth amendment standards will govern the authorization for and scope of stop and frisk.

After more discussion the committee agreed to defer further consideration of this section until the protection of property provisions were considered and the need for a separate justification for crime prevention could be better assessed.

Sec. 3.41. PROTECTION OF OWN PROPERTY.

(a) A person in lawful possession of land or tangible, moveable property is justified in threatening or using force, but not deadly force, against another when and to the degree the actor <u>reasonably</u> believes the force is immediately necessary to prevent or terminate the other's trespass on the land or unlawful interference with the property.

(b) A person unlawfully dispossessed of land or tangible, moveable property by another is justified in threatening or using force, but not deadly force, against the other when and to the degree the actor reasonably believes the force is immediately necessary to reenter the land or recover the property if

(1) the actor threatens or uses the force immediately or in fresh pursuit after the dispossession; and either

(2) the actor reasonably believes the other had no claim of right when he dispossessed the actor; or

(3) the other accomplished the dispossession by using force or fraud against the actor.

Dean Keeton noted that Subsection (a) covers defense of possession and Subsection (b) reentry or recaption after dispossession. He recommended modifying Subsection (b), however, to justify force for reentry-recaption after unlawful dispossession if either the dispossession was forcible or fraudulent or without claim of right. The committee agreed to this modification.

Mr. Dawson inquired whether Subsection (b) justifies force to eject a tenant who pays the first month's rent with a hot check. Dean Keeton thought it does, if the ejection is accomplished immedately, but he was unaware of any repoted occurrence of this type situation.

Judge Kelton argued he should be able to kill a trespasser if he can't eject him from his land any other way. Dean Keeton disagreed heatedly. Mr. Searcy suggested that the landowner can call the police to have the trespasser ejected. Mr. Cofer asked if all trespasses will be criminal; the consensus was that they will not be. [Staff Note: Section 3.42(2)(A) justifies a peace officer's ejection of a trespasser if requested by the landowner.] The committee discussed for some time the use of deadly force solely to protect property but left the issue unresolved.

Mr. Dawson suggested substituting "criminally" for "lawfully." Dean Keeton pointed out, however, that some dispossessions--for example, those under a claim of right--are not criminal but are tortious; and "unlawful" embraces both criminal and tortious.

At Mr. Dawson's request Mr. Searcy agreed to clarify

that "forcibly" refers to the use of force against the actor to effect dispossession.

Deferring a decision on the deadly force issue, the committee approved Section 3.41 with the modifications agreed on.

Sec. 3.42. PROTECTION OF THIRD PERSON'S PROPERTY.

A person is justified in threatening or using force, but not deadly force, against another to protect land or tangible, moveable property of a third person if

(1) under the circumstances as he reasonably believes them to be the actor would be justified under Section 3.41 in threatening or using force to protect his own land or property; and

(2) the actor reasonably believes

(A) the third person has requested his protection; or

(B) he has a legal duty to protect the third person's land or property; or

(C) the third person is the actor's spouse, parent, or child, [OR] resides with the actor, or is under the actor's care.

Since Subdivision (2) limits the classes of third persons whose property one is justified in using force to protect, this section, Dean Keeton noted, presents a good example of the need for a separate crime prevention justification. Mr. Rosenthal brought up the example of seeing a trespasser on your neighbor's property: under Subdivision (2) you are not justified in using force to eject him. Thus, Dean Keeton concluded, either crime prevention justification is necessary or a Subdivision (2)(D) should be added to this section justifying force to protect a third person's property if the interferer is committing an offense against that property. The committee discussed further but did not clearly resolve the issue of whose property one ought to be justified in using force to protect. However, the committee accepted Mr. Rosenthal's suggestion to add "or is under the actor's care" to the end of Subdivision (2)(C).

The committee renewed its discussion of deadly force solely to protect property and returned to Section 3.53(b)

and (c), which justify deadly force, respectively, by a peace officer to prevent a deadly offense anywhere and by a person other than a peace officer to prevent deadly offense in his dwelling.

Mr. Cofer asked whether deadly force is justified to protect property except against crime--for example, is deadly force justified to eject a trespasser from land? Dean Keeton replied that this raises the basic issue: should deadly force be justified to prevent the intentional damage to or destruction of property, not involving a substantial risk of death or serious bodily injury to a human being, and not occurring at night on premises? Judge Kelton answered that deadly force should be justified in this situation, and gave the example of someone tearing up the stock of merchandise in his store. He added that there is no point in having the arrest justification provisions if a thief knows the owner cannot kill him to prevent his making off with the stolen property. Mr. Daugherty, on the other hand, stated he wouldn't want it on his conscience that he had killed a fellow human being solely to prevent him from making off with his property. The committee continued to discuss this basic policy question for some time and then Dean Keeton requested a vote. The vote was 5-3 against justifying deadly force solely to protect property.

Mr. Cofer raised the question of justifying deadly force to prevent the commission of an offense on premises at night. Dean Keeton agreed that a stranger's commission of an offense on premises at night is probably sufficient, regardless of the nature of the offense, to create a substantial risk of death or serious bodily injury to a human being. Therefore, the law ought to justify deadly force in this situation. The committee directed the staff to redraft the crime prevention section to resolve the issues identified and tentatively resolved by the committee.

The meeting adjourned at 5 p.m.

TEXAS PENAL CODE REVISION PROJECT

Committee Meeting Notice

Date. October 3, 1969

To. State Bar Committee on Revision of Penal Code; Law Enforcement Advisory Committee, Advisory Committee on Corrections; Reporters; Staff

From. William G Reid, Project Director

Subj: Committee Meeting October 24 and 25

The committee will meet Friday and Saturday, October 24 and 25, 1969, at the Villa Capri Motel, 2400 North Interregional Highway, Austin. The Friday session will begin at 10 a.m. in the Envoy Room, the Saturday morning session will begin at 9 a.m. in the Viscount Room. Lunch will be served both days.

The committee will consider reports on a consolidated theft offense, territorial jurisdiction, justification, and mental responsibility for crime, all of which are enclosed.

The theft report is submitted in two parts. The statutes on yellow paper reflect changes recommended at the September 26 reporters' meeting; the basic theft report contains the original draft of these statutes together with comments on policy issues, current Texas law, treatment by the revising states, etc. We shall work from the yellow paper during the meeting.

The report on territorial jurisdiction was included on the committee agenda for its April 28-29, 1967 meeting, but lack of time prevented its consideration. The justification report was partially considered at the April 25, 1969 meeting, and the enclosed report contains the statutes not discussed at that meeting. The report on mental responsibility for crime was considered at both the February 9 and April 26-27, 1968 meetings, and the enclosed report deals with the issues not resolved at those meetings.

We have secured 15 rooms at the Holiday Inn, South Interregional Highway at Town Lake Road, and the 14 of you who have requested reservations are thus guaranteed them.

Enclosures

TEXAS PENAL CODE REVISION PROJECT

Committee Meeting Agenda

Friday and Saturday, October 24 and 25, 1969, Villa Capri Motel, 2400 North Interregional, Austin, Texas

Friday, October 24 (Envoy Room)

10 a.m.	Meeting called to order. Remarks by Dean Keeton.
10:10 a.m.	Theft report.
12:30 p.m.	Lunch.
1:30 p.m.	Theft report continued and concluded.
5 p.m.	Recess until Saturday.

Saturday, October 25 (Viscount Room)

9 a.m.	Meeting called to order.
9:15 a.m.	Territorial jurisdiction report.
10:30 a.m.	Justification report.
11:30 a.m.	Criminal responsibility report.
12:30 p.m.	Lunch and adjournment.

TEXAS PENAL CODE REVISION PROJECT

Summary of Minutes of the Meeting of The
Texas State Bar Committee
On
Revision of The Penal Code

October 24-25, 1969

Theft, Territorial Jurisdiction, Justification

The State Bar Committee on Revision of the Texas Penal Code met at the Villa Capri Restaurant in Austin, Texas, at 10:00 a.m. on Friday, October 24 to consider the report on Theft offenses. The committee met on Saturday, October 25, at 9 a.m. to consider reports on Territorial Jurisdiction, and the balance of the Justification report which had not been considered at the previous meeting. Consideration of the report on Criminal Responsibility scheduled for this meeting was postponed because of lack of time.

Present: Committee Members: Dean Page Keeton, chairman; Judge John Barron; Mr. Samuel Biery; Judge Archie S. Brown; Mr. Hume Cofer; Mr. Samuel Daugherty; Judge E. B. Duggan; Mr. George Gray; Mr. George Kelton; Mr. Frank Maloney; Judge T. Gilbert Sharpe; Mr. Travis Shelton; and Mr. Carol Vance.

Law Enforcement Advisory Committee: Mr. Glen Conner; Sgt. J. A. Knigge for Chief Herman Short.

Advisory Committee on Corrections: Mr. Bill Anderson; Mr. Luster Gollaher; Dr. George Killinger; and Mr. Bill Thompson.

Reporters: Professors Albert Alschuler; Alan Bromberg; Robert Dawson; and Michael Rosenthal.

Staff: Bill Reid, project director.

Texas Legislative Council Staff: Seth Searcy, chief revisor; Ken Drew, Darrell Blakeway, and Rick Yahr, revisors.

> NOTE: The drafts set out in this report are tentative only and do not necessarily represent the final decision of the State Bar of Texas Penal Code Revision Committee on any of the areas covered. The drafts do not represent the view of the State Bar of Texas or of the Texas Legislature.

The committee tentatively approved the following draft sections.

ARTICLE 223. THEFT

Sec. 223.0. DEFINITIONS.

In this article, unless the context requires a different definition,

(1) "deception" means

(A) creating or confirming by words or conduct an impression of law or fact likely to affect the judgment of another in the transaction that is false, and that the actor does not believe to be true;

(B) failing to correct a false impression of law or fact likely to affect the judgment of another in the transaction, that the actor previously created or confirmed by words or conduct and that the actor does not now believe to be true;

(C) preventing another from acquiring information likely to affect his judgment in the transaction;

(D) selling or otherwise transferring or encumbering property without disclosing a known lien, security interest, adverse claim, or other legal impediment to the enjoyment of the property, whether the lien, security interest, claim, or impediment is or is not valid, or is or is not a matter of official record; or

(E) promising performance that the actor does not intend to perform or knows will not be performed, except that failure to perform the promise in issue without other evidence of intent or knowledge is not sufficient proof that the actor did not intend to perform or know would not be performed;

(2) "deprive" means

(A) to withhold property from the owner permanently or for so extended a period of time that a major portion of the value or enjoyment of the property is lost to the owner;

(B) to withhold property from the owner with intent to restore it only upon payment of reward or other compensation; or

(C) to dispose of property in a manner that makes recovery of the property by the owner unlikely;

(3) "obtain" means

(A) to bring about a transfer or purported transfer of an interest in property, whether to the actor or another; or

(B) to secure the performance of a service;

(4) "owner" means the person other than the actor who has possession of property or any other interest in property, even if the possession or interest is unlawful;

(5) "property" means

(A) real property;

(B) tangible or intangible personal property including anything severed from land;

(C) a document that represents or embodies anything of value;

(6) "service" includes

(A) labor and professional service;

(B) telecommunication, public utility, and transportation service;

(C) hotel accommodation, restaurant service, and entertainment;

(D) the supply of a motor vehicle or other property for use;

(7) "steal" means to acquire property by theft;

(8) "coercion" means a threat, knowingly made and however communicated,

(A) to commit any offense;

(B) to inflict bodily injury in the future on the person threatened or another;

(C) to accuse any person of any offense;

(D) to expose any person to hatred, contempt, or ridicule;

(E) to harm the credit or business repute of any person;

(F) to take or withhold action as a public servant, or to cause a public servant to take or withhold action.

