



Oregon Criminal Law Revision Commission Records

Introduction

■ Oregon Legislative Assembly, 1967-1972

The purpose of the Criminal Law Revision Commission, established by the 1967 Legislative Assembly, was to prepare a thorough modernization of the criminal and correctional laws of Oregon. The revised criminal code was enacted by the 1971 Legislative Assembly. The commission then prepared a new criminal procedure code during the 1971-72 Interim which was enacted by the 1973 Legislative Assembly.



Senator Anthony Yturri
Chairman

The commission's paper records are available for research on this Web site. They are presented using the Portable Document Format (PDF) and can be viewed using free Adobe Reader software. Audio tapes are available for research in the Oregon State Archives reference room.

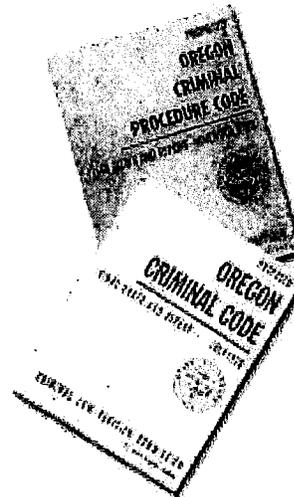
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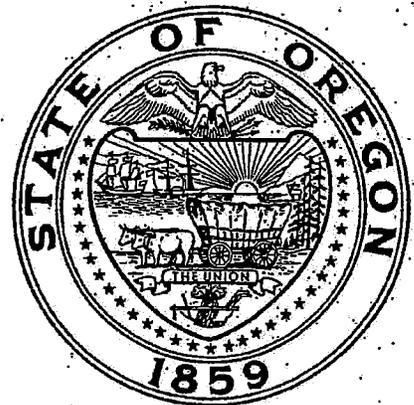
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Proposed criminal code publication.

PROPOSED
OREGON
CRIMINAL CODE

FINAL DRAFT AND REPORT JULY 1970



CRIMINAL LAW REVISION COMMISSION

311 State Capitol - Salem

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FOREWORD

The proposed Criminal Code is the product of three years of concerted effort by the Oregon Criminal Law Revision Commission. The Commission was created by chapter 573, Oregon Laws 1967; and was directed to "prepare a revision of the criminal laws of this state, including but not limited to necessary substantive and topical revisions of the law of crime and of criminal procedure, sentencing, parole and probation of offenders, and treatment of habitual criminals" for submission to the 56th Legislative Assembly in 1971.

Since 1962, when the American Law Institute published the Model Penal Code, the number of states recognizing the need for penal code reform has steadily mounted, until today over 30 of them are engaged in revision projects. In addition, a special commission is working on an unprecedented overhaul of the federal criminal statutes. Oregon thus is part of a major criminal law reform movement now occurring in this country.

Oregon's basic *corpus* of statutes that comprise its substantive criminal "code" is 106 years old, dating back to Deady's Code of 1864. In the course of over a century minor surgery has been performed on that body hundreds of times to try to correct specific ailments, but a major operation has never before been attempted. In 1931 the Legislature created a temporary crime commission "to study . . . the crime situation . . . and to suggest revisions and amendments to the statutes," and in 1959 an Interim Committee on Criminal Law was established. Neither of these groups undertook to accomplish a complete revision of the criminal code, but the latter committee, recognizing the need for and the magnitude of such a project, recommended the creation of a state commission with a 10 year life to accomplish the task.

The existing code, because of its age and the numerous piecemeal changes made in it over the years, suffers from two basic infirmities that plague the laws of many of the states—it has not kept pace with society's changing standards, resulting in retention of substantive provisions now neither necessary nor desirable—and it is replete with overlapping and seemingly inconsistent crimes and penalties. The Commission has endeavored to rectify these faults by drafting a comprehensive, interrelated Code—internally consistent and designed not for the 1860's but for the 1970's.

During the past three years the Commission members have been called upon to make difficult, and frequently controversial, value judgments. The proposed Code—encompassing departures from present law that range from minor modifications to major policy changes (discussed in further detail in the commentaries)—reflects the results of those decisions. The issues were always vigorously discussed and often hotly debated, first by one of the three adoption and revision subcommittees and later by the full Commission. The provisions set forth in this final draft and report represent a Commission position that was sometimes a unanimous expression but always a majority view. So, while the entire Commission recommends the enactment of the proposed Code, obviously not every member agrees with every provision in it.

