

See: Minutes of Subcommittee No. 1
2/11/69, p. 2, Vol. X
Tape #62

CRIMINAL LAW REVISION COMMISSION
208 State Agriculture Building
Salem, Oregon

ARTICLE 1 . PRELIMINARY

Section 3. General Definitions

Preliminary Draft No. 1, January 1969

Reporter: Donald L. Paillette

Subcommittee No. 1

ARTICLE 1 . PRELIMINARY

General Definitions

Preliminary Draft No. 1; January 1969

Section 3. General Definitions. Unless different meanings are expressly set out in subsequent provisions of this Code, the following terms have the following meanings:

(1) "Person" means a human being, and where appropriate, (Existing
a public or private corporation, an unincorporated association, (Law
a partnership, a government or a governmental instrumentality. (ORS
161.010 (11)

(2) "Possess" means to have physical possession or otherwise to exercise dominion or control over tangible property.

(3) "Physical injury" means impairment of physical condition or substantial pain.

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

(5) "Deadly physical force" means physical force that under the circumstances in which it is used is readily capable of causing death or serious physical injury.

(6) "Deadly weapon" means any instrument, article or substance specifically designed for and presently capable of causing serious physical injury.

(7) "Dangerous weapon" means any instrument, article or substance which under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing serious physical injury.

COMMENTARY - GENERAL DEFINITIONS

This section provides a new set of terms for general use throughout the proposed criminal code. There are, of course, other definitions found in the Draft, either as a part of the specific section in which they appear, or in the definitional sections of the particular articles to which they

apply. For example, the definitions of "crime", "felony", "misdemeanor" and "violation" appear in the draft of the section on classes of crimes.

The definitions of some terms that are employed generally in our present criminal statutes are located in ORS 161.010, most of which deal with language that will be replaced by new definitions set out in the Draft section on culpability. Except for the definition of "person" none of the proposed terms are now defined by statute.

The definitions are derived from New York Revised Penal Law s. 10.00, but differ therefrom in certain particulars of both form and substance. Michigan Revised Criminal Code section 135 contains basically the same list as New York. The Model Penal Code also contains a long list of definitions, most of which deal with culpability requirements.

Such a section is essential to the development of a comprehensive and internally consistent code; however, making a list of general definitions presents a "chicken or the egg" type of problem inasmuch as it is impossible to be sure now that the proposed list will be adequate after all the drafts of specific crimes are completed. On the other hand, though, drafting of the other sections is impaired until the reporters can be reasonably confident of the definitions to be given to many of the terms they must use. The list as suggested provides a tentative set of definitions for the reporters to work with and to test against the specific crimes as each is drafted. The list can be amended if it later appears necessary.

Subsection (1) "Person" is derived from New York Revised Penal Law s. 10.00 (7) and resembles the existing statutory definition in ORS 161.010 (11):

" 'Person' includes corporations as well as natural persons. Where 'person' is used to designate the party whose property may be the subject of a crime it includes this state, any other state, government or country which may lawfully own any property in this state, and all municipal, public or private corporations, as well as individuals."

The Draft continues the present legislative policy of including corporations within the sanction and protection of the criminal law and of protecting the property interests of governmental entities.

In addition to "corporations" the definition encompasses other business entities such as unincorporated associations and partnerships, as does the New York and Michigan codes. The conditional phrase "where appropriate" will leave to the courts the determination whether a particular entity should be held to be included within a specific statute. Such a provision obviates the necessity of expressly mentioning the business or governmental units in every instance where the text is meant to apply and allows the courts to apply the provision in fact situations as appropriate.

Subsection (2) "Possess" is a term appearing frequently in the Draft and has been defined to include the doctrine of constructive possession of property. It is identical to New York Revised Penal Law s. 10.00 (8).