Sec. 223.1. CONSOLIDATION OF THEFT OFFENSES.

Theft as defined in Section 223.2 constitutes a single offense superceding the separate offenses previously known as theft, theft by false pretext, conversion by a bailee, theft from the person, shoplifting, acquisition of property by threat, swindling, embezzlement, extortion, receiving or concealing embezzled property, and receiving or concealing stolen property.

Sec. 223.2. THEFT.

(a) A person, corporation, or association commits theft if, with intent to deprive the owner of property, he knowingly

(1) obtains the property unlawfully; or

(2) exercises control over the property other than real property unlawfully.

(b) Obtaining or exercising control over property is unlawful if

(1) the actor obtains or exercises control over the property without the property owner's effective consent; or

(2) the property is stolen and the actor obtains or exercises control over the property knowing it was stolen by another.

(c) Effective consent includes consent by any person legally authorized to act for the owner. Consent is not effective if

(1) induced by coercion or deception; or

(2) given by a person the actor knows is not legally authorized to act for the owner; or

(3) given by a person who by reason of youth, mental disease or defect, or intoxication is known by the actor to be unable to make reasonable property dispositions; or

(4) given only for the purpose of detecting the commission of an offense.

(d) Except as provided in Subsection (e), theft is a Class A misdemeanor.

(e) Theft is a felony of the third degree if

(1) the value of the property stolen is [$250] [$200] or more; or

(2) regardless of value, the property stolen is an automobile or other motor propelled vehicle; or

(3) regardless of value, the property is stolen from the person of another.

Comment

The committee was evenly divided on the amount required for felony theft. A majority was in favor of making the amount at least $200 and the division was on whether the higher amount should be used.

Sec. 223.4. VALUE.

(a) Subject to the additional criteria of Subsections (b)-(d), the value of property is

(1) the market value of the property at the time and place of the offense; or

(2) if the market value cannot be ascertained, the cost of replacing the property within a reasonable time after the theft.

(b) The value of documents, other than those having a readily ascertainable market value, is determined as follows:

(1) the value of a document constituting evidence of a debt is the amount due and collectible at maturity less any part that has been satisfied;

(2) the value of any other document is the greatest amount of economic loss that the owner might reasonably suffer by virtue of the loss of the document.

(c) When property has value that cannot be ascertained by the criteria set forth in Subsections (a) and (b), the property is deemed to have a value of less than [$250][$200].

[(d) If the actor gave consideration for or had a legal interest in the property involved, the amount of the consideration

or value of the interest shall be deducted from the total value of the property.]

> NOTE: After the meeting, the staff prepared Subsection (d) to specifically change Texas law in this respect. The chairman and staff recommend its inclusion. It is similar to Wis. Stat. Ann. § 943.20(2)(c) (1958). The holding being changed is that of LaMoyne v. State, 111 S.W. 950 (Tex. Crim. App. 1908).

Sec. 223.5. AGGREGATION OF AMOUNTS INVOLVED IN THEFT.

Amounts stolen in thefts committed pursuant to one scheme or course of conduct, whether from the same or several owners and whether at the same or different times, may be aggregated in determining the grade of the offense.

Sec. 223.6. ACTOR'S INTEREST IN THE PROPERTY.

(a) It is no defense to prosecution for theft that the actor has an interest in the property stolen if another person also has an interest that the actor is not entitled to infringe.

(b) Property in possession of the actor is not the property of another who has only a security interest in the property, even if legal title is in the other pursuant to a conditional sales contract or other security agreement.

Sec. 223.7. CLAIM OF RIGHT.

It is an affirmative defense to prosecution for theft that the actor

(1) acted under an honest claim of right to the property involved or acted in the honest belief that he had the right to obtain or exercise control of it as he did; or

(2) obtained or exercised control over property honestly believing that the owner, if present, would have consented.

Sec. 223.8. AVOIDING PAYMENT FOR SERVICES.

(a) A person, corporation, or association commits an offense if with intent to avoid payment for a service he knowingly obtains a service unlawfully.

(b) Obtaining a service is unlawful if

(1) performance of the service is induced by coercion or deception; or

(2) he has control over the disposition of services of others to which he is not entitled and he knowingly diverts their services to his own benefit or to the benefit of another not entitled to receive them.

(c) An offense under this section is a felony of the third degree, unless the value of the service involved is less than [$250][$200], in which event the offense is a Class A misdemeanor.

Sec. 223.9. UNAUTHORIZED USE OF AUTOMOBILE OR OTHER VEHICLE.

(a) A person commits an offense if he operates another's boat, airplane, or motor vehicle without the consent of the owner.

(b) An offense under this section is a Class A misdemeanor.

Civil Statutes

Art. 1c. PRIVILEGE TO INVESTIGATE THEFT.

A person, corporation, or association reasonably believing a person has stolen or is attempting to steal property is privileged to detain the person in a reasonable manner and for a reasonable period of time for the purpose of investigating ownership of the property.

TERRITORIAL JURISDICTION

Sec. 1.03. TERRITORIAL JURISDICTION.

(a) This state has jurisdiction over an offense that a person, corporation, or association commits by his own conduct or the conduct of another for which he is criminally liable if

(1) either the conduct or a result that is an element of the offense occurs within this state; or

(2) the conduct outside this state constitutes an attempt to commit an offense within this state; or

(3) the conduct outside this state constitutes a conspiracy to commit a felony within this state, and an act or verbal communication in furtherance of the conspiracy occurs within this state; or

(4) the conduct within this state constitutes an attempt, solicitation, or conspiracy to commit, or establishes criminal liability for the commission of, an offense in another jurisdiction that is also an offense under the law of this state.

(b) If the offense is criminal homicide, a "result" is either the physical impact causing death or the death itself. If the body of a criminal homicide victim is found in this state, it is presumed that the death occured in this state. If death alone is the basis for jurisdiction, it is an affirmative defense to the exercise of jurisdiction by this state that the conduct that is an element of the offense is not made criminal

in the jurisdiction where the conduct occurred.

(c) An offense based on an omission to perform a duty imposed on an actor by the law of this state is committed within this state regardless of the location of the actor at the time of the offense.

(d) This state includes the land and water (and the air space above the land and water) over which this state has power to define offenses.

CHAPTER 3. JUSTIFICATION EXCLUDING CRIMINAL RESPONSIBILITY

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 3.01. CHAPTER DEFINITIONS.

In this chapter, unless the context requires a different definition,

(1) "deadly force" means force that is intended or known by the actor to cause, or in the manner of its use or intended use is capable of causing, death or serious bodily injury;

(2) "escape" means unauthorized departure from custody or failure to return to custody following temporary leave for a specific purpose or limited period, but does not include a violation of conditions of probation or parole;

(3) "law" means the constitution or a statute of this state or of the United States, a municipal ordinance, an order of the county commissioners court, or a rule authorized by and lawfully adopted under a statute;

(4) "peace officer" means a public servant who has a duty imposed by law

(A) to maintain public order; or

(B) to make arrests for offenses, whether that duty extends to all offenses or is limited to specific offenses; or

(C) to investigate the commission or suspected commission of offenses;

(5) "penal institution" means a place designated by law for the confinement of persons arrested for, charged with, or convicted of an offense;

(6) "reasonable belief" means a belief the actor is not reckless or criminally negligent in holding under all the circumstances as viewed from his standpoint;

(7) "serious bodily injury" means physical pain, illness, or any impairment of physical condition that creates a substantial risk of death or that causes serious permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ;

(8) "unlawful" means criminal or tortious or both and includes what would be criminal or tortious but for a defense not amounting to justification or privilege.

Sec. 3.02. JUSTIFICATION AN AFFIRMATIVE DEFENSE.

Justification is an affirmative defense to prosecution for conduct that is justified under this chapter.

Sec. 3.03. CONFINEMENT AS JUSTIFIABLE FORCE.

Confinement is justified when force is justified by this chapter if the actor takes reasonable measures to terminate the confinement as soon as he knows he safely can unless the person confined has been arrested for an offense.

Sec. 3.04. RECKLESS OR NEGLIGENT INJURY OF INNOCENT THIRD PERSON.

Even though an actor is justified under this chapter in threatening or using force or deadly force against another, if in doing so he also recklessly injures or kills an innocent third person, the justification afforded by this chapter is unavailable in a prosecution for the reckless injury or killing of the innocent third person.

Sec. 3.05. CIVIL REMEDIES UNAFFECTED.

The fact that conduct is justified under this chapter does not abolish or impair any remedy for the conduct that is available in a civil suit.

SUBCHAPTER B. JUSTIFICATION GENERALLY

Sec. 3.21. NECESSITY.

Conduct is justified if

(1) the actor reasonably believes the conduct is immediately necessary to avoid imminent harm; and

(2) the desirability and urgency of avoiding the harm clearly outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the law proscribing the conduct; and

(3) a legislative purpose to exclude the justification claimed for the conduct does not otherwise plainly appear.

Sec. 3.22. PUBLIC DUTY.

(a) Except as qualified by Subsections (b) and (c), conduct is justified if the actor reasonably believes the conduct is required or authorized by law, by the judgment or order of a competent court or other tribunal, or in the execution of legal process.

(b) The other sections of this chapter control when force is threatened or used against a person to protect persons (Sections 3.31-3.34), to protect property (Sections 3.41-3.44), for law enforcement (Sections 3.51-3.53), or by virtue of a special relationship (Sections 3.61-3.63).

(c) The threat or use of deadly force is not justified under this section unless the actor reasonably believes the

deadly force is specifically required or authorized by law or the judgment of a competent court or unless it occurs in the lawful conduct of war. When deadly force is so justified, there is no duty to retreat before threatening or using it.

