

OREGON CRIMINAL LAW REVISION COMMISSION

Twenty-fourth Meeting, July 2, 1971

Members Present: Senator Anthony Yturri, Chairman
Judge James M. Burns
Mr. Robert W. Chandler
Mr. Donald E. Clark
Attorney General Lee Johnson
Mr. Frank D. Knight
Representative Norma Paulus
Mr. Bruce Spaulding
Representative Robert Stults

Delayed: Senator John D. Burns, Vice Chairman

Excused: Representative George F. Cole
Senator Kenneth A. Jernstedt
Representative Thomas F. Young

Staff Present: Mr. Donald L. Paillette, Project Director
Professor George M. Platt, Reporter

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Senator Anthony Yturri, Chairman, called the meeting to order at 10:00 a.m. in Room 315 State Capitol.

Approval of Minutes of Commission Meeting of December 10, 1970

Mr. Chandler moved that the minutes of the Commission meeting of December 10, 1970, be approved as submitted. Motion carried unanimously.

General Discussion and Review of Oregon Criminal Code of 1971 (Senate Bill 40) as Enacted by the 56th Legislative Assembly

Amendments to Senate Bill 40. Mr. Paillette stated that each member of the Commission would receive a copy of Enrolled Senate Bill 40 as soon as it came from the printer. He then pointed out some of the more significant amendments made to Senate Bill 40 by the 1971 legislature:

(1) Article 27, Offenses Against Privacy of Communications, was deleted in its entirety by House amendment. This amendment left two separate bodies of law "dangling" in ORS -- (1) the wiretapping provisions and (2) the statutes relating to guns, i.e., concealed weapons, gun permit requirements, ex-convict in possession, etc. These two areas remain unchanged in existing law, and he suggested that the Commission might later want to incorporate them into the criminal code.

(2) Article 4, Justification, was amended by the legislature but the amendments were mainly for purposes of clarification and the result was not a great deal different from the Commission's original intent. Probably the most significant part of the amendment was made in the Senate and specifically designated that deadly physical force is justified if a person reasonably believes that another person is committing or attempting to commit a burglary in a dwelling.

Section 28 dealing with use of deadly physical force by a police officer was one area where the Sheriffs' Association and the Chiefs of Police Association took issue with the bill. The section was therefore amended to itemize the circumstances in which such force is authorized. The most significant part of that amendment was contained in paragraph (d) of subsection (1) which said:

"(d) The crime committed by the person was a felony or an attempt to commit a felony and under the totality of the circumstances existing at the time and place, the use of such force is necessary;"

The purpose of the provision was to allow the officer, even though he had not yet been met with force, to take into account all he knew or had reason to believe about the particular arrest he was

attempting to make. The provision, he said, did not prescribe more than police departments already prescribed under their own departmental regulations. Subparagraph (e) of subsection (1) of that same section, although part of the arrest provisions, moves into the area of self-defense. In other words, it gives the officer the same rights of self-defense that any other citizen has under the code and which the officer would have anyway.

With respect to Article 13, Sexual Offenses, the Senate made no amendments, but the House made a desirable change in the definition of "sexual contact" to take care of a situation that arose in a case in Multnomah County involving sexual abuse of a minor. Under the code's original definition if the actor did the touching of the victim, that act was covered, but there was a question whether it would be a crime when the victim was forced to touch the private parts of the actor. The amendment clarified that situation.

(3) Section 89 containing the definition of "manslaughter" was amended to make it more of an objective test by authorizing an emotional disturbance to be used as a defense to a murder charge to reduce the charge to manslaughter. The amendment said in part:

" . . . the reasonableness of the explanation for the disturbance shall be determined from the standpoint of an ordinary person in the actor's situation under the circumstances as the actor reasonably believes them to be."

This language was derived, Mr. Paillette said, from the final draft of the Texas Penal Code.

(4) In the area of theft, credit card offenses and any area involving the taking of property, the dollar amount adopted by the legislature was \$200 as opposed to the \$250 recommended by the Commission. However, the \$200 referred to a single or aggregate transaction and the Commission's proposal allowed an aggregation only for credit card offenses.

