BURGLARY and CRIMINAL TRESPASS

Proposed Amendment to Final Draft

Source: John B. Leahy, Lane County District Attorney

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Section 135 is amended to read:

Burglary and criminal trespass; definitions. As used in sections 135 to 140 of this Act, unless the context requires otherwise:

(1) "Building," in addition to its ordinary meaning, includes any vehicle, boat, aircraft or other structure adapted for overnight accommodation of persons or for carrying on business therein. Where a building consists of separate units, including, but not limited to, separate apartments, offices, or rented rooms, each unit is, in addition to being a part of such building, a separate building.

(2) "Dwelling" means a building which is usually occupied by a person lodging therein at night, whether or not a person is actually present.

(3) "Enter or remain unlawfully" means:

(a) To enter or remain in or upon premises when the premises, at the time of such entry or remaining, are not open to the public and when the entrant is not otherwise licensed or privileged to do so;

(b) To enter or remain in or upon premises when the premises, at the time of such entry or remaining are open to the public, with knowledge that such entry or remaining is not for a purpose generally consistent with that for which the premises are open; or

(c) To fail to leave premises that are open to the public after being directed to do so by the person in lawful charge,if such direction is based upon the entrant's engaging in conduct other than that for which

the premises are open, or the entrant's refusal to cease conduct that interferes with the normal function of the premises, or the entrant's refusal to comply with any other lawful condition imposed on the entry or remaining in or upon the premises.

(4) "Open to the public" means premises which by their physical nature, function, custom, usage, notice or lack thereof or other circumstances at the time would cause a reasonable person to believe that no permission to enter or remain is required.

(5) "Person in lawful charge" means a person, or his representative, who, by ownership, tenancy or other legal relationship, or by express, implied or apparent authority, has lawful control of the premises.

(6) "Premises" includes any building and any real property, whether privately or publicly owned.

COMMENTARY

(Supplied by Lane County D.A.)

(Should be read with comments to Burglary and Criminal Trespass, Final Draft, July 1970.)

The draft of the Criminal Law Revision Commission appears to provide an effective means of protecting the possessory interest in privately owned real property which is not open to the public from unwanted intrusions. The proposed additions were designed to provide an effective means of protecting the possessory interest of privately owned real property which at the time is open to the public for limited purposes. In the case of publicly owned property, the interest protected is that the premises will be limited to the use for which they were opened.

The main idea is to make it perfectly clear that some person has the authority to direct the use of property, public or private, open to the public or not, so long as the conditions placed on entry, and limitations placed on use, do not infringe on the protected constitutional rights of the entrant. The state clearly has the constitutional power to do this. See Brown v. State of Louisiana, 383 US 131, 86 S Ct 719 (1966) (Concurrence of Mr. Justice White at 86 S Ct 728, dissents of Mr. Justices Black, Clark, Harlan, Stewart at 86 S Ct 729; Adderly v. State of Florida, 385 US 29, 87 S Ct 282 (1966); Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 US 308, 88 S Ct 1601 (1968).

The draft should provide an effective enforcement tool in the case of sit-ins or other disruptive conduct. The First Amendment doctrines of vagueness, overbreadth., and prior restraints have all been carefully complied with. Subsections (3) (a) and (4) are a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. The knowledge requirement of subsection (3) (b) makes that section even more definite. Subsection (3) (c) requires an actual direction to leave which provides absolute certainty of notice. Thus, there can be no vagueness atack. United States v. Petrillo, 332 US 1, 67 S Ct 1538 (1947).

No part of the draft can be said to be so broad that it includes and curtails protected activity. The enforcement remedy goes no further than necessary to guarantee that the person in charge can, (1) maintain the premises for their intended use, (2) stop interference with the function of the premises, (3) enforce any other lawful conditions imposed on use of the premises.

There can be no prior restraint of a First Amendment right under subsection (3) (a), (b) or the first reason expressed in subsection (3) (c) for directing an entrant to leave. There must be no First Amendment right to be in the place in question in order to convict under those sections. If the conviction is based on the last two reasons expressed in subsection (3) (c), there can still be no prior restraint. Although the entrant may have a First Amendment right to be in the place in question, he may not exercise his right in such a manner that actually interferes with the function conducted therein. See Brown v. Louisiana, supra; Logan Valley Plaza, supra; LeClair v. O'Neil, 307 F Supp 621 (D Mass 1969). The entrant may also be made to comply with lawful conditions such as permit requirements, or other conditions, so long as they do not violate a protected right. Poulos v. New Hampshire, 345 US 395, 73 S Ct 760 (1953). Moreover, the conduct must be engaged in before any direction to cease may be issued. There can be nothing prior in that type of proscription.