The most controversial question to come before the Commission was the matter of gun control, on which the members were almost evenly divided in their sentiments. By a narrow vote, after four grueling subcommittee drafting sessions and three Commission meetings, it was decided that a firearms registration proposal would be submitted to the Legislature in 1971, but because of its particularly volatile nature, that it would be introduced as a separate bill apart from the proposed Code. Consequently, the provisions dealing with gun registration, along with those covering the traditional kind of firearms offenses such as unlawfully carrying a concealed weapon and illegal possession of a firearm are not included in this draft.

It is self-evident, however, that sensitive and controversial provisions are contained in the Draft Code. A law revision project, especially one concerned with the criminal laws of the state,

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could not—and should not—avoid such matters and still discharge its responsibilities. The paramount and pervasive considerations that underscored all deliberations of the Commission were: (1) the protection of the citizens of the State of Oregon which should be enhanced by (2) eliminating or minimizing many of the current law enforcement problems by the adoption of (3) a Criminal Code that will better protect society from acts that threaten life or property by providing a basic tool of law enforcement that does not invoke unenforceable criminal sanctions against activity that many persons either practice or condone.

Among the more polemical changes recommended by the Commission are: (1) the abolition of criminal penalties for adultery, lewd cohabitation, seduction and private consensual homosexual conduct between adults; (2) the approval of reasonable mistake as to the female's age as a defense to statutory rape; (3) the repeal of the *M'Naghten Rule* as a test for legal insanity and adoption of the Model Penal Code's somewhat broader definition; (4) a new concept of criminal assault which requires the intentional or reckless infliction of actual physical injury on another; and (5) abrogation of degrees of murder.

Two other areas in which significant policy changes are suggested involve gambling and obscenity. The sections on gambling focus on the professional, exploitative kind of conduct and do not prohibit the "friendly social game." The obscenity sections make no attempt at controlling material that is dispensed to or consumed by adults, but do try to carefully define the legal limits of permissible materials for minors or public displays of nudity or sex for advertising purposes.

Probably the most notable aspect of the proposal and a chief concern of the Commission are the grading and sentencing provisions which employ an offense classification system. Each offense, excepting the noncriminal "violation," is classified as a felony or misdemeanor under an A, B, C format, according to the seriousness of the crime. The grading and classification of offenses was the final step in the drafting of the specific crimes to ensure that differences in their gravity were appropriately considered and that similar penalties would attach for similar offenses.

The proposed Code consists of 288 sections, only 152 of which define specific offenses. The remaining 136 sections deal with general provisions, definitions, defenses, sentencing, etc. The draft would repeal 467 existing statute sections, 340 of which are crimes, transferring seven of them to other chapters in *Oregon Revised Statutes*. The net result is that the proposed Code contains 181 fewer crimes than the existing law. Of the 181 crimes deleted, 34 would be repealed outright with no comparable statute reenacted, and the other 147 crimes would be covered by new, comparable provisions that eliminate needless distinctions and redundant sections by consolidating similar offenses.

The substantive changes in the proposed Code are set forth in a new format that is designed to present the provisions as clearly and simply as possible. Everyday language is used wherever possible and terms that are intended to have fixed legal meanings are fully defined. The liberal use of definitions in each article permits a shorter and less complicated statement of the elements comprising each statutory offense.

We believe that the proposal removes many of the ambiguities that lurk in the existing statutes, but we realize that in drafting the 32 articles we may have unknowingly created some new questions that will have to be resolved by the courts. However, the criminal laws of the state should not remain static but, on the contrary, should be a viable force in society. The Commission certainly doesn't mean to imply that it has drafted a perfect criminal code; nonetheless it is submitted to be a vast improvement in many areas. The integrated structure of the Code will help it to remain a viable force in years to come because it can be systematically changed or amended by the Legislature as the future need arises. Furthermore, the culpability definitions, the classification of offenses and the general provisions of the Code will provide the Legislature with the guiding principles that can be followed to attain uniformity among the numerous regulatory statutes that carry criminal penalties.

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This has been a *working* Commission. Since August 1967 the members have attended 57 subcommittee meetings and 21 full Commission meetings, six of which were two-day sessions. The combined total of 78 meetings represents approximately 4,000 manhours expended, not including staff time.