Subsection (3) "Physical injury" and subsection (4) "Serious physical injury" are taken from the New York statute and have particular importance in the assault and robbery areas. Use of the modifying adjective "physical" instead of "bodily" seems preferable in a criminal code because it is more precise. Both definitions impliedly recognize that the cause of such an injury is some form of external violence that produces a harmful effect upon the body. This is in accord with the case law definition of "bodily injury." See 117 A.L.R. 733. The meaning of "serious physical injury" is synonymous with "serious bodily harm" or "great bodily harm," according to 21A Words and Phrases. The proposed definitions furnish guidelines for distinguishing between minor and major injuries which are based on the same type of rationale found in the majority of cases on the subject. Most courts have said that an injury is "serious" when it gives rise to the apprehension of danger to life, health or limb. See, for example, Gonzales v. State, 146 Tex. Cr. R. 108, 172 S.W. 2d 97; Hall v. State, Okla. Cr., 309 P.2d 1096. Restatement, Torts, s. 63 (b) defines serious bodily harm as "bodily harm, the consequence of which is so grave that it is regarded as differing in kind, and not merely in degree, from other bodily harm. A harm which creates a substantial risk of fatal consequences is a 'serious bodily harm' as is a harm, the infliction of which constitutes the crime of mayhem."

Subsection (5) "Deadly physical force" is another new definition borrowed from the New York Revised Penal Law and has significance in the assault area and in connection with the defense of "justification." The term, as defined, would include the use of dangerous or deadly weapons, as well as other "physical force" of such magnitude so as to be "deadly" in nature.

Subsection (6) "Deadly weapon" and (7) "Dangerous weapon" must be considered together because these definitions attempt to distinguish between those instruments, articles or substances that are specifically designed to be used as "weapons" and those which, because of the circumstances in which they are used or attempted to be used, become "weapons." The definition of "dangerous weapon" is substantially the same as the definition of "dangerous instrument" in section 10.00 (13) of the New York Revised Penal Law. The Draft does not use the New York definition of "deadly weapon" which is merely an itemized list of well-known weapons, but nevertheless uses the same rationale.

"Weapon" is defined in Words and Phrases as "an instrument of offensive or defensive combat." The courts generally have not drawn a clear distinction between a deadly weapon and a dangerous one. A deadly weapon is often defined as a weapon likely, from the manner of its use, to produce death or great bodily injury. (The Draft definition of "dangerous weapon" is closer to this one.) But, as one court observed in Pittman v. State, 25 Fla. 648, 6 So. 437, "any weapon is a deadly weapon which is likely to produce death, but a weapon capable of producing death is not necessarily likely to produce death."

State v. Rosever, 8 Wash. 43, 35 Pac. 357 indicates a basis of distinction between "deadly" and "dangerous" weapons in this statement: "Some weapons are per se deadly; others, owing to the manner in which they are used, become deadly." This is the foundation on which the Draft definitions are laid: A deadly weapon is labeled so because of the nature of the instrument itself, whereas a dangerous weapon is one which has become such due to the use it is put to. This, then, places the determination of the former on the court as a matter of law, the latter on the jury as a question of fact to be decided under proper court instructions.

The Oregon cases and, indeed, the statutes appear to employ "deadly" and "dangerous" interchangeably, (See ORS 41.350 (1), 161.240, 161.250, 162.380, 162.400, 163.628.). The early case of State v. Godfrey, 17 Or 300 (1889) stated that a dangerous weapon is one by the use of which death or great bodily injury may be inflicted. This definition is broad enough to include lethal weapons such as guns, knives and the others that are deemed dangerous weapons as a matter of law and also those things which become dangerous weapons owing to the manner in which they are employed. The Oregon Court has consistently adhered to the above definition which is adequate in the assault area, but which is unsatisfactory when applied to robbery or burglary while armed with a "deadly" weapon. (See Tent. Drafts No. 1 of those articles.)