(d) The justification afforded by this section is available if

(1) the actor reasonably believes the court or tribunal has jurisdiction or the process is lawful, even though the court or tribunal lacks jurisdiction or the process is unlawful;

(2) the actor reasonably believes his conduct is required or authorized to assist a public servant in the performance of his official duty, even though the servant exceeds his lawful authority.

SUBCHAPTER C. PROTECTION OF PERSONS

Sec. 3.31. SELF-PROTECTION.

(a) Except as provided in Subsection (b), a person is justified in threatening or using force against another when and to the degree he reasonably believes the force is immediately necessary to protect himself against the other's use or attempted use of unlawful force.

(b) The threat or use of force against another is not justified

(1) to resist an arrest or search that the actor knows is being made by a peace officer, or by a person acting in a peace officer's presence and at his direction, even though the arrest or search is unlawful, unless the resistance is

justified under Subsection (c); or

(2) if the actor consented to the exact force used by the other; or

(3) if the actor provoked the other's use or attempted use of unlawful force, unless

(A) the actor abandons the encounter or clearly communicates to the other his intent to do so, or the actor reasonably believes he cannot safely abandon the encounter; and

(B) the other nevertheless continues or threatens the use of unlawful force against the actor.

(c) The threat or use of force to resist an arrest or search is justified

(1) if, before the actor offers any resistance, the peace officer (or person acting at his direction) uses or attempts to use unnecessary force to make the arrest or search; and

(2) when and to the degree the actor reasonably believes the force is immediately necessary to protect himself against the peace officer's (or other person's) use or attempted use of unnecessary force.

Sec. 3.32. DEADLY FORCE.

A person is justified in threatening or using deadly force against another

(1) if he would be justified in threatening or using force against the other under Section 3.31; and

(2) if a reasonable man in the actor's situation would not have retreated; and

(3) when and to the degree he reasonably believes

the deadly force is immediately necessary to protect himself against the other's use or attempted use of unlawful deadly force.

Sec. 3.33. PROTECTION OF THIRD PERSON.

A person is justified in threatening or using force or deadly force against another to protect a third person if

(1) under the circumstances as the actor reasonably believes them to be the actor would be justified under Section 3.31 or 3.32 in threatening or using force or deadly force to protect himself against the unlawful force or unlawful deadly force he reasonably believes to be threatening the third person he seeks to protect; and

(2) the actor reasonably believes that his intervention is immediately necessary to protect the third person.

Sec. 3.34. PROTECTION OF LIFE AND HEALTH.

(a) A person is justified in threatening or using force, but not deadly force, against another when and to the degree he reasonably believes the force is immediately necessary to prevent the other from committing suicide or inflicting serious bodily injury on himself.

(b) A person is justified in threatening or using both force and deadly force against another when and to the degree he reasonably believes the force or deadly force is immediately necessary to preserve the other's life in an emergency.

SUBCHAPTER D. PROTECTION OF PROPERTY

Sec. 3.41. PROTECTION OF OWN PROPERTY.

(a) A person in lawful possession of land or tangible, moveable property is justified in threatening or using force,

but not deadly force, against another when and to the degree the actor reasonably believes the force is immediately necessary to reenter the land or recover the property if

(1) the actor threatens or uses the force immediately or in fresh pursuit after the dispossession; and either

(2) the actor reasonably believes the other had no claim of right when he dispossessed the actor; or

(3) the other accomplished the dispossession by using force or fraud against the actor.

Sec. 3.42. PROTECTION OF THIRD PERSON'S PROPERTY.

A person is justified in threatening or using force, but not deadly force, against another to protect land or tangible, moveable property of a third person if

(1) under the circumstances as he reasonably believes them to be the actor would be justified under Section 3.41 in threatening or using force to protect his own land or property; and

(2) the actor reasonably believes

(A) the third person has requested his protection; or

(B) he has a legal duty to protect the third person's land or property; or

(C) the third person is the actor's spouse, parent, or child, resides with the actor, or is under the actor's care.

Sec. 3.43. USE OF DEVICE TO PROTECT PROPERTY.

The justification afforded by Sections 3.41 and 3.42 applies to the use of a device to protect land or tangible, moveable

property if use of the device is reasonable under all the circumstances as the actor reasonably believes them to be when he installs the device.

Sec. 3.44. DEADLY FORCE TO PROTECT HABITATION.

(a) A person in lawful possession of a habitation is justified in threatening or using deadly force against another when and to the degree he reasonably believes the deadly force is necessary to prevent the other's imminent commission of arson or burglary of the habitation.

(b) There is no duty to retreat before threatening or using deadly force justified by this section.

(c) For purposes of this section, "habitation" means a structure or vehicle adapted for the overnight accommodation of persons, and includes

(1) a separately secured or occupied portion of the structure or vehicle; and

(2) a structure appurtenant to or connected with the structure or vehicle;

SUBCHAPTER E. LAW ENFORCEMENT

Sec. 3.51. ARREST.

(a) A peace officer, or a person acting in a peace officer's presence and at his direction, is justified in threatening or using force against another when and to the degree the actor reasonably believes the force is immediately necessary to make or assist in making an arrest, or to prevent or assist in preventing escape after arrest, if

(1) the actor reasonably believes the arrest is

lawful or, if the arrest is made under a warrant, he reasonably believes the warrant is valid; and

(2) before threatening or using force, the actor manifests his purpose to arrest and identifies himself as a peace officer or as one acting at a peace officer's direction, unless he reasonably believes his purpose and identity are already known by or cannot reasonably be made known to the person to be arrested.

(b) A person other than a peace officer (or one acting at his direction) is justified in threatening or using force against another when and to the degree the actor reasonably believes the force is immediately necessary to make or assist in making a lawful arrest, or to prevent or assist in preventing escape after lawful arrest if, before threatening or using force, the actor manifests his purpose to and the reason for the arrest or believes his purpose and the reason are already known by or cannot reasonably be made known to the person to be arrested.

(c) Only a peace officer is justified in threatening or using deadly force against another when and to the degree the peace officer reasonably believes the deadly force is immediately necessary to make or assist in making an arrest, or to prevent or assist in preventing escape after arrest, if

(1) the threat or use of force would have been justified under Subsection (a); and

(2) the actor reasonably believes the conduct for which arrest is authorized included the use or attempted use of deadly force; and

(3) the actor reasonably believes there is a substantial risk that the person to be arrested will cause death or serious bodily injury to another if the arrest is delayed.

(d) There is no duty to retreat before threatening or using deadly force justified by Subsection (c).

Sec. 3.52. PREVENTION OF ESCAPE FROM PENAL INSTITUTION.

(a) A peace officer, or guard employed by a penal institution, is justified in threatening or using force against a person in the custody of a penal institution when and to the degree the actor reasonably believes the force is necessary to prevent the person's imminent escape from the penal institution.

(b) A peace officer, or guard employed by a penal instition, is justified in threatening or using deadly force against a convicted felon in the custody of a penal institution when and to the degree the actor reasonably believes the deadly force is necessary to prevent the convicted felon's imminent escape from the penal institution or while being transported to or from the penal institution. There is no duty to retreat before threatening or using deadly force justified by this subsection.

Sec. 3.53. CRIME PREVENTION.

(a) A person is justified in threatening or using force against another when and to the degree the actor reasonably believes the force is necessary to prevent the imminent commission of an offense.

(b) A peace officer is justified in threatening or using deadly force against another when and to the degree the peace

officer reasonably believes the deadly force is necessary to prevent the imminent commission of an offense if

(1) the peace officer reasonably believes the offense includes the use or attempted use of deadly force; and

(2) the peace officer reasonably believes there is a substantial risk that the offense if not prevented will cause death or serious bodily injury to another.

(c) There is no duty to retreat before threatening or using deadly force justified by Subsection (b).

SUBCHAPTER F. SPECIAL RELATIONSHIPS

Sec. 3.61. PARENT-CHILD.

The threat or use of force, but not deadly force, against a child younger than 18 years is justified

(1) if the actor is the child's parent or someone acting in loco parentis to the child; and

(2) when and to the degree the actor reasonably believes the force is necessary to discipline the child or to safeguard or promote his welfare.

Sec. 3.62. TEACHER-STUDENT.

The threat or use of force, but not deadly force, against a person is justified

(1) if the actor is entrusted with the care or supervision of the person for a special purpose; and

(2) when and to the degree the actor reasonably believes the force is necessary to further the special purpose or to maintain discipline in a group.

Sec. 3.63. GUARDIAN-INCOMPETENT.

The threat or use of force, but not deadly force, against a mental incompetent is justified

(1) if the actor is the incompetent's guardian or someone similarly responsible for the general care and supervision of the incompetent; and

(2) when and to the degree the actor reasonably believes the force is immediately necessary

(A) to safeguard and promote the incompetent's welfare; or

(B) if the incompetent is in an institution for his care and custody, to maintain discipline in the institution.

TEXAS PENAL CODE REVISION PROJECT

Committee Meeting Notice

Date: January 9, 1970

To: State Bar Committee on Revision of Penal Code; Law Enforcement Advisory Committee; Advisory Committee on Corrections; Reporters; Staff

From: William G Reid, Project Director

Subj: Committee Meeting February 6 & 7

The committee will meet Friday and Saturday, February 6 & 7, 1970, in the director's room of state bar headquarters, 201 West 15th Street, Austin. The Friday session will begin at 10 a.m., the Saturday morning session at 9 a.m.

The committee will consider the enclosed reports on sentencing, multiple prosecutions and double jeopardy, and mental responsibility for crime. (You received a copy of the mental responsibility report for the October 24-25, 1969 meeting, but we were unable to get to it; the enclosure is an extra copy in case you misplaced the earlier one.)

Please complete and mail to us promptly the enclosed postcard indicating whether you plan to attend the committee meeting and whether you want us to reserve accommodations for your trip. If you do want accommodations, we must receive your postcard on or before February 2 to guarantee their reservation.

Enclosures

TEXAS PENAL CODE REVISION PROJECT

Committee Meeting Agenda

Friday and Saturday, February 6 & 7, 1970, Director's Room,
State Bar Headquarters
201 West 15th Street
Austin, Texas

Friday, February 6		
	10 a.m.	Meeting called to order. Remarks by Dean Keeton.
	10:15 a.m.	Revised Sentencing report.
	12:30 p.m.	Lunch at the Alumni Center, 2110 San Jacinto.
	1:30 p.m.	Sentencing report continued.
	5 p.m.	Recess until Saturday.
Saturday, February 7		
	9 a.m.	Meeting called to order.
	9:15 a.m.	Report on Multiple Prosecutions and Double Jeopardy.
	11 a.m.	Report on Mental Responsibility for Crime.
	12:30 p.m.	Adjournment and lunch.