As the work of the Commission progressed, study drafts and related materials were distributed to the various legal, judicial and law enforcement groups and other interested persons throughout the state for their evaluation and comments. Literally hundreds of copies of such papers have been so circulated during the past 36 months in order to keep these parties apprised of Commission activity.

In the early stages of its activity the Commission decided to undertake first a revision of the substantive laws and to defer work on a procedural code until completion of this phase of the project. One of the main considerations in reaching this decision was the fact that the Model Penal Code and the recent revisions of several sister states provided us with a ready and valuable source of materials for comparative research. The *rationale* of the proposed Code is in many instances derived from the Model Penal Code, although the *structure* and frequently the substance of the Oregon proposal generally follows the New York Revised Penal Law (1965, amend. 1967-8) and the Michigan Revised Criminal Code (1967). Other state codes or drafts on which some of our proposals are based are the Illinois Criminal Code (1961) and the Proposed Connecticut Penal Code (1969). We gratefully acknowledge the assistance we have received from each of these states. We also wish to thank the members and staff of the Joint Legislative Committee for Revision of the California Penal Code for their generous help and advice.

Many other groups and individuals within the state have contributed time and talent to the project. The Commission is deeply grateful to George M. Platt, Associate Professor of Law, University of Oregon School of Law, who was Reporter for Articles 5, 6 and 10 and who assisted the Commission in many other ways during the past three years. We extend our thanks also to Courtney Arthur, Professor of Law, Willamette University College of Law, who assisted in drafting Articles 1 and 7. Liaison has been maintained with special committees of the Oregon Circuit Judges Association, the District Judges Association, the Oregon District Attorneys Association and the several law enforcement associations. Members of the Oregon State Bar Committee on Criminal Law and Procedure have been especially helpful. The Commission expresses its thanks to each of these associations, committees and individuals for the aid given.

One final observation about the proposed Code needs to be made. It does not contain procedural provisions, with a few minor and two major exceptions—the sections dealing with procedure in cases of mental disease or defect excluding responsibility (Article 5)—and the sections covering eavesdropping warrants (Article 27). In these instances the procedure involved was so important to the operation of the substantive sections that they were made a part of this draft. If the integrated Code is enacted by the Legislature, the Commission recommends that the procedural sections remain a part of it.

The Commission believes that a comprehensive revision of the criminal procedure statutes should be the next order of business and will now begin work on a procedural code. We intend to formally request the 56th Legislative Assembly for a two year extension in order to complete the procedure phase of the criminal law revision project.

Mr. Justice Frankfurter once observed that “the Legislature is dependent on treacherous words to convey complicated ideas.” We earnestly trust that the words on which we have depended will not prove “treacherous” but will serve the Legislature well in the pages that follow.

OREGON CRIMINAL LAW REVISION COMMISSION
Senator Anthony Yturri, Chairman

Salem, Oregon
July 1970

ference in the first degree as a felony. Since extradition is not available in misdemeanor cases, subsection (1) of § 101 was included to provide a criminal sanction in cases where a person not having lawful custody removes the person taken or enticed from the state. In such situation, while a civil remedy does exist, it was considered inadequate due to the expense and difficulty involved in locating the fleeing offender. Custodial interference would, likewise, be raised a degree in cases where there is a substantial risk to the victim's health or safety. For example: the person taken is an infant who requires a special formula or medication and is deprived of it by the actions of the defendant.

B. Derivation

Section 100 is based on New York Revised Penal Law § 134.45; subsection (1) (a) of § 101 is new; subsection (1) (b) of § 101 is derived from § 135.50 of the New York Revised Penal Law.

C. Relationship to Existing Law

Child-stealing is proscribed by ORS 163.640. This statute seeks to protect the rights of the parent or guardian having legal custody of the child. In *State v. Metcalf*, 129 Or 577, 278 P 974 (1929), the court said that child-stealing was primarily an offense against the parents.

The proposed draft incorporates ORS 163.640 within the offense of custodial interference. The draft goes beyond the present statute by including

not only children under the age of sixteen, but also any incompetent or committed person. The draft also would repeal ORS 165.245, substituting a child for infant committed to one's care.

A number of states have child-stealing statutes which prohibit the taking of a child under a specified age from the custody of his lawful guardian. The age specified varies: twelve years in Illinois; fourteen years in Indiana and New Jersey; sixteen years in New York and Oregon; eighteen years under the Model Penal Code.