Oregon does not follow that line of case law which includes an unloaded gun in the classification of a "dangerous weapon" within the meaning of a statute denouncing robbery while armed with a dangerous weapon. But the use of a firearm within carrying distance of the threatened victim in Oregon allows an inference that the weapon was loaded and the burden of going ahead with the evidence to prove that the weapon was not loaded is on the defendant. State v. Lanegan, 192 Or 691, 236 P.2d 438 (1951); State v. Noblen, 214 Or 60, 326 P.2d 139 (1958). The result is that a robbery with an unloaded gun, not used to strike with, is not robbery while armed with a dangerous weapon. This rule would place in jeopardy a definition of a "deadly" weapon as one specifically designed or readily adaptable to produce serious bodily injury. A firearm is specifically designed for such a purpose and although unloaded is readily adapted to that purpose by loading it. Therefore, to continue the necessity of the firearm being loaded before it would be considered a "deadly" weapon within the meaning of the "armed robbery" statute it is necessary to adopt a definition which demands such a result, but which also does not disturb the inference that the gun is loaded. The New York Revised Penal Law and the Michigan Revised Criminal Code accomplish this by simply stating that a "deadly weapon" is "any loaded weapon." Both codes also enumerate several other instruments which are classed as "deadly." To avoid the difficulty of enumeration and the possibility of gaps which such a technique leaves, a more general definition is suggested. The requirement of "present capability" resolves the problem of an "unloaded" gun. The demand that the instrument be "specifically designed" for "the purpose of inflicting serious bodily injury" would encompass all firearms as well as other instruments designed for offensive or defensive purposes, such as

metallic knuckles, billies, dirks, switchblade knife and gravity knife. However, the "specifically designed" requirement might limit the applicability of the definition to "air rifles" or a "loaded pen knife" which were not so designed. However, such instruments could easily fall within a definition of "dangerous weapon" which stresses the manner in which the instrument is used.

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See: Minutes of Subcommittee No. 3
7/20/68, p. 1, vol. XI

CRIMINAL LAW REVISION COMMISSION
309 Capitol Building
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ARTICLE 1 . PRELIMINARY

Preliminary Draft No. 1; July 1968

Section 4. Classes of crimes; violations

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Note: See Article 7 for subsequent drafts of this material.

ARTICLE 1 . PRELIMINARY

Classes of Crimes; Violations

Preliminary Draft No. 1; July 1968

Section 4. Classes of crimes; violations. (1) An offense defined by this Code or by any other statute of this state, for which a sentence of imprisonment is authorized, constitutes a crime. Crimes are classified as felonies, misdemeanors or petty misdemeanors.

(Existing
(Law
(
(ORS
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(2) A crime is a felony if it is so designated in this Code or if persons convicted thereof may be sentenced to imprisonment in the penitentiary of this state or in the Oregon State Correctional Institution. When a crime punishable by imprisonment in the penitentiary or in the Oregon State Correctional Institution is also punishable by imprisonment in a correctional facility other than the penitentiary or the Oregon State Correctional Institution for a term of which the maximum is one year or by a fine, in the discretion of the court, it shall be deemed a misdemeanor for all purposes, after a judgment imposing a punishment other than imprisonment in the penitentiary or in the Oregon State Correctional Institution. Where a court grants probation to a defendant without imposition of sentence upon conviction of a crime punishable by imprisonment in the penitentiary or in the Oregon State Correctional Institution and also punishable by imprisonment in a correctional facility other than the penitentiary or the Oregon State Correctional Institution for a term of which the maximum is one year or by a fine, the court shall at the time of granting probation declare the offense to be a felony, or, in the discretion of the court, declare the offense to be a misdemeanor.

(3) A crime is a misdemeanor if it is so designated in this Code or in a statute other than this Code enacted subsequent thereto.

(4) A crime is a petty misdemeanor if it is so designated in this Code or in a statute other than this Code enacted subsequent thereto or if it is defined by a statute other than this Code which now provides that persons convicted thereof may be sentenced to imprisonment for a term of which the maximum is less than one year.

(5) An offense defined by this Code or by any other statute of this state constitutes a violation if it is so designated in this Code or in the law defining the offense or if no other sentence than a fine, or fine and forfeiture or other civil penalty is authorized upon conviction or if it is defined by a statute other than this Code which now provides that the offense shall not constitute a crime. A violation does not constitute a crime and conviction of a violation shall not give rise to any disability or legal disadvantage based on conviction of a criminal offense.