TEXAS PENAL CODE REVISION PROJECT

Summary of Minutes of the Meeting of the Texas
State Bar Committee on
Revision of the Penal Code

January 9-10, 1970

Complicity and Inchoate Offenses; Criminal Trespass; Criminal Mischief; Robbery; Aiding Suicide; Reckless Conduct; Criminal Nonsupport; Causal Relationship

The State Bar Committee on Revision of the Texas Penal Code met on Friday and Saturday, January 9 and 10, 1970, at State Bar Headquarters in Austin to consider the reports listed above. All draft statutes except the section on causal relationship were tentatively approved by the committee and are set out in this summary; the committee directed the staff to revise the causal relationship section and submit the revised draft at a future meeting.

Persons present at the meeting were:

Committee Members: Dean Page Keeton, chairman; Senator Charles F. Herring, vice chairman; Judge James e. Barlow; Judge John M. Barron, Jr.; Mr. Samuel F. Biery; Judge Archie S. Brown; Mr. George Hume Cofer; Mr. Emmett Colvin, Jr.; Mrs. Samuel E. Daugherty; Mr. George W. Gray III; Mr. Frank J. Maloney; Representative James E. Nugent; Judge T. Gilbert Sharpe; Mr. Travis D. Shelton; and Mr. James Terry Townsend.

Law Enforcement Advisory Committee: Mr. Glen Conner; Lt. Edwin D. Heath for Chief W. F. Dyson; and Sgt. J. A. Knigge for Chief Herman Short.

Advisory Committee on Corrections: Mr. Bill Anderson; Mr. Luster P. Gollaher; Dr. George Killinger; and Mr. Bill Thompson.

Observers: The Honorable Frank D. Coffey, representing the Texas County & District Attorneys Association; and Mr. George E. Gilkerson, representing the State Bar of Texas Criminal Law & Procedure Section.

Reporters: Professors Albert W. Alschuler, Newell H. Blakely, and Michael P. Rosenthal.

Staff: William G Reid, project director; Seth S. Searcy III, chief revisor; Darrell V. Blakeway, J.R. Patterson, Richard A. Yahr, revisors; C. Taylor Ashworth, student research assistant.

NOTE: The drafts set out in this report are tentative only and do not necessarily represent the final decision of the State Bar of Texas Penal Code Revision Committee on any of the areas covered. The drafts do not represent the view of the State Bar of Texas or of the Texas Legislature.

CHAPTER 7. CRIMINAL RESPONSIBILITY FOR CONDUCT OF ANOTHER

SUBCHAPTER A. COMPLICITY

Sec. 7.01. PARTIES TO OFFENSES.

(a) A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both.

(b) Each party to an offense may be charged with commission of the offense.

Sec. 7.02. CRIMINAL RESPONSIBILITY FOR CONDUCT OF ANOTHER.

(a) A person is criminally responsible for an offense committed by the conduct of another if,

(1) acting with the kind of culpability required for the offense, he causes or aids an innocent or irresponsible person to engage in conduct prohibited by the definition of the offense; or

(2) acting with intent to promote or assist the commission of the offense, he solicits, directs, aids, or attempts to aid the other person to commit the offense; or

(3) having a legal duty to prevent commission of the offense and acting with intent to promote or assist its commission, he fails to make a reasonable effort to prevent commission of the offense.

(b) A coconspirator is not a party to an offense committed by the conduct of another unless he is criminally responsible for the offense under Subsection (a).

Sec. 7.03. DEFENSES EXCLUDED.

In a prosecution in which an actor's criminal responsibility is based on the conduct of another, the actor may be convicted on proof of commission of the offense and that he was a party to it, and it is no defense

(1) that the actor belongs to a class of persons who by definition of the offense is legally incapable of committing the offense in an individual capacity; or

(2) that the person for whose conduct the actor is criminally responsible has been acquitted, has not been prosecuted or convicted, has been convicted of a different offense or of a different type or class of offense, or is immune from prosecution.

Sec. 7.04. DEFENSES AVAILABLE.

(a) It is an affirmative defense to a prosecution in which an actor's criminal responsibility is based on the conduct of another

(1) that the actor is a victim of the offense; or

(2) that the offense is so defined that the actor's conduct is inevitably incident to its commission; or

(3) that, under circumstances manifesting a voluntary and complete renunciation of his criminal objective, the actor withdrew from participation in the offense before its commission and made a substantial effort to prevent its commission.

(b) For purposes of Subsection (a)(3), renunciation is

not voluntary and complete if it is motivated in whole or part by

(1) circumstances not present or apparent at the inception of the actor's course of conduct that increase the probability of detection or apprehension or that make more difficult the accomplishment of the criminal objective; or

(2) a decision to postpone the criminal conduct until another time or to transfer the criminal effort to another but similar objective or victim.

[Staff Note: Pending consideration of the report on burden of proof, renunciation is treated as an affirmative defense.]

AMENDMENT TO MURDER STATUTE

[Subsection (a)(4) is added]

Sec. 210.2. MURDER.

(a) Except as provided in Section 210.3(a)(2), a person commits murder if

. . .

(3) he commits or attempts to commit a felony, other than manslaughter or negligent homicide, and in the course of and in furtherance of the felony, or in immediate flight from the commission or attempt, he commits or threatens to commit an act clearly dangerous to human life that causes the death of another; or

(4) he is a party to a felony and another party to the felony commits murder as defined in Subdivision (3) and the actor

(A) solicits, directs, aids, or attempts to

aid the homicidal act; or

(B) is armed with a deadly weapon; or

(C) is reckless in regard to whether the other party is armed with a deadly weapon; or

(D) is reckless in regard to whether the other party intends to commit an act clearly dangerous to human life.

TITLE 4. INCHOATE OFFENSES

CHAPTER 15. PREPARATORY OFFENSES

Sec. 15.01. CRIMINAL SOLICITATION.

(a) A person, corporation, or association commits criminal solicitation if, with intent that a capital felony or felony of the first degree be committed, he requests, commands, or attempts to induce another to engage in specific conduct that, under the circumstances as the actor believes them to be, would constitute the felony or would make the other a party to its commission.

(b) A person, corporation, or association may not be convicted of criminal solicitation unless the solicitation is made under circumstances strongly corroborative of both the solicitation itself and the actor's intent that the other person act upon the solicitation.

(c) It is no defense to prosecution for criminal solicitation

(1) that the person solicited is not criminally responsible for the offense solicited; or

(2) that the actor belongs to a class of persons who by definition of the offense solicited is legally incapable of committing the offense in an individual capacity; or

(3) that the offense solicited was actually committed; or

(4) that the person solicited has been acquitted, has not been prosecuted or convicted, has been convicted of a different offense or of a different type or class of offense, or is immune from prosecution.

(d) Unless otherwise provided by law, it is an affirmative defense to prosecution for criminal solicitation

(1) that the actor is the victim of the offense solicited; or

(2) that the offense solicited is so defined that the actor's conduct is inevitably incident to its commission.

(e) Criminal solicitation of a capital felony is a felony of the first degree. Criminal solicitation of a felony of the first degree is a felony of the second degree.

Sec. 15.02. CRIMINAL FACILITATION.

(a) A person, corporation, or association commits criminal facilitation if, with knowledge that another intends to commit a specific felony, he knowingly furnishes substantial assistance in the commission of the felony.

(b) It is no defense to prosecution for criminal facilitation

(1) that the person whose conduct was facilitated is not criminally responsible for the offense facilitated; or

(2) that the actor belongs to a class of persons who by definition of the offense facilitated is legally incapable of committing the offense in an individual capacity; or

(3) that the offense facilitated was actually committed; or

(4) that the person whose conduct was facilitated has been acquitted, has not been prosecuted or convicted, has been convicted of a different offense or of a different type or class of offense, or is immune from prosecution.

(c) Unless otherwise provided by law, it is an affirmative defense to prosecution for criminal facilitation

(1) that the actor is the victim of the offense facilitated; or

(2) that the offense facilitated is so defined that the actor's conduct is inevitably incident to its commission.

(d) Criminal facilitation in the commission of a capital felony is a felony of the first degree. Criminal facilitation in the commission of a felony of the first degree is a felony of the second degree. Criminal facilitation in the commission of a felony of the second or third degree is a Class A misdemeanor.

Sec. 15.03. CRIMINAL CONSPIRACY.

(a) A person, corporation, or association commits criminal conspiracy if, with intent that a felony be committed,

(1) he agrees with one or more persons that they or one or more of them engage in conduct that, under the circumstances as the actor believes them to be, would constitute the felony; and

(2) he or one or more of the others performs an overt act in pursuance of the agreement.

(b) A coconspirator's criminal responsibility for the

felony committed in furtherance of the conspiracy is determined under Section 7.02.

(c) It is no defense to prosecution for criminal conspiracy

(1) that one or more of the coconspirators is not criminally responsible for the object felony; or

(2) that the actor belongs to a class of persons who by definition of the object felony is legally incapable of committing the felony in an individual capacity; or

(3) that the object felony was actually committed; or

(4) that one or more of the coconspirators has been acquitted, has not been prosecuted or convicted, has been convicted of a different offense or of a different type or class of offense, or is immune from prosecution; or

(5) that the agreement of a purported coconspirator was feigned.

(d) Unless otherwise provided by law, it is an affirmative defense to prosecution for criminal conspiracy

(1) that the actor is the victim of the object felony; or

(2) that the object felony is so defined that the actor's conduct is inevitably incident to its commission.

(e) Criminal conspiracy to commit a capital felony is a felony of the first degree. Criminal conspiracy to commit a felony of the first degree is a felony of the second degree. Criminal conspiracy to commit a felony of the second degree is a felony of the third degree. Criminal conspiracy to commit

a felony of the third degree is a Class A misdemeanor.

Sec. 15.04. CRIMINAL ATTEMPT.

(a) A person, corporation, or association commits criminal attempt if, acting with the kind of culpability required for an offense,

(1) he intentionally engages in conduct that would constitute the offense if the circumstances surrounding his conduct were as he believes them to be; or

(2) he intends to cause a particular result, which result is an element of the offense, and he believes his conduct will cause the result without further conduct on his part; or

(3) he intends to complete a course of conduct that would constitute the offense, under the circumstances as he believes them to be, and his conduct constitutes a substantial step toward commission of the offense.

(b) Conduct does not constitute criminal attempt unless the actor's entire course of conduct is strongly corroborative of his intent to commit the offense.

(c) It is no defense to prosecution for criminal attempt that the offense attempted was actually committed.