These statutes are designed to protect the rights of the person or institution having legal custody of the child against invasion by those having no right to custody. The intervention of the courts is necessary to adequately safeguard the child's welfare and sense of security. Without the inhibiting influence of a penal statute prohibiting child-stealing, the law of custody could be reduced to a "seize and run" policy since the only deterrent to such conduct would be a contempt of court proceeding.

The Commission believes the courts have a duty to protect the interests and welfare of the child in custody disputes and in cases where a removal from custody adversely affects the child's welfare. The court must have the power to compel adherence to its decisions. Since custody orders are often unenforceable as a practical matter once the offending party and the child leave the state, the criminal process should be available as a means of regaining custody and securing enforcement of the original custody decree in aggravated cases.

Section 102. Coercion. (1) A person commits the crime of coercion when he compels or induces another person to engage in conduct from which he has a legal right to abstain, or to abstain from engaging in conduct in which he has a legal right to engage, by means of instilling in him a fear that, if the demand is not complied with, the actor or another will:

- (a) Cause physical injury to some person; or
- (b) Cause damage to property; or
- (c) Engage in other conduct constituting a crime; or
- (d) Accuse some person of a crime or cause criminal charges to be instituted against him; or
- (e) Expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or
- (f) Cause or continue a strike, boycott or other collective action injurious to some person's business, except that such a threat shall not be deemed coercive when the act or omission compelled is for the benefit of the group in whose interest the actor purports to act; or

(g) Testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or

(h) Use or abuse his position as a public servant by performing some act within or related to his official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely; or

(i) Inflict any other harm which would not benefit the actor.

(2) Coercion is a Class C felony.

COMMENTARY

See commentary under § 103 infra.

Section 103. Coercion; defense. In any prosecution for coercion committed by instilling in the victim a fear that he or another person would be charged with a crime, it is a defense that the defendant reasonably believed the threatened charge to be true and that his sole purpose was to compel or induce the victim to take reasonable action to make good the wrong which was the subject of the threatened charge.

COMMENTARY TO SECTIONS 102 AND 103

A. Summary

Coercion consists of compelling a person by intimidation to commit or refrain from committing an act. Coercion is separated from the offense of theft by extortion. Extortion is basically a form of coercion in which the act compelled is the payment of money. The proposed § 102 defines coercion in terms similar to theft by extortion and the kinds of threats which form a basis for the offense of coercion are equated with those contained in § 127 infra. (See the commentary therein regarding the kinds of threats which comprise the offense of theft by extortion.)

Coercion as defined by the proposed draft requires successful intimidation; the victim must actually act or refrain from acting. A mere threat or attempt failing of its coercive purpose would constitute attempted coercion.

The proposed draft is based on the premise that the forceful compulsion by means of a threat to act or forbear from acting, ought to be recognized as a crime even though the offense committed cannot be measured by monetary standard. The problem arises in coercion as to how to measure the gravity of the actor's misconduct since the act sought to be compelled may be of slight significance such as threatening to call the police unless the victim ceases seeing the defendant's daughter or the act may be as serious as attempting to compel the victim to leave town.

The Model Penal Code, § 212.5(2), attempts to measure the gravity of the defendant's misconduct on the basis of whether the threat is to commit a felony or the actor's purpose is felonious. New York Revised Penal Law § 135.65 raises the offense a degree on the basis of (1) the kind of threat specified and (2) the kind of conduct which he compels the victim to perform.

The proposed draft adopts neither of these measures but defines only one degree of coercion. This affords some protection against such threats but avoids imposing additional penalties on the basis of artificial distinctions. This is in accord with the committee commentary to the Michigan Revised Criminal Code which states:

"The committee is not persuaded that the utility in subjecting some persons who commit coercion to extended prison terms outweighs the difficulties inherent in classifying the particular threats made." (§ 2125)

Section 103 is the counterpart of the defense to theft by extortion. (See Article 14 infra.) This section provides a defense to a defendant charged with coercion committed by one particular kind of threat, namely, a threat to "accuse some person of a crime or cause criminal charges to be instituted against him," and where the defendant's coercive action is undoubtedly an attempt to compel or induce the victim to take reasonable steps to make good the

wrong perpetrated by him. As an example, a defendant accused of coercion for having compelled a youth, under threat of charging him with criminal mischief, to paint defendant's fence which the youth had marked up in an act of vandalism would have this defense available to him.