(6) Any offense declared by law to constitute a crime, without specification of the grade thereof or of the sentence authorized upon conviction, is a misdemeanor.

(7) An offense defined by any statute of this state other than this Code shall be classified as provided in this section and the sentence that may be imposed upon conviction thereof shall hereafter be governed by this Code.

COMMENTARY - PRELIMINARY: CLASSES OF CRIMES; VIOLATIONS

A. Summary

This section retains the traditional felony-misdemeanor classification, but subdivides misdemeanors into misdemeanors and petty misdemeanors, and adds a non-criminal offense termed a violation.

The section retains the feature of Oregon law which provides that certain crimes may be prosecuted as felonies but that the sentencing judge may sentence as for a misdemeanor, and that the crime shall be deemed a misdemeanor for all purposes, after a judgment imposing a punishment other than imprisonment in the penitentiary or in the Oregon State Correctional Institution. The section would clarify existing law by providing, in crimes which are felonies or misdemeanors at the discretion of the sentencing judge, that the judge shall, if he grants probation, at the time of granting probation declare the offense to be a felony or, in the discretion of the court, declare the offense to be a misdemeanor.

One reason for adding the minor offense classifications of petty misdemeanor and violation is to provide more rational bases for future procedural decisions, such as the decision as to which classes of offenses other than felonies will require appointment of counsel for indigents. In addition, the new classifications are deemed necessary to give room for flexibility in the drafting of the sentencing provisions of the Code.

The violation category is added for the further reason that the reporter feels that the use of the criminal law as an attempted cure-all for every social problem has been notoriously ineffective, and has tended to bring the criminal law into disrepute. In a day when major crime is increasing at a sobering rate we should direct our scarce and overburdened police and correctional resources to areas of real concern and not to enforcement of regulatory measures.

B. Derivation

The somewhat unusual feature of Oregon law which gives the sentencing judge discretion to sentence for certain crimes either to the penitentiary (or to the Oregon State Correctional Institution) or to the county jail for a term of a year or less, and which classifies the crime as a misdemeanor for all purposes after a judgment imposing a punishment other than imprisonment in the penitentiary or in the Oregon State Correctional Institution is generally

continued. ORS 161.030 (2). This plan is followed by present California and Idaho law. California Penal Code, section 17; Idaho Code, section 18.111. On the other hand, Iowa, Washington and Massachusetts (apparently representing a majority of all the states) determine the classification of a specific crime as a felony or misdemeanor by the punishment that may be given and not by what is actually given. See, for example, State v. Sayward, 65 Wash. 2d 698, 404 P.2d 783 (1965). The reference to the county jail has been deleted with the idea in mind that the Code should anticipate the use of county correctional camps and perhaps state correctional facilities (other than the penitentiary and Oregon State Correctional Institution) for minor offenders.

The new provision directing the judge to declare whether a crime is a felony or a misdemeanor at the time of granting probation, in those cases where a crime may be punished either as a felony or a misdemeanor, in the judge's discretion (and in which the judge grants probation rather than imposing a sentence of imprisonment), was suggested by a somewhat similar provision added to California Penal Code, section 17, by a 1963 amendment.

It is believed that the sentencing judge should be given a wide discretion as to severity of sentence in order to avoid unnecessarily long and severe sentences. The Model Penal Code has been criticized on the ground that it has the effect of lengthening, rather than reducing, unnecessarily long prison terms. 46 A.B.A.J. 994; The Law of Criminal Correction, Rubin, 142.