(d) Criminal attempt to commit a capital felony is a felony of the first degree. Criminal attempt to commit a felony of the first degree is a felony of the second degree. Criminal attempt to commit a felony of the second degree is a felony of the third degree. Criminal attempt to commit a felony of the third degree is a Class A misdemeanor. Criminal attempt

to commit a Class A misdemeanor is a Class B misdemeanor. Criminal attempt to commit a Class B or C misdemeanor is a Class C misdemeanor.

Sec. 15.05. RENUNCIATION DEFENSE.

(a) It is an affirmative defense to prosecution for criminal facilitation that, before commission of the offense he facilitated, the actor made a substantial effort to prevent commission of the offense.

(b) It is an affirmative defense to prosecution for criminal solicitation or criminal conspiracy that, under circumstances manifesting a voluntary and complete renunciation of his criminal objective, the actor countermanded his solicitation or withdrew from the conspiracy and made a substantial effort to prevent commission of the offense.

(c) It is an affirmative defense to prosecution for criminal attempt under Section 15.04(a)(2) or (a)(3) that, under circumstances manifesting a voluntary and complete renunciation of his criminal objective, the actor avoided commission of the offense attempted by abandoning his criminal conduct or, if abandonment was insufficient to avoid committing the offense, by taking further, affirmative steps that prevented the commission.

[Staff Note: Pending consideration of the report on burden of proof, renunciation is treated as an affirmative defense.]

[Sec. 15.06. MULTIPLE PROSECUTIONS PROHIBITED.

(a) No person may be prosecuted for more than one of the preparatory offenses defined in this chapter if the offenses arise out of the same criminal episode.

(b) No person may be prosecuted for both a preparatory offense defined in this chapter and the offense that was the object of the preparatory offense.

(c) Facilitation or solicitation of, or conspiracy or attempt to commit, a preparatory offense defined in this chapter is not an offense.]

[Staff Note: The committee postponed consideration of this section pending presentation of the report on multiple prosecutions and double jeopardy. Subsection (c) was not in the original report, but is recommended by the reporter.]

CHAPTER 28. ARSON AND OTHER PROPERTY DAMAGE OR DESTRUCTION

Sec. 28.04. CRIMINAL MISCHIEF.

(a) A person, corporation, or association commits criminal mischief if, without the effective consent of the owner, he

(1) recklessly destroys or damages the owner's tangible property; or

(2) knowingly tampers with the owner's tangible property and recklessly causes substantial inconvenience or pecuniary loss to the owner or a third person.

(b) Criminal mischief is a Class C misdemeanor unless the actor knowingly causes pecuniary loss to another of $50 or more, in which event criminal mischief is a Class B misdemeanor.

Sec. 28.05. AGGRAVATED CRIMINAL MISCHIEF.

(a) A person, corporation, or association commits aggravated criminal mischief if, without the effective consent of the owner, he knowingly destroys, damages, or tampers with the

owner's tangible property, and either

(1) knowingly causes pecuniary loss to another of $250 or more; or

(2) knowingly causes impairment or interruption for a substantial number of persons of public communications, public transportation, public water, gas, or power supply, or other public service.

(b) Aggravated criminal mischief is a felony of the third degree.

CHAPTER 30. BURGLARY AND CRIMINAL TRESPASS

Sec. 30.02. CRIMINAL TRESPASS.

(a) A person commits criminal trespass if he enters or remains on property when he

(1) knows that he does not have the owner's effective consent to do so; and

(2) is reckless about whether his presence will cause fear for the safety of another.

(b) A person commits criminal trespass if, knowing he does not have the owner's effective consent to do so, he enters or remains on property as to which notice against trespass is given by

(1) personal communication to the actor by the owner or by someone with apparent authority to act for the owner; or

(2) fencing or other enclosure obviously designed to exclude intruders; or

(3) posting reasonably likely to come to the attention of intruders.

(c) It is an affirmative defense to prosecution under this section that the property was open to the public when the actor entered or remained unless the actor's conduct substantially interferes with the owner's use of the property.

(d) An offense under Subsection (a) is a Class C misdemeanor unless committed in a habitation, in which event it is a Class B misdemeanor. An offense under Subsection (b) is a Class C misdemeanor.

CHAPTER 29. ROBBERY

Sec. 29.01. ROBBERY.

(a) A person commits robbery if, in the course of committing theft as defined in Chapter 31 and with intent to obtain or maintain control of the property, he

(1) recklessly causes serious bodily injury to another; or

(2) knowingly places another in fear of imminent bodily injury or death.

(b) Robbery is a felony of the second degree.

Sec. 29.02. AGGRAVATED ROBBERY.

(a) A person commits aggravated robbery if he commits robbery as defined in Section 29.01 and in the course of committing the theft he

(1) recklessly causes serious bodily injury to another; or

(2) knowingly places another in fear of imminent bodily injury or death with a deadly weapon.

(b) Aggravated robbery is a felony of the first degree.

Sec. 29.03. IN THE COURSE OF COMMITTING THEFT.

Conduct occurs in the course of committing theft if it occurs in an attempt to commit theft, during the commission, or in immediate flight after the attempt or commission.

CHAPTER 19. CRIMINAL HOMICIDE

Sec. 19.06. AIDING SUICIDE.

(a) A person commits an offense if, with intent to promote or assist the commission of suicide by another, he aids or attempts to aid the other to commit or attempt to commit suicide.

(b) An offense under this section is a Class C misdemeanor unless the actor's conduct causes suicide, or attempted suicide resulting in serious bodily injury, in which event the offense is a felony of the third degree.

CHAPTER 22. ASSAULTIVE OFFENSES

Sec. 22.03. RECKLESS CONDUCT.

(a) A person commits an offense if he recklessly engages in conduct that places another in imminent danger of death or serious bodily injury.

(b) An offense under this section is a Class B misdemeanor.

CHAPTER 25. FAMILY OFFENSES

Sec. 25.07. CRIMINAL NONSUPPORT.

(a) A person commits criminal nonsupport if he knowingly fails to provide support that he can provide and that he knows he is legally obligated to provide to his spouse who is in needy circumstances or to his child younger than 18 years.

(b) Except as provided in Subsection (c), criminal nonsupport is a Class A misdemeanor.

(c) Criminal nonsupport is a felony of the third degree if

(1) the actor has been finally convicted one or more times before under this section; or

(2) the actor commits the offense while residing in another state.

(d) For purposes of this section, "child" includes a child born out of wedlock whose paternity has been admitted by the actor or established in a civil suit.

TEXAS PENAL CODE REVISION PROJECT

Memorandum

Date: July 13, 1970

To: State Bar Committee on Revision of Penal Code; Observers; Law Enforcement Advisory Committee; Advisory Committee on Corrections; Reporters

From: Staff

Subj: Issues for manuscript review of Chapters 2, 6, 7, 9, 21, 25, 28-31, 36-39

Chapter 2. Burden of Proof

1. The chapter is rewritten to treat each burden of proof device in a separate section. Sections 2.02 (exception) and 2.04 (preponderance of evidence defense) are added, as is Subsection (e) to Section 2.03 (affirmative defense).

Chapter 6. Culpability Generally

2. §§ 6.01-6.06 are rewritten for clarity but not changed in substance.

3. § 6.07 (causal relation). This section is the staff's final attempt to articulate a general principle of causal relation for use in those few criminal cases in which there is a break in the causal chain between conduct and the harmful result. The section derives basically from the Model Penal Code, but improves that code's analysis and formulation of the pertinent issues. The section comment explains its application; however, one significant departure from earlier drafts should be mentioned. Section 6.07 places no temporal limit on the length of the causal chain; thus, at least in theory, death resulting four years after defendant inflicted the wound would constitute murder.

Chapter 7. Criminal Responsibility for Conduct of Another

4. § 1.___ ("association," "person"). The phraseology for use in the accusatory portion of offense definitions is new and explained in the comment on pages 24 and 25.

5. C. C. P. art. 17A.08, §§ 1, 2 (probation for corporation or association). Should the probation rules for corporations and associations conform exactly to those for individuals in art. 42.12, as amended by the committee in connection with the sentencing provisions? No doubt the period of probation

[art. 17A.08, § 2(b)] should, but how about the application method [§ 1(b)] and contents [§ 1(c)]?

Chapter 9. Justification Excluding Criminal Responsibility

6. § 9.31 (self-defense). The phrase "stop, frisk, or halt at a roadblock" is added to Subsections (b)(2) and (c).

The verbal provocation rule is relocated in Subsection (b)(1) from the assault chapter.

7. § 9.51 (arrest and search). "Search" is added to Subsection (a).

8. § 9.52 (stop, frisk & halt). This section is added at the committee's direction to mesh with the stop & frisk authorization in the Code of Criminal Procedure.

9. § 9.53 (escape). The "in transit" phrase is added to Subsection (a) to parallel Subsection (b) and mesh with the escape from custody offense, Section 38.06.

Chapter 21. Sexual Offenses

10. § 21.01 (chapter definitions). The definition of "criminal episode" approved for Chapter 3 (multiple prosecutions and double jeopardy) is added.

11. §§ 21.03 (aggravated rape), 21.05 (aggravated sexual abuse). The phrase "extreme pain" is omitted from Subsection (a)(1) of each section because included in the definition of "bodily injury."

12. §§ 21.06 (homosexuality). Since public acts of homosexuality are punishable under Sections 21.07 (public indecency), 42.___ (disorderly conduct), and 43.___ (soliciting), the inclusion of this section is both unnecessary and inconsistent with this chapter's basic premise that consensual sexual conduct between adults in private is an inappropriate concern of the criminal law.

The only serious justification for inclusion is that omitting consensual homosexuality from our penal law is to condone it, thus leading to a general breakdown of the moral fiber of the community. See Devlin, Law, Democracy, and Morality, 110 U. Pa. L. Rev. 635 (1962); Ploscowe, Sex Offenses: The American Legal Context, 25 Law & Contemp. Prob. 217 (1960). But omission does not equal approval, and there is simply the moral breakdown argument. Homosexuality is considered a mental illness by most experts, and it is hardly likely that mental illness will become more widespread because homosexual conduct is no longer criminal. See Vedder &

King, Problems of Homosexuality and Corrections ch. 1 (1967).

Consensual conduct in private is difficult to detect without abusing the individual's right to privacy and freedom from unreasonable searches; its detection usually requires offensive conduct by police agents as well. Enforcement is also uneven, and the potential for blackmail substantial. Because of these harmful side-effects, and the absence of a victim, the traditional justifications for making conduct criminal do not exist and, in fact, Section 21.06 is constitutionally suspect. See, e.g., Powell v. Texas, 392 U.S. 514 (1968) (due process); Griswold v. Connecticut, 381 U.S. 479 (1965) (privacy); Robinson v. California, 370 U.S. 660 (1962) (cruel and unusual punishment). Finally, the basic sanction itself--imprisonment--is analogous to tossing Br'er Rabbit in the briar patch.