(5) The public trespass amendment in section 135 was the one amendment proposed by the Commission after the Final Draft was published. It was adopted basically as the Commission approved it.

(6) The definition of burglar's tools was amended to pick up acetylene torches, burning bars and other typically professional burglar tools. Mere possession would not be criminal but proof of intent would enhance the crime to first degree status and make it a Class A felony if the actor was a professional burglar.

Mr. Chandler expressed the view that the legislature had actually made very few changes in the criminal code, and Mr. Paillette commented that the Commission could take a great deal of satisfaction in the fact that it was changed so little.

(7) House Bill 1355, the "Happy Canyon bill," was the only bill to pass the legislature which made a substantive change in Senate Bill 40. The effect was to amend the definition of gambling in Article 30, Gambling Offenses. It permitted tokens to be used for gambling in certain circumstances and its purpose was to authorize the tokens that had been used in the past at the Pendleton Roundup. He said he was unable to say what effect it would have on gambling on a state-wide basis.

Mr. Johnson stated that HB 1355 was drafted by his office at the request of Senator Raymond. It was designed to apply only to the Happy Canyon at the Pendleton Roundup and he was not convinced that it should cause any great amount of concern over gambling activities in other parts of the state.

(8) Two important amendments were made in the Senate Committee on Criminal Law and Procedure to section 274, the basic section on criminal activity in drugs. One made the first conviction of possession of less than one ounce of marihuana a straight Class A misdemeanor. Every other crime having to do with drugs had the felony-misdemeanor option. The second amendment made it a Class A felony, with double the possible maximum penalty, for furnishing narcotics or dangerous drugs to a minor.

(9) One other change was made in the narcotics area in response to a request by police agencies who wanted a "burn law" to take care of the situation where someone sold talcum powder or other substance to a peace officer representing it as a narcotic. The section became section 278a of Engrossed Senate Bill 40 and was called "Fraudulent sale of imitation drugs." The section, drafted by Mr. Paillette in conjunction with the Senate Committee on Criminal Law and Procedure, prohibited selling "any compound, substance or other matter, not a narcotic or dangerous drug, to a peace officer or his agent by falsely representing it to be a narcotic or dangerous drug." It did not require that the person know that he was selling to a peace officer.

Offenses Against Privacy of Communications. Mr. Johnson was of the opinion that the Commission had an obligation to do something about wiretapping and electronic eavesdropping in view of the fact that the legislature had deleted the subject from Senate Bill 40. He moved that the matter be assigned to a subcommittee with instructions to prepare a proposal for submission to the next legislature that would at least limit the type of crimes where electronic eavesdropping could be used. The proposal, he said, should be more restrictive than that originally approved by the Commission.

Mr. Paillette advised that this subject was discussed at the recent meeting of the District Attorneys' Association. There the consensus of opinion was that if an occasion should arise where a

district attorney needed to apply for an eavesdropping warrant, he would have two choices. He could either go to federal court under the federal Act and get a federal warrant or he could follow the procedural provisions of the state statute, setting forth the kind of material in the affidavit that was subject to the same kind of limitations imposed by the Omnibus Crime Control Act. The district attorneys agreed that if a wiretapping warrant was obtained under the existing state law, it would be a violation of federal law.

Judge Burns expressed approval of Mr. Johnson's motion. He said it would not be a time consuming project and would not impose any great burden on the subcommittee or the Commission to make the changes he had suggested. Chairman Yturri commented that if wiretapping were submitted to a subcommittee, it might be advisable to submit it to a special subcommittee composed of the same members who worked on the subject initially.

Professor Platt was of the opinion that there were major faults in the draft and if they were corrected, it might ameliorate much of the opposition from the ACLU but would not solve the basic objection of some of the opponents who wanted no eavesdropping in any form. Mr. Paillette expressed the view that the ACLU would not support electronic eavesdropping in any form. Some of the amendments proposed by the ACLU were adopted by the Senate committee, he said, but they were still strongly opposed to the Article even after their amendments were adopted.

Following further discussion, vote was taken on Mr. Johnson's motion to refer the Article on Offenses Against Privacy of Communications to a subcommittee for revision. Motion carried.