The source of the concept of a non-criminal classification termed a violation is section 1.04 (5) of the Model Penal Code (references to the Model Penal Code are to the Proposed Official Draft dated May 4, 1962, unless otherwise indicated) and section 135 (b) of the Michigan Revised Criminal Code (references to the Michigan Revised Criminal Code are to the Final Draft - September 1967, unless otherwise indicated). "Violation" in the Michigan Code means an offense for which a sentence to a term not in excess of 15 days is authorized, or for which no sentence of imprisonment can be imposed. Our proposed section 4 (5) makes no provision for imprisonment, following the reasoning of the Model Penal Code Comments, Tentative Draft No. 2, page 8, which state that:

"If a sentence of imprisonment is authorized . . . it is an inadmissible semantic manipulation to declare that the offense is not a crime. Imprisonment, it is submitted, ought not be available as a punitive sanction, unless the conduct that gives

rise to it warrants the type of social condemnation that is and ought to be implicit in the concept 'crime'."

Section 4 (5) of the proposed Oregon Code is thus in the language of the Model Penal Code.

The California Penal Code Revision Project Tentative Draft No. 1, September 1967, introduction, page 5, states:

"Lesser offenses will be divided into misdemeanors, petty misdemeanors and (for purely regulatory laws) infractions. The latter will not be criminal offenses and will be punishable only by fine or other appropriate non-criminal penalty."

The California proposed "infraction" is thus comparable to the "violation" here proposed.

Setting up classifications of crimes is a modest beginning. Much more needs to be done by way of investigating types of deviance and the effectiveness of legal sanctions. See 1967 Wis. L. Rev. 703, Summer 1967, and 12 Crime and Delinquency 70, January 1966, articles by W. J. Chambliss on the deterrent influence of punishment.

The petty misdemeanor classification found in section 4 (4) of this draft would also be a new one for Oregon law. The source is section 1.04 (4) of the Model Penal Code and Title 18, sec. 1 (3) of United States Code.

The New York classification scheme is quite complicated, but generally speaking it provides for felonies in various grades, misdemeanors in various grades, and violations. New York Penal Law, section 55.10 (1965). The New York Penal Law also provides for an additional classification termed a traffic infraction.

C. Relationship to Existing Law

The proposed classification generally continues existing Oregon law, see ORS 161.020 and 161.030, with minor changes, and adds petty misdemeanor and violation classifications which are deemed necessary to give room for adequate flexibility in the drafting of the sentencing provisions of the Code.

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ORS 161.020. Crime defined. A crime or public offense is an act or omission forbidden by law and punishable upon conviction by any of the following punishments:

- (1) Imprisonment.
- (2) Fine.
- (3) Removal from office.
- (4) Disqualification to hold and enjoy any office of honor, trust or profit under the Constitution or laws of this state.

ORS 161.030. Felonies and misdemeanors defined. (1) Crimes are divided into felonies and misdemeanors.

(2) A felony is a crime which is punishable by imprisonment in the penitentiary of this state. When a crime punishable by imprisonment in the penitentiary is also punishable by a fine or imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes, after a judgment imposing a punishment other than imprisonment in the penitentiary or in the Oregon State Correctional Institution.

(3) Every crime not included in subsection (2) of this section is a misdemeanor.

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TEXT OF REVISIONS OF OTHER STATES

Text of Model Penal Code

Section 1.04. Classes of Crimes; Violations.

(1) An offense defined by this Code or by any other statute of this State, for which a sentence of [death or of] imprisonment is authorized, constitutes a crime. Crimes are classified as felonies, misdemeanors or petty misdemeanors.

(2) A crime is a felony if it is so designated in this Code or if persons convicted thereof may be sentenced [to death or] to imprisonment for a term which, apart from an extended term, is in excess of one year.

(3) A crime is a misdemeanor if it is so designated in this Code or in a statute other than this Code enacted subsequent thereto.

(4) A crime is a petty misdemeanor if it is so designated in this Code or in a statute other than this Code enacted subsequent thereto or if it is defined by a statute other than this Code which now provides that persons convicted thereof may be sentenced to imprisonment for a term of which the maximum is less than one year.

(5) An offense defined by this Code or by any other statute of this State constitutes a violation if it is so designated in this Code or in the law defining the offense or if no other sentence than a fine, or fine and forfeiture or other civil penalty is authorized upon conviction or if it is defined by a statute other than this Code which now provides that the offense shall not constitute a crime. A violation does not constitute a crime and conviction of a violation shall not give rise to any disability or legal disadvantage based on conviction of a criminal offense.