COMMENT ON DEFINITIONS:

1. The definitions of "dwelling" and "building" are unchanged.

2. The definition of "enter or remain unlawfully" in subsection (3) (a) remains the same with the exception of the change explained in Comment 3. Subsection (3) (a) should adequately cover all situations of unauthorized persons on premises which are at the time closed to the public whether privately or publicly owned. If a person entered legally and it later became necessary to eject him, the state would look to the internal regulations of such place to see if his license or privilege had been revoked. The state action concept is preserved and could cause the difference between public and private ownership to become important.

Subsection (3) (b) is new. This section was designed primarily to insure that such areas as flower gardens, beaches (vehicle ban), hiking trails on public land, tennis courts in public parks, etc., can be effectively limited to the use intended. Since most such areas have no "person in lawful charge" present to direct the entrant to leave, this section makes the entrant a trespasser ab initio.

Subsection (3) (c) is new. This section was designed to handle, although not limited to, the more troublesome cases when the entrant purports to have a First Amendment right to be in the place in question. This section requires a direction to leave from the person in lawful charge. The word "direction" was used to achieve a broader meaning than order. Way v. Patton, 195 Or 36, 48 (1952). The word "direction" was used with the intent to also include a "request" from the person of authority since under such circumstances a "request" would in fact be a command in an inoffensive form. State ex rel Freeman v. Scheve, 93 NW 169, 170 (1903).

There is no requirement that the person in lawful charge identify himself as such. See Clark v. State, 135 SE2d 270 (1964). There is no requirement that the basis for the direction to leave be stated. Feiner v. People of State of New York, 340 US 315, 71 S Ct 303 (1951).

It is felt that in most cases the authority of the person in charge and his basis for directing another to leave will be readily apparent or stated explicitly. An offender should not escape conviction because of the inability of the person in charge to state these things during what may be a tense and exciting moment.

The direction to leave must in fact come from one in authority, and the direction must in fact be based on one of the specified grounds included in the section in order to sustain a conviction. These factors should adequately meet the concern of Mr. Justice Black in his dissent in Feiner, supra.

If the direction to leave is based on the first reason expressed (the premises are not open for that conduct) no request, or order, to cease the objectionable conduct is required before the direction to leave may be issued. See Adderly v. State of Florida, supra.

If the direction to leave is based on the second reason (refusal to cease a particular manner of conduct that causes interference) there must first be a request, or order, to cease the objectionable manner of conduct and a refusal, before the direction to leave may be issued. This was included to take care of situations where the entrant has a right to be in the place in question, but exercises that right in a manner which actually interferes with the function of the premises. The provision allows the entrant in such cases, the opportunity to cease the objectionable manner and remain and exercise his right.

The reason for including the third ground (refusal to comply with other lawful conditions) was to insure those persons in charge of premises open to the public an effective method of enforcing any other conditions imposed on the use of such premises. The language is broad enough to be a catch all yet it avoids a conflict with the Civil Rights Act of 1964, 42 USCA s 2000 et seq and the doctrine of Hamn v. City of Rock Hill, 379 US 306, 85 S Ct 384 (1964) where applicable.

The burden of proving the lawfulness of the condition is on the state; at best, this presents a very difficult job. Appropriate instructions from the case law and the Civil Rights Statute may be able to overcome the problem. The language of the last part of this section preserves the "State Action" concept, and thus, this portion of the draft does bring into play the public v. private ownership distinction. This and subsection (3) (a) are the only parts of the draft that do so.

3. The definition of "open to the public" is new. It is simply an objective reasonable man test. This definition does alter the mens rea requirement of subsection (3) (a) from strict liability to a "should have known" requirement. This change seems desirable to avoid a conviction for walking across completely

open property on a well worn path, where in fact the owner allows no passage. In such a case, actual communication to the entrant that no passage is allowed would then make it appear to a reasonable person that permission was required to remain, and any remaining would be done as a trespasser. Theaters, motels, golf courses and other places charging admission for entry would not be "open to the public" under this definition. Subsection (3) (a) would adequately cover such places.

4. The definition of "person in lawful charge" is new. It includes those persons who by possessing some legal interest in, or relationship to, the property concerned, as well as those persons, who, by authority of their office or position, have such control. A policeman would be the person in lawful charge of the jail, station house, etc., but unless he was acting as the representative of the person in lawful charge he would not have the power, under this draft, to direct another to leave other premises. The definition should stop any hyper-technical defense and yet avoid allowing just anyone to order another to leave certain premises or suffer conviction.

5. The definition of "premises" is that of the Criminal Law Revision Commission with the addition of words to make it clear that publicly owned property is included, and that "premises" as well as "buildings" may be divided into discreet units.