B. Derivation

Section 102 of the proposed draft is adopted from § 135.60 of the New York Revised Penal Law and § 212.5 (1) of the Model Penal Code. Section 103 is adopted from § 135.75 of the New York Revised Penal Law.

C. Relationship to Existing Law

Under present Oregon law "any person . . . who threatens any injury to the person or property of another . . . or threatens to accuse another of any crime with intent thereby to extort any pecuniary advantage or property from him, or with intent to compel him to do any act against his will, shall be punished . . ." (ORS 163.480). **The crime is committed when the threat is made and there is no requirement that property be obtained. The proposed draft follows the present law but separates the offenses of theft by extortion and coercion.**

ARTICLE 13. SEXUAL OFFENSES

Section 104. Sexual offenses; definitions. As used in this Act, unless the context requires otherwise:

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

(2) "Female" means a female person who is not married to the actor. Spouses living apart under a decree of separation from bed and board are not married to one another for purposes of this definition.

(3) "Forcible compulsion" means physical force that overcomes earnest resistance; or a threat, express or implied, that places a person in fear of immediate death or serious physical injury to himself or another person, or in fear that he or another person will immediately be kidnapped.

(4) "Mentally defective" means that a person suffers from a mental disease or defect that renders him incapable of appraising the nature of his conduct.

(5) "Mentally incapacitated" means that a person is rendered incapable of appraising or controlling his conduct at the time of the alleged offense because of the influence of a narcotic or other intoxicating substance administered to him without his consent or because of any other act committed upon him without his consent.

(6) "Physically helpless" means that a person is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

(7) "Sexual contact" means any touching of the sexual or other intimate parts of a person not married to the actor for the purpose of arousing or gratifying the sexual desire of either party.

(8) "Sexual intercourse" has its ordinary meaning and occurs upon any penetration, however slight; emission is not required.

laid or delivered by mistake. The latter category covers the kind of situation wherein one accepts a \$10 bill knowing that the other person thinks he is handing over a \$1 bill. In such a case the receiver acquires the property without trespass or false pretense and the traditional concept of larceny fails to reach such conduct. However, it is not proposed to make criminal certain types of tolerated sharp trading such as the purchase of another's property at a bargain price on a mere showing that the buyer was aware that the seller was mistaken regarding the value of the property sold.

B. Derivation

The section is based on Model Penal Code § 223.5; New York Revised Penal Law § 155.05 (1)(b); and Illinois Criminal Code § 16-2.

C. Relationship to Existing Law

At common law, "lost property" is property not intentionally deposited by the owner in a place where it was found. *Jackson v. Steinberg*, 186 Or 129 (1949). "Mislaid property" is that which the owner has voluntarily and intentionally laid down in a place where he can again resort to it and then has forgotten where he laid it. ORS 98.010-98.040 presently impose certain affirmative duties on the finders of lost goods; however, none of the criminal statutes deal with the question. Under existing case law one who receives money from another to which he knows he is not entitled, and which he knows has been paid to him by mistake, and conceals such overpayment, appropriating the money to his own use, with intent to defraud, is guilty of larceny. *State v. Ducher*, 8 Or 394 (1880).

Section 127. Theft by extortion. (1) A person commits theft by extortion when he compels or induces another person to deliver property to himself or to a third person by means of instilling in him a fear that, if the property is not so delivered, the actor or another will in the future:

- (a) Cause physical injury to some person; or
 - (b) Cause damage to property; or
 - (c) Engage in other conduct constituting a crime; or
 - (d) Accuse some person of a crime or cause criminal charges to be instituted against him; or
 - (e) Expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or
 - (f) Cause or continue a strike, boycott or other collective action injurious to some person's business; except that such conduct shall not be considered extortion when the property is demanded or received for the benefit of the group in whose interest the actor purports to act; or
 - (g) Testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or
 - (h) Use or abuse his position as a public servant by performing some act within or related to his official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely; or
 - (i) Inflict any other harm that would not benefit the actor.
- (2) Theft by extortion is a Class B felony.