(6) Any offense declared by law to constitute a crime, without specification of the grade thereof or of the sentence authorized upon conviction, is a misdemeanor.

(7) An offense defined by any statute of this State other than this Code shall be classified as provided in this Section and the sentence that may be imposed upon conviction thereof shall hereafter be governed by this Code.

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Text of Michigan Revised Criminal Code - Final Draft, September 1967

Section 135. Definitions of Terms of General Use in This Act

Unless different meanings are expressly set out in subsequent provisions of this act, the following terms have the following meanings:

(a) "Offense" means conduct for which a sentence to a term of imprisonment or to a fine is provided by any law of this state or by any law, local law or ordinance of a political subdivision of this state.

(b) "Violation" means an offense for which a sentence to a term not in excess of 15 days is authorized by this act, or for which no sentence of imprisonment can be imposed.

(c) "Misdemeanor" means an offense for which a sentence to a term of imprisonment in excess of 15 days but not in excess of 1 year is authorized by this act.

(d) "Felony" means an offense for which a sentence to a term of imprisonment in excess of 1 year is authorized by this act.

(e) "Crime" means a misdemeanor or a felony.

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Text of New York Revised Penal Law (1967)

Section 55.10. Designation of offenses

1. Felonies. The particular classification of each felony defined in this chapter is expressly designated in the section or article defining it. Any offense defined outside this chapter which is declared by law to be a felony without specification of the classification thereof, or for which a law outside this chapter provides a sentence to a term of imprisonment in excess of one year, shall be deemed a class E felony.

2. Misdemeanors.

(a) Each misdemeanor defined in this chapter is either a class A misdemeanor or a class B misdemeanor, as expressly designated in the section or article defining it.

(b) Any offense defined outside this chapter which is declared by law to be a misdemeanor without specification of the classification thereof or of the sentence therefor shall be deemed a class A misdemeanor.

Text of New York Revised Penal Law (1967) (Cont'd)

(e)¹ Except as provided in paragraph (b) of subdivision three, where an offense is defined outside this chapter and a sentence to a term of imprisonment in excess of fifteen days but not in excess of one year is provided in the law or ordinance defining it, such offense shall be deemed an unclassified misdemeanor.

3. Violations. Every violation defined in this chapter is expressly designated as such. Any offense defined outside this chapter which is not expressly designated a violation shall be deemed a violation if:

(a) Notwithstanding any other designation specified in the law or ordinance defining it, a sentence to a term of imprisonment which is not in excess of fifteen days is provided therein, or the only sentence provided therein is a fine; or

(b) A sentence to a term of imprisonment in excess of fifteen days is provided for such offense in a law or ordinance enacted prior to the effective date of this chapter but the offense was not a crime prior to that date.

4. Traffic infraction. Notwithstanding any other provision of this section, an offense which is defined as a "traffic infraction" shall not be deemed a violation or a misdemeanor by virtue of the sentence prescribed therefor.

¹ So in original. Probably should read "(c)".

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Text of Title 18, United States Code

Section 1. Offenses classified

Notwithstanding any Act of Congress to the contrary:

(1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.

(2) Any other offense is a misdemeanor.

(3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than \$500, or both, is a petty offense.

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Text of Illinois Criminal Law and Procedure (1961)

Chapter 38 - General Definitions

Section 2-7. "Felony"

"Felony" means an offense punishable with death or by imprisonment in the penitentiary.

Section 2-11. "Misdemeanor"

"Misdemeanor" means any offense other than a felony, and includes conduct prohibited by a statute which provides no penalty for its violation.

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Text of California Penal Code (1963 amendment)

Section 17

Where a court grants probation to a defendant without imposition of sentence upon conviction of a crime punishable in the discretion of the court by imprisonment in the state prison or imprisonment in the county jail, the court may at the time of granting probation, or, on application of defendant or probation officer thereafter, declare the offense to be a misdemeanor.

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