Firearms. Judge Burns indicated that the Commission owed to the purity of the criminal code and to the completion of their legislative directive the responsibility to reword and codify the existing gun control statutes so they would be consistent with the terminology of the new code. Much of that work had already been done, he said.

Judge Burns then moved that a bill be prepared and submitted to the 1973 legislature that would reword existing statutes relative to guns to conform with the terminology of the criminal code and to include those statutes within the code itself. Mr. Knight seconded the motion.

Mr. Chandler commented that the people of Oregon had previously spoken with respect to a legislative redraft that contained no substantive changes when they voted down the revised Constitution. He said he would suspect that there would be just as much opposition to a rewrite of the present firearms statutes as was encountered to the Constitution. Some word would inevitably be included that would cause all kinds of opposition, he said.

In reply to the Chairman's request for his comments, Mr. Clark said he would vote for the motion but nevertheless agreed that it would stir up a hornet's nest because there were people who were opposed to any gun law, including the present ones.

Mr. Spaulding remarked that he saw no point in opening up the question just to reword existing law.

Mr. Paillette said it would be desirable to at least incorporate the gun statutes into the criminal code. After further discussion, Mr. Paillette suggested that as a member of the Bar Committee on Criminal Law and Procedure, he could bring the matter before that committee to see if they would be agreeable to submitting a bill on the subject to the next legislature. Chairman Yturri expressed approval of this proposal.

Vote was taken on Judge Burns' motion to have the Commission submit a rewrite of the firearm statutes to the 1973 legislature. Motion failed.

Implementation of New Code

Pleading forms. Mr. Paillette indicated that one of the problems to be solved in connection with implementation of the new criminal code was the matter of instructions and pleading forms -- complaints, indictments, etc. He referred to a letter he had received from Judge Charles S. Crookham, Circuit Court Judge in Multnomah County:

"For a number of years the Judicial Council has had a committee whose function has been to prepare uniform criminal instructions, which are ultimately published by the Oregon Bar. The success of your Commission leaves in doubt the validity of our work vis-a-vis the new Criminal Code.

"Our committee will have its next meeting during the Bar Convention at Gearhart in October. We would be most appreciative if your staff could review the present set of instructions to see which ones will still be appropriate and which will need revision and/or deletion."

Judge Burns pointed out that Judge Crookham was referring to the Judicial Conference rather than the Judicial Council that had been abolished by the 1971 legislature.

Mr. Johnson advised that his office was planning to work on sample forms and was just beginning the project by drafting sample indictment forms.

Judge Burns commented that while the instructions were important, the forms should take priority because they had to be ready by January 1 whereas the instructions could wait another 60 to 90 days. He had discussed drafting the sample forms with Mr. Paillette to see if the Commission could properly undertake the project, but Mr. Paillette was reluctant to become too involved because of the time factor. He had also explored the possibility of obtaining a federal grant through the Law Enforcement Council to hire a staff to work on the matter but that attempt had so far met with no success. During the past week he had conferred with a number of people in Portland and it was the intent of that group to set up a small committee consisting of six or seven prosecutors, defense lawyers and judges to try to produce a set of charging forms by the first of the year. Mr. Johnson said part of the appropriation of his office was for this particular purpose and he would be glad to work with Judge Burns' committee.

Mr. Spaulding asked if the plan was to make the forms statutory. Judge Burns replied that they would not be in the statute but he would like to see some kind of a statement included with them to the effect that the Commission had not drafted them but had maintained liaison with the drafters and the Commission generally believed that the forms were in accord with the spirit of the statutes.

Mr. Johnson said it was his hope that Mr. Sanderson and Mr. O'Dell of his staff could work with Mr. Paillette in drafting the forms. The majority of the Commission was in agreement that Mr. Paillette's schedule would not permit him to devote very much time to the project.

Mr. Spaulding was of the opinion that such a project was not appropriate Commission work.

Mr. Paillette asked Mr. Knight if the district attorneys were planning any activity along this line and was told that they were not.