COMMENTARY

A. Summary

This section continues the comprehensive definition of theft and deals with situations where coercion is employed to obtain property of another. The crime would consist of the wrongful acquisition of

property by intimidation or threat. Because of the threat element the crime is considered more dangerous than other methods of committing theft and is classified as a Class B felony.

The kinds and varieties of threats or intimidating

conduct that would amount to theft by extortion are set forth in paragraphs (a) to (i) of subsection (1).

As recommended by the Model Penal Code, paragraph (a) covers threats to injure *anyone*, on the theory that if the threat is in fact the effective means of compelling another to give up property, the nature of the relationship between the victim and the person he chooses to protect is immaterial. The issues are whether the threat is intended to intimidate and whether it is effective for that purpose.

Paragraph (b) is aimed at the threat to cause damage to someone's business, home or other property. A common example would be the selling of "protection" to a store owner.

The provisions of paragraph (c) are taken directly from New York Revised Penal Law and are similar to the Model Penal Code which employs the language "commit any other criminal offense." Commentary to Model Penal Code indicates its purpose is to cover a situation like this: A racketeer obtains property from another racketeer by threatening to operate houses of prostitution or illegal gambling enterprises in competition with him. Threat to compete would not ordinarily be criminal because the right to compete is one which, in our society, may be bargained away. However, where the competition itself would be criminal activity, there is no need to immunize a threat to engage in that activity when it is used for the purpose of extortion. (Tent. Draft No. 2 at 76). Paragraph (d) resembles closely the language now appearing in ORS 163.480 and is common to most extortion statutes.

Paragraph (e) amounts to a threat to defame. Unlike defamation actions, the truth of the matter threatened to be exposed would not constitute a defense to a prosecution under this subsection. The prohibition is directed against "selling" forbearance from defamation and not against the publication of defamation itself. It is emphasized, however, that the subsection is not intended to make it criminal to conduct legitimate negotiation or to agree to settlement of an asserted claim as consideration for a promise to forbear from civil litigation.

The provisions of paragraph (f) are aimed at racketeering, but do not in any way jeopardize the collective bargaining process, since even menaces are not criminal if the benefits are to be received by the group on behalf of which the "bargaining" is conducted. The group representative or official who threatens such action unless he gets a "kickback" would be reached by this subsection, however. Paragraph (g) is self-explanatory.

Paragraph (h) is aimed at extortion committed under cover of public office and is close to the "bribery" type of crimes now incorporated in ORS 162.230, 162.240 and 162.510. (See also articles 21 and 25 *infra*.)

Paragraph (i) is a statement of the general principle on which other threats are to be included within extortion. Examples suggested by Model Penal Code are: (a) The foreman in a manufacturing plant requires the workers to pay him a percentage of their wages on pain of dismissal or other employment discrimination; (b) A close friend of the purchasing agent of a corporation obtains money from an important supplier by threatening to influence the purchasing agent to divert his business elsewhere; (c) A professor obtains property from a student by threatening to give him a failing grade.

B. Derivation

The draft follows Model Penal Code § 223.4 and is a blend of that section and New York Revised Penal Law § 155.05 (e). The New York statute proscribes larceny of property by threat to cause physical injury to some person in the future. The Model Penal Code punishes obtaining of property by a threat to inflict bodily injury on anyone. It is submitted that the New York provision is preferable because it more clearly distinguishes between this type of theft and robbery, which is the threatening of immediate use of physical force upon another. Illinois Criminal Code and Michigan Revised Criminal Code contain comparable statutes.

C. Relationship to Existing Law

ORS 163.480, Oregon's "extortion" law, provides that any person who threatens any injury to the person or property of another or threatens to accuse another of any crime with the intent to extort any "pecuniary advantage or property" from him or to compel him to do any act against his will shall be punished. The crime is committed by making the threat, and obtaining property thereby is not an element.

The proposed draft goes beyond the existing statute by providing that the actor would commit theft if he actually obtained property from another as a result of the threat. It should be noted, however, that the Commission does not propose thereby to eliminate the proscription against the conduct now covered by ORS 163.480. (See § 102 *supra*). Such conduct would, in any event, amount to "attempted theft by extortion" under the draft if the purpose of the threat is to obtain property thereby.

Section 128. Theft by deception. (1) A person, who obtains property of another thereby, commits theft by deception when, with intent to defraud, he:

(a) Creates or confirms another's false impression of law, value,