The staff recommends deletion of Section 21.06.

13. §§ 21.07 (public indecency), 21.08 (indecent exposure). The phrase "is reckless about whether" is substituted for "knows" because closer to the intended meaning.

14. § 21.08 (indecent exposure). The phrase "with intent to arouse or gratify the sexual desire of any person" is added to Subsection (a) to exclude those in public restrooms, etc., and children. The exhibitionist, at whom this section is aimed, of course has this intent.

15. § 21.10 (sexual abuse of a child). The phrase "with intent to arouse or gratify the sexual desire of any person," inadvertently omitted, is restored to Subsection (a) to parallel Sections 21.04 (sexual abuse) and 21.11 (indecency with a child).

16. § 21.11 (indecency with a child). The phrase "with knowledge his conduct is likely to offend or alarm any person" is omitted. The phrase was used to define "publicness" in Sections 21.07 and 21.08, but is inconsistent with the objective of this section, under which indecency may be committed with a child in private.

Chapter 25. Offenses Against the Family

17. §§ 25.04 (criminal abortion), 25.05 (aiding self-abortion), 25.06 (distributing abortifacients). These three sections must be reexamined in light of the three-judge federal district court decision in Roe v. Wade, Civ. Action Nos. 3-3690-B and 3-3691-C, N.D. Tex., June 17, 1970, which declared void for overbreadth (violation of privacy) and vagueness the Texas abortion statutes, Penal Code arts. 1191-1196. In addition, if the Supreme Court affirms this decision, and the decision in United States v. Vuitch, 305 F. Supp. 1032 (D.D.C. 1969), cert. granted, ___ U.S. ___ (1970), on the right-to-privacy rationale, the staff believes the only restriction Texas

may constitutionally place on obtaining abortions is to ensure the safety of the pregnant female, e. g., by requiring performance by a licensed physician, in a hospital, with the female's consent, during a specified initial period of pregnancy (e. g., 26 weeks, the first trimester). If the Supreme Court so rules, the staff recommends:

(1) A new criminal abortion offense.

Sec. 25.04. CRIMINAL ABORTION.

(a) An individual, corporation, or association commits an offense if he intentionally terminates a woman's pregnancy otherwise than by live birth of a viable fetus.

(b) It is an exception to the application of this section that the pregnancy was terminated by a practitioner of medicine licensed by the State Board of Medical Examiners.

(c) An offense under this section is a felony of the second degree.

The only restriction recommended is the requirement that a licensed physician perform the abortion. Clearly performance in a hospital is not necessary for the woman's health; an abortion may be safely performed in a doctor's office or clinic. A time limit for performing abortions is rejected for the same reason the committee rejected one in the proposed therapeutic abortion act, R. C. S. art. 4447i: it is a matter better left to sound medical judgment reinforced by the availability of the civil malpractice remedy. Finally, the pregnant woman's consent to abortion is not made an element of the exception for the same reason, i. e., the doctor who aborts without the woman's consent is civilly liable.

(2) Include the exception of recommended Section 28.04 in Section 28.05 (aiding self-abortion).

(3) Retain Section 28.06 (distributing abortifacients) as drafted.

(4) Omit R. C. S. art. 4447i (therapeutic abortion).

Chapter 28. Arson and Other Property Damage or Destruction

18. § 28.02 (reckless damage). This section creates a new offense

incorporating conduct previously covered by criminal mischief. Criminal mischief as approved was really two offenses--reckless damage and knowing or intentional damage--with different penal consequences.

19. § 28.03 (criminal mischief). This section combines criminal mischief and aggravated criminal mischief. The elements of the two were identical; mischief was aggravated if the damage exceeded $250 or if the object of the mischief was a public service, neither of which are elements of the offense. The penalty structure is conformed to that for theft, Section 31.03.

20. § 28.04 (arson). First, the concept of "effective consent" is added for the burning of another's building; otherwise, an employee hired to burn would be guilty of arson. Secondly, "habitation" is substituted for "occupied structure." The substantive effect is that burning vehicles and structures other than buildings that are used to conduct "business," e.g., taxicab, bus, truck, shrimp boat, fruit stand, is not arson. In these cases, if there is danger to the person it will usually be obvious, in which case the actor may be prosecuted for murder or attempted murder. Otherwise, it will be a third degree felony under criminal mischief.

The staff recommends deleting Subsection (a)(2). It makes it a second degree felony to burn an insured book if there is intent to collect insurance on the book; it also discriminates in favor of fire insurers and against others. It derives from the M. P. C., which a few states have proposed or enacted, with one critical difference: The M. P. C. provided an affirmative defense if no person or building or habitation was endangered recklessly.

The evil involved is defrauding insurance companies and it is of no great significance that fire rather than a sledge hammer was used. Although the conduct is theft--obtaining the proceeds of the policy claim with intent to deprive the insurer and without his consent because he was deceived into thinking the loss was accidental--a separate offense in the fraud chapter may be desirable to please insurance companies. A suggestion follows:

> Sec. 32.___. FRAUDULENT DESTRUCTION OF INSURED PROPERTY.
>
> (a) An individual, corporation, or association commits an offense if he damages or destroys property with intent to collect insurance for the damage or destruction.
>
> (b) An offense under this section is a Class A misdemeanor unless the extent of damage or destruction is $250 or more, in which event it is a felony of the third degree.

New York has a dopted a similar approach; see N. Y. Rev. Pen. Law § 175. 50 (presenting false insurance claim).

21. The reckless burning offense is omitted because it duplicates Sections 28. 02 (reckless damage) and 22.___ (reckless conduct). As approved by the committee in 1966, the offense read:

> Sec. 28. 05. RECKLESS BURNING.
>
> (a) An individual or corporation commits reckless burning if he intentionally starts a fire or causes an explosion and intentionally, knowingly, or recklessly:
>
> (1) places another in danger of death or serious bodily injury; or
>
> (2) places a building or habitation of another in danger of damage or destruction.
>
> (b) Reckless burning is a Class A misdemeanor.

22. §§ 28. 05 (actor's interest), 28. 06 (amount of pecuniary loss). These are new sections, but each tracks its counterpart in Chapter 31 (theft).

Chapter 30. Burglary and Criminal Trespass

23. § 30. 02 (burglary). "Without the owner's effective consent" is substituted for "without license or privilege." The concept of "effective consent" was developed for the theft offense and is carefully defined in the code definitions.

The staff recommends deleting Subsection (a)(3). It is not in present Texas law, no other revising state has included it, and the staff cannot imagine a single example of its application.

The no-defense-if-no one-present provision approved by the committee in 1967 is deleted as unnecessary since presence is not an element of burglary.

24. § 30. 03 (trespass). The definition of "enter" is added, and is designed to distinguish burglarious from trespassory entry so that, for example, reaching through a fence to retrieve a hat does not constitute trespass.

Is a definition of "property" needed for the trespass offense?

Chapter 31. Theft

25. § 31.03 (theft). The penalty structure is altered in line with suggestions made at various committee meetings after the theft report was considered. Subsection (c)(1) makes thefts under $50 a justice or corporation court offense; Subsection (c)(4) makes thefts of $10,000 or more a second degree felony.

The committee was closely divided on the value dividing misdemeanor from felony theft; all members agreed it should be no lower than $200, about half wanted $250.

26. § 31.04 (value). Subsection (d) is new, and reduces "value" for grading purposes by the amount of the thief's interest in the property stolen or the amount of consideration he gave for it.

27. § 31.08 (theft of services). Subsection (b) was added at the committee's request.

28. Theft by check. A separate section punishing this conduct is being drafted for inclusion in the theft chapter. It will contain the standard presumption for nonpayment on a 10-day notice and be graded like the theft offense.

Chapter 36. Bribery and Corrupt Influence

29. § 36.02 (coercion of public servant). The term "coercion," as defined in Chapter 31 (theft), is substituted for "threatens harm to."

30. § 36.03 (improper influence). Former Section 240.2 (threats and other improper influence) is separated into two offenses--Sections 36.02 (coercion of public servants) and 36.03 (improper influence).

31. § 36.10 (exceptions and affirmative defenses). Three of the exceptions are made affirmative defenses in Subsection (b) to place a burden of producing evidence on defendant.

Chapter 37. Perjury and Other Falsification

32. Subornation (former Section 241.3) is deleted as unnecessary because the suborner is responsible as a party to perjury.

33. § 37.05 (retraction). This is made a preponderance of evidence defense.

34. False Alarms to Agencies of Public Safety (former Section 242.1) is omitted in view of the more comprehensive false alarm offense in Chapter 42 (disorderly conduct and related offenses).

35. §§ 37.09 (tampering with or fabricating physical evidence), 37.10 (tampering with governmental records). "Legibility" is added to the varieties of tampering.

Chapter 38. Obstructing Governmental Operations

36. § 38.02 (resisting arrest on search). Resisting arrest "by using any other means creating a substantial risk of causing bodily injury to a peace officer or another" is deleted because superfluous.

The affirmative defense based on the peace officer's use of unnecessary force is deleted because covered in Chapter 9 (justification).

The staff is drafting a section proscribing resisting or evading stop & frisk and halt at roadblock.

37. § 38.03 (evading arrest). The staff recommends deleting this section. Ordinarily, flight from arrest is motivated by the instinctive desire to preserve one's freedom or a panic induced by fear or misunderstanding. If the one fleeing is eventually apprehended, the fact of his flight can be used against him as evidence of guilt of the primary criminal offense. But if the arrested person is innocent or cannot be proved guilty of the offense for which he was arrested, it is unjust to prosecute for the flight.

Evading arrest is not an offense in present law, nor does the Model Penal Code or any of the recently revised penal codes proscribe it.

The proper remedy for flight from police is pursuit and use of reasonable force to effect arrest. Flight in an authomible is already an offense against the traffic laws, see R. C. S. art. 6701d, §§ 23, 143.

38. § 38.04 (hindering apprehension or prosecution). The staff recommends grading this offense a Class A misdemeanor.

The object of the offense is to punish one who inconveniences the state by frustrating its law enforcement efforts. If harboring or aiding a fugitive to avoid arrest could effectively preserve the fugitive's freedom, the offense might be worthy of felony treatment. But the nature of our society virtually ensures the eventual apprehension of any fugitive. Moreover, most harboring is accomplished by relatives who act from noble if illegal motives. Although a nuisance to law enforcement, therefore, it is hardly serious enough to merit felony treatment.