Mr. Knight commented that the problem with the forms in the old form books put out by the Attorney General's office a number of years ago was that they had too much excess material in them and suggested that the new forms be considerably simplified.

Senator Burns said that the forms should be prepared in consultation with Mr. Paillette but he agreed with Mr. Spaulding that their preparation was not a legitimate function of the Commission.

Chairman Yturri concurred that the Commission should not become involved in preparation of the forms but Mr. Paillette could lend whatever assistance was necessary.

Training police officers; Supplement to Final Draft. Mr. Paillette said the Police Standards and Training Board was anxious to instruct police officers on the provisions of the new criminal code. They wanted to purchase a reprint of about 4,000 copies of the Final Draft plus copies of the enrolled bill and were attempting to get a law enforcement grant to do so. He had informed them he would write a supplement to the Final Draft of the code that could be used as an insert to call attention to the new sections and the amendments made by the legislature together with brief commentary. When this was completed, he said it could be reproduced and sent to judges, district attorneys, etc. The Bar might also be interested in reproducing copies for the lawyers in the state. Chairman Yturri expressed approval of this plan and said he had intended to ask Mr. Paillette to prepare such a supplement for the Commission members in any event so it would not involve much added expense or time to distribute copies to those who would make use of them.

Senator Burns remarked that if the Police Standards and Training Board was unable to obtain a grant to pay for their 4,000 copies, the Joint Committee on Legislative Administration would still have to charge 50¢ for each copy of the enrolled bill because the actual cost was very close to that amount.

Codification of criminal code. Mr. Johnson commented that it would be helpful to the police in their training sessions if Legislative Counsel would publish the criminal code with ORS numbers in booklet form. Mr. Paillette agreed and said he had discussed that point with the Police Standards Board. The problem was that the Advance Sheets would probably not be ready in time for the projected training session.

Senator Burns asked Mr. Johnson to write a letter to him and to Robert Smith, Speaker of the House, requesting that Legislative Counsel set up the criminal code with ORS numbers in booklet form as a priority over the codification of other material passed at the last session. He, as President of the Senate, and the Speaker could then make a formal request to Legislative Counsel.

Professor Platt asked if any of the commentary to the code would be published by Legislative Counsel. Mr. Paillette said it would not and, in reply to a further question, added that the commentary in the Final Draft would not be included in the Annotations to ORS.

Professor Platt asked if the minutes of the Commission and the subcommittees would be made available in printed form. Mr. Paillette explained that all of the minutes and the tapes together with every draft considered by the subcommittees and the Commission were clearly indexed and would be filed permanently with the State Archivist so that anyone who wanted to refer to them could easily obtain copies. In addition, copies were on file with the Supreme Court Library and the law school libraries.

Follow-up and Evaluation of New Code During 1972

Mr. Paillette indicated that without expending a great deal of time and money, members of the Bar, judges and district attorneys could be notified that the Commission would be interested in receiving specific suggestions on improving the code or hearing about problems encountered under the new code. The Commission could then recommend amendments to the 1973 Legislative Assembly to clean up any areas that needed revision and correct areas where problems became apparent after a year or so of experience under the new code.

Chairman Yturri said this would be all right so long as it didn't get out of hand. The Commission would be involved in the procedural aspects of the criminal law and wanted to be careful not to take on so many additional chores that they would not be doing their duty with respect to the procedural revision.

Regarding review of the code in years to come, Judge Burns said that Professor Morris, an expert in the field of criminal law, suggested strongly in his book that states should have permanent criminal law review commissions. He said he intended to see what could be done in Oregon toward establishing a permanent group with review functions to keep the legislature posted on the need for updating and improving the code.

Chairman Yturri said that the Criminal Law Committee of the Oregon State Bar could perform this function. Judge Burns' suggestion appeared desirable, he said, but he doubted that the legislature would appropriate money for that purpose. Judge Burns said he had not intended to seek any funds from the legislature.

Professor Platt advised that the University of Oregon Law School was currently attempting to acquire substantial funding from LEAA to establish a center for a criminal justice institute within the law school. One of the principle functions of the institute would be an ongoing law improvement study in the criminal law field.

