

See: Minutes of Commission
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Tape #68

CRIMINAL LAW REVISION COMMISSION
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ARTICLE 1 . PRELIMINARY

Section 3. General Definitions

Preliminary Draft No. 2, February 1969

ARTICLE 1 . PRELIMINARY

General Definitions

Preliminary Draft No. 2; February 1969

Section 3. General Definitions. As used in this _____, except as the context may require otherwise:

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

Existing Law ORS
161.010 (11)

(2) "Possess" means to have physical possession or otherwise to exercise dominion or control over 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 death or 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 death or 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 CRS 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, 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 CRS 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 forces" 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), 163.240, 163.250, 163.280, 162.380, 162.400.) 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. Draft 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 knives and gravity knives.

TEXT OF NEW YORK REVISED PENAL LAW

Section 10.00. Definitions of terms of general use in this chapter.

Except where different meanings are expressly specified in subsequent provisions of this chapter, the following terms have the following meanings:

1. "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, or by any order, rule or regulation of any governmental instrumentality authorized by law to adopt the same.
2. "Traffic infraction" means any offense defined as "traffic infraction" by section one hundred fifty-five of the vehicle and traffic law.
3. "Violation" means an offense, other than a "traffic infraction," for which a sentence to a term of imprisonment in excess of fifteen days cannot be imposed.
4. "Misdemeanor" means an offense, other than a "traffic infraction," for which a sentence to a term of imprisonment in excess of fifteen days may be imposed, but for which a sentence to a term of imprisonment in excess of one year cannot be imposed.
5. "Felony" means an offense for which a sentence to a term of imprisonment in excess of one year may be imposed.
6. "Crime" means a misdemeanor or a felony.
7. "Person" means a human being, and where appropriate, a public or private corporation, an unincorporated association, a partnership, a government or a governmental instrumentality.
8. "Possess" means to have physical possession or otherwise to exercise dominion or control over tangible property.
9. "Physical injury" means impairment of physical condition or substantial pain.
10. "Serious physical injury" means physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ.
11. "Deadly physical force" means physical force which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury.

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

12. "Deadly weapon" means any loaded weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged, or a switch-blade knife, gravity knife, billy, blackjack, or mental knuckles.

13. "Dangerous instrument" means any instrument, article or substance, including a "vehicle" as that term is defined in this section, which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or other serious physical injury.

14. "Vehicle" means a "motor vehicle" as defined in the vehicle and traffic law, any aircraft, or any vessel equipped for propulsion by mechanical means or by sail.

15. "Public servant" means (a) any public officer or employee of the state or of any political subdivision thereof or of any governmental instrumentality within the state, or (b) any person exercising the functions of any such public officer or employee. The term public servant includes a person who has been elected or designated to become a public servant.

16. "Juror" means any person who is a member of any jury, including a grand jury, impaneled by any court in this state or by any public servant authorized by law to impanel a jury. The term juror also includes a person who has been drawn or summoned to attend as a prospective juror.

17. "Benefit" means any gain or advantage to the beneficiary and includes any gain or advantage to a third person pursuant to the desire or consent of the beneficiary.

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TEXT OF MICHIGAN REVISED CRIMINAL CODE

Definitions of Terms of General Use in This Act.

Section 135. 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 the excess of one year is authorized by this act.

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

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

(f) "Person" means a human being, and where appropriate a public or private corporation, an unincorporated association, a partnership, a government or a governmental instrumentality.

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

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

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

(j) "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.

(k) "Deadly weapon" means any loaded weapon from which a shot may be discharged, or a switchblade knife, gravity knife, billy, blackjack, bludgeon, metal knuckles, or slungshot.

Text of Michigan Revised Criminal Code (Cont'd.)

(l) "Dangerous instrument" means any instrument, article, or substance that under the circumstances in which it is used, attempted to be used, or threatened to be used is readily capable of causing death or serious physical injury, and includes a "vehicle" as that term is defined in subparagraph (m).

(m) "Vehicle" includes any vehicle as defined in section 79 of Act No. 300 of the Public Acts of 1949 as amended, being section 257.79 of the Compiled Laws of 1948, any vessel as defined in section 1 of Act No. 245 of the Public Acts of 1949 as amended, being section 281.651 of the Compiled Laws of 1948, and aircraft.

(n) "Burden of injecting the issue" means that the defendant must offer some competent evidence relating to all matters subject to the burden, but the state must then disprove the existence of these matters beyond a reasonable doubt.

(o) "Element of an offense" means conduct, attendant circumstances or results of conduct that are included in the description of the prohibited conduct in the definition of the offense, that establish the required kind of culpability, that negative an excuse or justification for conduct, that negative a defense relating to time limitations, or that establish territorial applicability or place of trial.

(p) "Material element of an offense" means an element that does not relate exclusively to time limitations, territorial applicability, place of trial or any other matter similarly unconnected with the harm or evil incident to conduct sought to be prevented by the law defining the offense, or with the existence of a justification or excuse for conduct.

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TEXT OF MODEL PENAL CODE

Section 1.13. General Definitions.

In this Code, unless a different meaning plainly is required:

- (1) "statute" includes the Constitution and a local law or ordinance of a political subdivision of the State;
- (2) "act" or "action" means a bodily movement whether voluntary or involuntary;
- (3) "voluntary" has the meaning specified in Section 2.01;
- (4) "omission" means a failure to act;
- (5) "conduct" means an action or omission and its accompanying state of mind, or, where relevant, a series of acts and omissions;
- (6) "actor" includes, where relevant, a person guilty of an omission;
- (7) "acted" includes, where relevant, "omitted to act";
- (8) "person," "he" and "actor" include any natural person and, where relevant, a corporation or an unincorporated association;
- (9) "element of an offense" means (i) such conduct or (ii) such attendant circumstances or (iii) such a result of conduct as
 - (a) is included in the description of the forbidden conduct in the definition of the offense; or
 - (b) establishes the required kind of culpability; or
 - (c) negatives an excuse or justification for such conduct; or
 - (d) negatives a defense under the statute of limitations; or
 - (e) establishes jurisdiction or venue;

Text of Model Penal Code (Cont'd.)

(10) "material element of an offense" means an element that does not relate exclusively to the statute of limitations, jurisdiction, venue or to any other matter similarly unconnected with (i) the harm or evil, incident to conduct, sought to be prevented by the law defining the offense, or (ii) the existence of a justification or excuse for such conduct;

(11) "purposely" has the meaning specified in Section 2.02 and equivalent terms such as "with purpose," "designed" or "with design" have the same meaning;

(12) "intentionally" or "with intent" means purposely;

(13) "knowingly" has the meaning specified in Section 2.02 and equivalent terms such as "knowing" or "with knowledge" have the same meaning;

(14) "recklessly" has the meaning specified in Section 2.02 and equivalent terms such as "recklessness" or "with recklessness" have the same meaning;

(15) "negligently" has the meaning specified in Section 2.02 and equivalent terms such as "negligence" or "with negligence" have the same meaning;

(16) "reasonably believes" or "reasonable belief" designates a belief which the actor is not reckless or negligent in holding.

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