39. §§ 38.06 (escape), 38.07 (permitting or facilitating escape). Use of a deadly weapon should be the only aggravating factor for escape. Unaggravated

escapes inconvenience law enforcement, but are not per se injurious to life or property. On the other hand, an escapee who uses a deadly weapon poses a substantial danger to human life. By aggravating only the use of deadly force, we can focus this dangerous aspect of the escapee's conduct and perhaps discourage his use of weapons. Under the grading scheme approved, on the other hand, an escapee from a penal institution or a felon risks nothing more by using a weapon to effect his escape.

40. § 38.10 (bail jumping and failure to appear). The approved draft of this section did not apply to a required appearance for an offense punishable by fine only, and Subsection (e) is added to provide Class C misdemeanor punishment for such failure to appear.

The approved draft defined the offense as failure to appear "without lawful excuse." Subsection (c) replaces the vague "without lawful excuse" concept with an affirmative defense to allow the prosecutor to make a prima facie case without proving lack of a lawful excuse.

41. § 38.11 (barratry). The staff recommends deleting this section. Barratry by an attorney is punishable by disbarment, R. C. S. art. 313. In the rare instance of barratrous conduct by a nonattorney, the appropriate remedy is a tort action for malicious prosecution.

42. § 38.12 (obstructing administration of law or other governmental function). The staff recommends deleting this section.

It is very vague in describing the prohibited conduct. The obstruction, impairment, or hinderance of the administration of law or performance of a governmental function is a concept too abstract to properly define a crime. The additional elements--intentional commission of the offense by means of force, physical interference, or obstacle--narrow somewhat the wide range of conduct to which this section might apply, but even so the section does little more than suggest the definition of a crime, and leaves to one's imagination its intended application.

The section might apply to minor disturbances and suspicious conduct, and obviously could be employed by law enforcement to authorize arrests for such conduct. However, the code has more specific devices to fulfill these needs of effective law enforcement--e. g., Section 30.03 (criminal trespass), Chapter 42 (disorderly conduct and related offenses), C. C. P. art. 14.01, as amended (stop & frisk). Finally, nearly all of the offenses in Title 8 (offenses against the state and public administration) define in specific and more familiar terms the varieties of obstructing or hindering the administration of law--e. g., resisting arrest, aiding escape, coercion of a public servant.

TEXAS PENAL CODE REVISION PROJECT

Memorandum

Date: August 28, 1970

To: State Bar Committee on Revision of Penal Code; Observers; Law Enforcement Advisory Committee; Advisory Committee on Corrections; Reporters

From: Staff

Subj: Issues for manuscript review of Chapters 36-39, 3, 8, 12, 15, 16, 19, 20, 22, 32, C. C. P. 14, 42, 43, 46-48

Chapter 36. Bribery and Corrupt Influence

1. § 36.02 (coercion of public servant). The term "coercion," as defined in Chapter 31 (theft), is substituted for "threatens harm to."

2. § 36.03 (improper influence). Former Section 240.2 (threats and other improper influence) is separated into two offenses--Sections 36.02 (coercion of public servants) and 36.03 (improper influence).

3. § 36.06 (compensation for past official behavior). The staff recommends applying the exceptions and affirmative defenses of Section 36.10 to this section, which is analogous to Section 36.08 (gifts to public servants) to which Section 36.10 does apply.

4. § 36.10 (exceptions and affirmative defenses). Three of the exceptions are made affirmative defenses in Subsection (b) to place the burden of producing evidence on defendant.

Chapter 37. Perjury and Other Falsification

5. Subornation (former Section 241.3) is deleted as unnecessary because the suborner is responsible as a party to perjury.

6. § 37.05 (retraction). This is made a preponderance of evidence defense.

7. False Alarms to Agencies of Public Safety (former Section 242.1) is omitted in view of the more comprehensive false alarm offense in Section 42.

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illegal motives. Although a nuisance to law enforcement, therefore, it is hardly serious enough to merit felony treatment.

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14. § 38.11 (barratry). The staff recommends deleting this section. Barratry by an attorney is punishable by disbarment, R. C. S. art. 313. In the rare instance of barratrous conduct by a nonattorney, the appropriate remedy is a tort action for malicious prosecution.

15. § 38.12 (obstructing administration of law or other governmental function). The staff recommends deleting this section.

It is very vague in describing the prohibited conduct. The obstruction, impairment, or hinderance of the administration of law or performance of a governmental function is a concept too abstract to properly define a crime. The additional elements--intentional commission of the offense by means of force, physical interference, or obstacle--narrow somewhat the wide range of conduct to which this section might apply, but even so the section does little more than suggest the definition of a crime, and leaves to one's imagination its intended application.

The section might apply to minor disturbances and suspicious conduct, and obviously could be employed by law enforcement to authorize

arrests for such conduct. However, the code has more specific devices to fulfill these needs of effective law enforcement--e. g., Section 30. 03 (criminal trespass), Chapter 42 (disorderly conduct and related offenses), C. C. P. art. 14. 01, as amended (stop & frisk). Finally, nearly all of the offenses in Title 8 (offenses against the state and public administration) define in specific and more familiar terms the varieties of obstructing or hindering the administration of law--e. g., resisting arrest, aiding escape, coercion of a public servant.

Chapter 3. Multiple Prosecutions and Double Jeopardy

16. § 3. 01 (definitions). The definition of "similar offenses" is new.

17. § 3. 02 (compulsory joinder). The defendant is given the right to severance of offenses joined solely because they are similar offenses by C. C. P. art. 36. 09, as amended.

Subsection (c) is new.

C. C. P. art. 21. 24 is amended to require alleging joined offenses in separate counts. Under present law counts are used to allege alternative theories of prosecution. Should the amended article specify that alternative theories must be alleged in separate paragraphs of a count?

18. § 3. 03 (single sentence following multiple convictions). Former Subdivision (1), which permitted separate sentences for joined offenses aimed at different harms or evils, is omitted both because too vague and because dealt with in the definition of "criminal episode."

19. § 3. 04 (jeopardy). Subsection (a)(2)(D) restores the collateral estoppel doctrine in light of Ashe v. Swenson, 397 U. S. 436 (1970).

20. C. C. P. Most of the conforming amendments are new, and those to arts. 21. 24, 27. 05, 36. 09, and 37. 07 in particular should be carefully reviewed.

Chapter 8. General Defenses to Criminal Responsibility

21. § 8. 03 (intoxication). Subsections (c)(3)(C) and (c)(3)(D) are added to include as involuntary intoxication two additional situations when the actor's intoxication is not within his control.

22. § 8.05 (entrapment). The time limits for raising the entrapment issue, Subsection (c), are new. They are the same as those for raising insanity, see C. C. P. art. 46.02, § 2.01, as amended.

23. C. C. P. art. 46.02 (incompetency and insanity). The sections have been rearranged. Rather than a functional organization, they are arranged to group procedures according to the issue involved.

24. C. C. P. art. 46.02, § 1.05 (restoration hearing). Provision for a defendant found incompetent to raise the restoration issue when not committed has been added. If hospitalized, he can raise the issue under § 1.07.

25. C. C. P. art. 46.02, § 2.04 (determination of need for hospitalization). The committee was divided over whether a defendant found not guilty by reason of insanity should be committed automatically or only after a jury finding of need for hospitalization. In reviewing the issue of automatic commitment, the staff concluded that the Tex. Const. art. I, §§ 15, 15a, forbid automatic commitment.

26. C. C. P. art. 46.02, § 3.02 (commitment for psychiatric examination). Paragraph (c) places the burden of proof at the hearing to extend a commitment under this section. It was overlooked earlier.

Chapter 12. Punishments

27. § 12.42 (habitual offender). The staff recommends substituting the following for Subsection (b):

> (b) The extended term of imprisonment for an habitual offender consists of:
>
> (1) a minimum term the court shall fix at not less than one year nor more than 12 years and a maximum of not more than 30 years, if defendant stands adjudged guilty of a felony of the second degree;
>
> (2) a minimum term the court shall fix at not less than one nor more than six years and a maximum of not more than 30 years, if defendant stands adjudged guilty of a felony of the third degree.

The other two extended term sections, 12.43 (organized crime) and 12.44 (habitual petty thief), proportion the extended term authorized to the ordinary term of imprisonment authorized for the trigger offense. There is no reason in principle why habitual offenders should be treated differently, and in fact the requirement of proportionality may have constitutional stature.

28. Special dangerous offender. This provision is deleted as unnecessary in view of the habitual offender provision, Section 12.42. It authorized extended term imprisonment, proportioned to the trigger offense, for a defendant convicted of a felony that involved either (1) the knowing infliction or attempted infliction of death or serious bodily injury on another, or (2) the knowing creation of a substantial risk of death or serious bodily injury to another plus one or more prior felony convictions, coupled with the court's finding that there is reasonable probability that the defendant will knowingly inflict or attempt to inflict death or serious bodily injury on another so that extended term imprisonment is necessary to protect the public.

29. § 12.43 (organized crime) is new, drafted at the committee's direction.

30. § 12.46 (death penalty). Subsection (b) is new.

31. § 12.48 (slate-clearing) is rewritten in light of the committee's direction.

32. C. C. P. art. 42.02, § 6. Subsections (c) and (f) are new.

33. C. C. P. art. 42.02, § 7, is rewritten in light of the committee discussion of death penalty procedures.

34. C. C. P. art. 42.09 (commencement of sentence) is rewritten to require transfer of defendants to the Department of Corrections pending disposition of their appeal.

35. C. C. P. art. 42.12, § 4 (conditions and period of probation). Paragraph (c) spells out the work-release authorization as a condition of probation.

36. C. C. P. art. 42.12, § 8 (revocation). Paragraph (c) is new.

37. C. C. P. art. 42.12, § 15(c) (parole). The second sentence is new.

38. C. C. P. art. 4.03 (appellate review jurisdiction of Court of Criminal Appeals). Paragraph (b) makes sentence review coextensive with conviction review.

39. C. C. P. art. 44.04 (bond pending appeal). This article is rewritten to deny bail pending appeal to a defendant convicted of a capital or first degree felony or who appeals only his sentence, seeking only a reduction in it.

40. C. C. P. art. 44.25 (disposition of appeal). Authorization to increase as well as decrease the severity of a sentence on appeal is new.

41. Collection of fine. The paragraph below should be added to C. C. P. art. 43.03 (pay or jail) to comply with the Supreme Court's recent holding in Williams v. Illinois, 20 S. Ct. 1018 (1970).

> (b) If a defendant is sentenced both to imprisonment and to pay a fine or costs of both, and he defaults in payment of either after making a good faith effort to pay, a term of imprisonment for the default, when combined with the term of imprisonment already assessed, may not exceed the maximum term authorized for the offense for which defendant was sentenced.