Mr. Paillette commented that the Law Improvement Committee, of which he was a member, had discussed law revision generally -- with no particular reference to criminal law -- and conducted a survey about a year ago to see what other states were doing in this field. A surprisingly large number of states, including California and New York, had a continuous law revision commission that operated as an arm of the legislature. The Law Improvement Committee, however, had not taken a position on the matter.

Report on Continuation of Commission; Appropriation for 1971-73
Biennium

Mr. Paillette advised that Senate Bill 130 as passed by the legislature extended the life of the Criminal Law Revision Commission for two more years.

House Bill 2096 was the appropriation bill. The initial budget request was for \$147,971 and the actual amount granted to the Commission was \$123,774. The General Fund appropriation was \$85,747 and the additional \$38,027 would come from federal funds through the Law Enforcement Council. The understanding was that if the federal funds were not forthcoming, the Commission would be free to go before the Emergency Board to obtain the additional money from the General Fund.

The legislature also set up a juvenile code revision committee and part of the Commission's General Fund appropriation would be used for identification purposes for in-kind matching funds by the state to get federal money to fund the juvenile code revision. This would not, however, in actuality take any money from the Commission's budget.

Proposed Oregon Criminal Procedure Code

Ex-officio members of the Commission. Chairman Yturri recalled that in the past a member of the Supreme Court had sat with the Commission during its deliberations. He was Justice Sloan who at that time was Chairman of the Bar Committee on Criminal Law and Procedure. The Chairman suggested that the Chief Justice of the Supreme Court be advised that the Commission would like to have one of its members sit with the Commission again.

The Commission had considered introduction of a bill at the last legislative session to add a member of the Court of Appeals to the Commission. The bill was not introduced but he asked how the Commission would feel about also inviting a member of the Court of Appeals to sit with the Commission in an ex-officio capacity.

Judge Burns was of the opinion that it was more important to have a member of the Court of Appeals sit in since they were the ones who dealt with criminal law matters, but there was nothing wrong with also inviting a member of the Supreme Court. Senator Burns commented that Judge Sloan had contributed a great deal to the Commission's deliberations and expressed approval of the Chairman's suggestion so long as the members of the courts understood that they were serving in an ex-officio capacity.

The Chairman indicated he would write a letter to both courts and extend the invitations.

Report on criminal procedure bills considered by 1971 legislature. Mr. Paillette had prepared a packet of the major criminal procedure bills considered by the last session of the legislature. He explained the bills:

Senate Bill 66 relating to courts, court reporters and appeals was endorsed by the Commission prior to the legislative session. The appeal provisions were those in which the Commission was primarily interested and they were passed substantially as submitted. Mr. Johnson commented that the only major change made by the legislature was to make bail on appeal discretionary in the circuit court.

Senate Bill 363 was tabled in the Senate Criminal Law and Procedure Committee and would have allowed denial of bail for certain types of defendants.

Senate Bill 450 made district courts courts of record and allowed appeals from district courts in criminal cases. One of the provisions was contingent upon an amendment to the Oregon Constitution allowing six man juries in inferior courts.

House Joint Resolution 12 passed the House but failed in the Senate. It would have amended the Constitution to permit a criminal charge in circuit court by D. A. information if the defendant had been held to answer. This is an area the Commission will be considering. The bill was endorsed by the Bar and supported in the legislature by both prosecutors and defense attorneys.

House Bill 1003 allows the state to appeal from pre-trial orders dismissing indictments and passed both Houses.

House Bill 1004 was the witness immunity bill and also passed. Mr. Paillette asked if the Commission would want to leave the subject of witness immunity alone inasmuch as it had been acted upon by the 1971 session. Chairman Yturri replied that as matters arose that had been revised by the last session of the legislature, the Commission should reexamine them to see if they needed to be changed to correlate with the changes made in the procedural revision.

House Bill 1331 was passed and reduced from 60 to 30 days the time in which a person held to answer must be indicted.

House Bill 1533 was a significant bill that required trial or release of the defendant in jail within 60 days after his arrest.

House Bill 1802 was the expungement record bill and allowed the court under certain circumstances to set aside convictions. Judge Burns explained that HB 1802 provided that under certain circumstances, following a period of five years, conviction could be expunged but it did not apply to traffic offenses. The bill, he said, was drafted by Judge Unis. Mr. Paillette added that it applied to a low grade felony or a misdemeanor.

General discussion of Commission activity for 1971-73. Mr. Paillette directed attention to the Tentative Outline of the Proposed Oregon Criminal Procedure Code. Under this outline, the procedure code would contain five basic parts. Work had begun before the

legislative session on Part I and the draft on the statute of limitations was in tentative draft form. In addition, Professor Platt had done considerable work on search and seizure and was planning to go ahead with that project this summer, recognizing that the Commission may well decide not to codify the subject.

Mr. Paillette indicated that the Commission needed to make a decision as to how to proceed from this point:

(1) Recognizing the time limitations, should priorities be established from the standpoint of the subjects that were most important so that if the controversial material took longer than anticipated, they would at least be able to finish the most important parts; or

(2) Should the Commission proceed in chronological order on the basis of the tentative outline of the procedure code.

Chairman Yturri stated that as long as three subcommittees were going to be operating, they might as well be working on three parts of the code simultaneously beginning with Parts I, II and III. The Commission agreed.

Mr. Paillette noted that approximately the first half of the code had already been assigned to subcommittees. If those assignments were to stand, he asked if there was anything toward the end of the code that should be considered in the early stages. Chairman Yturri said he thought there was not and if there was, it would soon be discovered as work proceeded.

Mr. Paillette pointed out that the Bar Committee on Criminal Law and Procedure was greatly interested in the procedure code and the 1970-71 report of that committee recommended that it continue to assist the Criminal Law Revision Commission in the revision and drafting of a Code of Criminal Procedure. They were particularly interested in the two areas of discovery and disclosure and the matter of negotiated pleas.

The report stated in its recommendations:

"The Committee has not undertaken the drafting of proposed legislation, either in the field of the substantive criminal law or in the procedural aspects thereof, it being the purpose of the Committee to reserve such efforts until the adoption or rejection of the proposed Oregon Criminal Code by the 1971 Oregon Legislature (Senate Bill 40). The Committee recognizes the need for improvement in the administration of criminal justice, but anticipates the continued efforts of the Criminal Law Revision Commission, and deems it most appropriate to assist and work within the

framework of such Commission to accomplish its purposes. The Commission has acknowledged assistance of the Bar Committee in the past and has indicated a continued interest in having the professional assistance of members of such Committee during its proposed future efforts to draft a Criminal Code of Procedure."

Mr. Paillette advised that members of the Bar committee had supported Senate Bill 40 during the last session and would probably have three or four members assigned to attend Commission meetings. He also planned to continue the practice followed in the course of the substantive revision of coordinating the Commission's efforts through the District Attorneys' Association, the Circuit and District Judges' Associations, sheriffs, police chiefs, etc. to keep those groups apprised of meetings and drafts as the revision proceeded.

Future Meetings

Chairman Yturri said that since it was so difficult to get everyone together during the months of July and August, the Commission would probably not meet again until early in September. Subcommittees, however, might be able to meet prior to that time. After the subcommittees became operative, he said, the Commission should probably plan for monthly two-day meetings.

Mr. Paillette said it might take a while to get enough drafts through the subcommittees to occupy the Commission for two days. He planned to add another attorney to the staff not later than September and that should speed up the work of the subcommittees.

Mr. Chandler suggested that meetings be set up as far in advance as possible so the members could adjust their schedules accordingly. Chairman Yturri agreed and said an attempt would be made to schedule meetings three months in advance. He also indicated that subcommittee members and chairmen would be announced in the near future.

The Chairman asked that members of the Commission make every effort to attend all meetings. When someone was absent, he said, it became necessary for the rest of the Commission to review and repeat previous discussions and it wasted a great deal of time. Mr. Chandler added that if a member missed a meeting, he should at least read the minutes carefully so he would be apprised of what took place.

The meeting was adjourned at 12:30 p.m.

Respectfully submitted,

Mildred E. Carpenter, Clerk
Criminal Law Revision Commission