Chapter 19. Criminal Homicide

42. § 19.02 (murder). Former Subdivision (2) made it murder to cause death while intentionally or knowingly inflicting serious bodily injury. This subdivision is omitted because covered by the felony murder doctrine of present Subdivision (2) since the intentional or knowing infliction of serious bodily injury is a felony under Section 22.02 (aggravated assault).

43. Criminal responsibility for omission. As approved by the committee on August 7, Section 6.03 (criminal responsibility for omission) makes an omission to act criminal only if the offense specifically proscribes omissions. This is not the common-law rule, nor that adopted by most states revising their penal laws; rather, if a person has a legal duty to act and fails to act (with the requisite culpable mental state) both at common law and under the new codes of most states he is criminally responsible for the omission.

Recommended Section 6.03(2) below restores a narrowed version of the common-law rule. Only duties imposed by statute may serve as a predicate for criminal responsibility; contractual and tort law duties, and those imposed by ordinance, for example, are not covered. Thus, a mother whose infant dies because of her intentional failure to feed it is guilty of murder, but the passerby whose silence allows a blind man to walk over a cliff to his death is not.

Sec. 6.03. CRIMINAL RESPONSIBILITY FOR OMISSION.

A person does not commit an offense if his criminal responsibility is based solely on an omission to perform a voluntary act unless:

(1) the law defining the offense imposes criminal responsibility for the omission; or

(2) a duty to perform the omitted voluntary act is imposed by statute.

COMMITTEE COMMENT § 6.03

Derivation	Cross Reference
Fed. Prop. Crim. Code § 301	Causation, see § 6.07
	"Law" defined, see § 1.__
N. Y. Rev. Pen. Law §§ 15.00(3), 15.10	"Omission" defined, see § 1.__

This section codifies the criminal law's traditional reluctance to punish failure to act absent a clear imposition of duty to act on the actor, see Anderson v. State, 11 S. W. 33 (Tex. Ct. App. 1889).

Many offenses, of course, proscribe omissions to act, and when they do Subdivision (1) permits imposition of criminal responsibility for the omission. Examples of such offenses include Sections 25.03

(interference with child custody), 25.07 (criminal nonsupport), 38.07 (permitting or facilitating escape), 39.02 (official misconduct), and R. C. S. art. ___ (failing to stop and render aid).

If the offense itself does not penalize an omission, "there must be a violation of some duty [to perform the omitted act] imposed by law, directly or impliedly, and with which duty the defendant is especially charged. . . ." Anderson v. State, supra, 11 S. W. at 34. Subdivision (2) codifies this common-law rule, but narrows it to encompass only duties imposed by statute. Thus, a husband who fails to feed his wife who is too ill to care for herself, or a mother who fails to feed her infant, may be convicted of criminal homicide (Chapter 19), if the failure causes the death of the wife or infant, because Family Code § 4.02 imposes a duty of support on the spouse and parent. On the other hand, a niece's failure to feed her invalid aunt, who starves to death as a result, is not guilty of criminal homicide because the niece has no statutory duty of support. Contractual duties, and those arising from a special relationship or fact situation, are thus excluded and will not support the imposition of criminal responsibility.

44. § 19.03 (manslaughter). Should the existence of legal provocation, Subsection (a)(2), reduce felony murder [Section 19.02(a)(2)] to manslaughter?

The definition of legal provocation, Subsections (a)(2) and (b), is somewhat altered from the version approved by the committee in 1967.

Chapter 20. Kidnapping and False Imprisonment

45. § 20.01 (kidnapping). Subsection (a)(3) is changed from "to inflict bodily injury or serious bodily injury" to "to inflict serious bodily injury or death."

46. § 20.02 (false imprisonment). The offense of aggravated false imprisonment has been amalgamated into this section in the form of factors aggravating the penalty from a Class B misdemeanor to a

third degree felony. The involuntary servitude and masked or disguised aggravation factors are deleted because archaic, and the aggravating factor of Subsection (c)(1), applying to false imprisonment of children, has been added to correspond with present law, Penal Code art. 1177.

Chapter 22. Assaultive Offenses

47. § 22.01 (assault). The penalty for provocative or offensive touching, Subsection (a)(3), is reduced to the present law's penalty for all simple assaults because violence is not involved and the harm is not as serious as bodily injury.

48. § 22.02 (aggravated assault). Aggravation of simple assault solely because the actor is masked or disguised is eliminated because anachronistic..

49. Criminal coercion. This offense is eliminated because it duplicates other offenses, e.g., assault, theft, terroristic threat, coercion of public servant, etc. The offense, as originally adopted by the committee, read as follows:

> (a) A person is guilty of criminal coercion when for the purpose of causing another to perform an act or to omit the performance of an act, he threatens, by means reasonably likely to succeed, to:
>
> (1) commit any criminal offense; or
>
> (2) accuse anyone of a criminal offense; or
>
> (3) expose any secret that would subject him to hatred, contempt or ridicule or to impair his credit or business repute; or
>
> (4) take or withhold action as an official, or cause an official to take or withhold action.
>
> (b) Criminal coercion is a Class A misdemeanor unless the offense threatened or act compelled is a felony, in which event criminal coercion is a felony of the third degree.

Chapter 32. Fraud

50. § 32.21 (forgery). The staff recommends requiring proof of intent to deceive and harm to establish forgery. Present law requires intent to defraud or injure a pecuniary interest. "Harm" in Section 32.21 is purposely broader than pecuniary interest, but "deceive" is not an equivalent of "defraud." Without the requirement of intent to deceive and harm, innocent deceptions are criminalized.

51. § 32.22 (criminal simulation). The staff recommends requiring proof of intent to deceive and harm to establish criminal simulation. See the explanation in paragraph 49 of this memorandum.

52. § 32.31 (credit card abuse). If one who with consent uses another's credit card can pay for his purchases, should he be guilty of an offense even though the cardholder cannot pay? He would be under Subsection (a)(8).

53. § 32.32 (false statement to obtain property or credit). The staff recommends making the creditor's reliance on the statement an element of the offense. Reliance is an element of theft by deception, i.e., the owner must give up his property, which this offense closely resembles. If the creditor does not rely on the statement, e.g., loan money thereon, is he harmed enough to treat making the statement a crime? (If he does loan money, the debtor of course commits theft; thus, if reliance is made an element there is probably no need for Section 32.32).

54. § 32.42 (deceptive business practices). The staff added the phrases "in a manner that makes the property or service inferior" and "in a manner that deceives and harms another" to Subsections (b)(1) ("adulterated") and (b)(6) ("mislabeled"), respectively. Without the addition the sale of a $50 watch tagged and sold for $10 would violate the section.

55. § 32.46 (securing execution of document by deception). The staff recommends deleting this section because most of the deceptive conduct covered is also theft. If it is retained, however, the staff recommends stating the culpable mental state element as "with intent to deceive and harm another" to parallel forgery and criminal simulation. See paragraph 49 of this memorandum.

56. § 32.47 (fraudulent destruction, removal, or concealment of writing). The staff recommends deleting this section because, with exception of the penalty, it duplicates Sections 28.03 (criminal mischief) and 31.03

(theft). If harm to irreplaceable documents should be graded a felony in all cases, the staff recommends amending the value sections (28. 06 and 31. 04) for criminal mischief and theft to accomplish this objective.

If Section 32. 47 is retained, the staff recommends stating the culpable mental state element as "with intent to deceive and harm another"; see paragraph 49 of this memorandum.

C. C. P. Chapter 14. Stop, Halt, and Arrest without Warrant

57. art. 14. 01 (stopping persons for investigation). The original draft limited the authorized duration of the stop to a maximum of 20 minutes. The reporters felt that 20 minutes was too short a time to carry out the functions of a stop in many cases, so they recommended expanding the time period to a maximum of one hour. The committee voted to omit any fixed duration and instead allow stops for a "reasonably necessary" time.

The Advisory Committee of the American Law Institute felt that 20 minutes was sufficient time to accomplish the purposes of a stop in most cases, that is, to ascertain whether the person stopped is prepared to cooperate with the investigation, to check an identification, description, or explanation by calling police headquarters, and to determine what further action to take. Empirical studies indicated that the great majority of stops surveyed were less than 20 minutes.

A stop is authorized on a more informal, less stringent basis than an arrest. A stop is a seizure of the person and to be constitutional (i.e., reasonable), must not entail any serious inconvenience or sense of constraint. To allow stops for a "brief time" or a "reasonable time" would, in some cases, plausibly appear to the stopping officer to be a period of one, two, or even more hours. Such a detention comes dangerously close to an arrest, and to authorize such stops puts the authorization in serious constitutional jeopardy. If stops are allowed on less than probable cause for arrest, the stop must be distinguishable from arrest in terms of the severity of restraint upon the person.

To limit a stop to a definite time period will clearly distinguish it from an arrest; certainly that duration should not be more than one hour. A fixed period also gives the officer a clear notion of how long he can detain a person on "reasonable suspicion."

Chapter 43. Public Indecency

Subchapter A. Prostitution

58. § 43.03 (patronizing a prostitute). The patron of prostitution is not prosecuted under present law, and the committee was unsure whether this should be an offense in the new code.

Subchapter B. Obscenity

59. § 43.24 (sale to minor). The staff recommends lowering the critical age from 18 to 16. Sixteen is the age of consent used in sexual offenses involving minors, and it is ludicrous for the penal law in effect to say "You may engage in sexual intercourse at 16, but you may not look at pictures of it."

Chapter 46. Weapons

60. § 46.03 (prohibited weapons). The committee voted to raise the penalty for possession, sale, etc. of explosive weapons (e.g., bombs), machine guns, sawed-off guns, and silencers from a third to a second degree felony. It is true that these weapons present a serious threat to society. However, it is anomalous to punish possession and sale, alone, without proof of specific criminal intent, with the same severity as actual use of the weapon with specific intent to cause destruction, as in arson. Furthermore, if the weapon is used with intent to cause death, the offense is murder or attempted murder.

The staff recommends lowering the penalty to a third degree felony.

Chapter 47. Gambling

61. This chapter differs substantially from the report submitted to the committee on May 2, 1970. It represents an effort to follow the policy decisions of the committee as expressed at that meeting. Special attention is due this chapter since most of the sections are completely new.

Chapter 48. Drugs

62. § 48.02(7) (definition of "restricted drug"). Should the tranquilizers enumerated in Subdivision (B) be included?

63. § 48.10 (authorization defense). Subsection (b) is new.

64. Organized criminal trafficking operations (formerly § 48.10). Section 12.43, in the sentencing chapter, authorizes extended term imprisonment as a general enhancement feature for all organized crime activity.