See: Commission Minutes
3/18-19/70, P. 16, Vol, IX
Tapes #49 & 50

Minutes of Subcommittee on
Grading and Sentencing
4/5/70, p. 56, Vol. X
Tape #57

CRIMINAL LAW REVISION COMMISSION
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ARTICLE 23. ESCAPE AND RELATED OFFENSES

Preliminary Draft No. 3; January 1970

Reporter: Roger D. Wallingford Subcommittee No. 1

ARTICLE 23. ESCAPE AND RELATED OFFENSES

Preliminary Draft No. 3; January 1970

Existing Law

ORS

29.510-740
162.322
420.905-915
420.005 (4)
420.855 (4)
419.472 (4)
419.602 (2)
162.340
133.350
ch. 362 Or Laws 1969

Section 1. Escape and related offenses; definitions. As used in this Article, unless the context requires otherwise:

(1) "Contraband" means any article or thing which a person confined in a detention facility, juvenile training school or state hospital is prohibited from obtaining or possessing by statute, rule, regulation or order.

(2) "Custody" means the imposition of actual or constructive restraint by a peace officer pursuant to an arrest or court order, but does not include detention in a detention facility, juvenile training school or a state hospital.

(3) "Dangerous contraband" means contraband whose use would endanger the safety or security of a detention facility, juvenile training school, state hospital or any person therein.

(4) "Detention facility" means any place used for the confinement of persons charged with or convicted of a crime or otherwise confined pursuant to a court order. "Detention facility" does not include a juvenile training school, and applies to a state hospital only as to persons detained therein charged with or convicted of a crime, or detained therein after acquittal of a crime by reason of mental disease or defect pursuant to section 12, Article ___.

(5) "Escape" means the unlawful departure of a person from custody or a detention facility.

(6) "Juvenile training school" means the MacLaren School for Boys, Hillcrest School of Oregon and any other school established by law for similar purposes, and includes the other camps and programs maintained under ORS chapter 420.

(7) "Peace officer" means a sheriff, constable, marshal, municipal policeman or a member of the Oregon State Police.

(8) "State hospital" means the Oregon State Hospital, F. H. Dammasch State Hospital, Columbia Park Hospital and Training Center, Eastern Oregon Hospital and Training Center, Fairview Hospital and Training Center and any other hospital established by law for similar purposes.

COMMENTARY - ESCAPE AND RELATED OFFENSES; DEFINITIONS

A. Summary

Subsection (1) defines "contraband" as anything a person confined in a detention facility, juvenile training school or state hospital is prohibited by law or administrative regulation from obtaining or possessing. "Custody", as distinguished from a "detention facility", is not part of the contraband definition. If contraband is passed to a person in custody and is used as an implement in escape, the actor might be an accomplice. A person in custody, not yet admitted to a detention facility, should not be held responsible for restrictions on contraband since such knowledge is not ordinarily available to him during the initial period of restraint.

Subsection (3) defines "dangerous contraband" as contraband which by its use presents a danger to the safety or security of the specified institution or persons therein. The use of the term provides an enhanced degree of "supplying contraband" based upon the creation of a higher level of risk.

Due to the problem of inadvertent exclusion, it was felt advisable not to attempt to list specific articles as being "dangerous", e.g., deadly weapons, narcotic or dangerous drugs, liquor. Supplying an article used in a subsequent escape would, of course, subject the actor to accomplice liability.

Subsection (2) defines "custody" as the imposition of actual or constructive restraint by a peace officer pursuant to either (a) an arrest, or (b) court order. "Peace officer" is defined in subsection (7) in conformity with its use throughout the proposed criminal code. "Custody" is intended to apply to custodial situations other than detention facility confinement, i.e., while the actor is under actual or constructive restraint but not yet committed to a detention facility.

Subsection (4) defines "detention facility" as any place used for the confinement of persons charged with or convicted of a crime, or detained therein under court order. The definition is designed to reach persons under civil arrest and those detained for purposes of deportation, extradition, and as a material witness. Facilities maintained for the detentention of dependent or delinquent children are expressly excluded. ORS chapter 420 provides a procedure for the apprehension of escaped or absent students from juvenile training schools. Section 5, infra, "facilitating escape", covers persons who aid or abet the escape of such inmates. A state hospital is a "detention facility" for two classes of persons:

(1) Those detained therein charged with or convicted of a crime; and

(2) Those detained therein after acquittal by reason of mental disease or defect pursuant to section 12 of the Responsibility Article.

Criminal escape sanctions do not apply to patients committed to a state hospital as a result of noncriminal proceedings.

"Escape" is defined in subsection (5) as the unlawful departure of a person from custody or a detention facility. The definition of "custody" refers expressly to both actual and constructive restraint. It is intended that the same rule apply to restraint imposed by a "detention facility", i.e., an inmate is considered confined within a "detention facility" from time of original commitment until lawfully discharged, regardless of his actual presence within the

institution. It has been argued that since some situations involve no actual restraint, e.g., work release programs, temporary leave, the actor's unauthorized departure from the limits of his liberty did not constitute an escape. This Article rejects that view.

The definitions of "juvenile training school" and "state hospital" are self-explanatory. The language "and any other school-hospital established for similar purposes" is designed to provide coverage for any like institution that may in the future be authorized.

B. Derivation

These definitions, with substantial changes, are derived from New York Revised Penal Law section 205.00 and Michigan Revised Criminal Code section 4601. The definition of "escape" is a restatement of its generally accepted legal meaning.

C. Relationship to Existing Law

There are a number of statutory definitions in existing law relevant to escapes.

ORS 162.322 (1) defines "escape" as unlawful departure, including failure to return to custody after temporary leave granted for a specific purpose or limited time.

ORS 162.322 (2) defines "official detention" as:

> "(a) Arrest by a peace officer or member of the Department of State Police;
>
> "(b) Detention in a facility for the custody of persons under charge or conviction of crime;
>
> "(c) Detention for extradition or deportation; or
>
> "(d) Other detention because the individual detained is charged with or convicted of crime."

Paragraph (a) refers to "custody" and paragraph (b) to a "detention facility". Paragraphs (c) and (d) refer both to custody and a detention facility. The definition does not cover the custody or detention of juvenile offenders not charged with a crime or those restrained under civil arrest.

ORS 29.510-740 is the Oregon civil arrest provision.

ORS 420.905-915 provides the procedure for the apprehension of escaped or absent students from juvenile training schools.

ORS 420.005 (4) defines "juvenile training schools" as:

> "The Hillcrest School of Oregon, the MacLaren School for Boys and any other school established by law for similar purposes, and includes the other camps and programs maintained under this chapter."

ORS 420.855 (4) defines "youth care center".

ORS 419.472 (4) and ORS 419.602 (2) define "detention facility" as used in connection with the provisions on the detention of dependent and delinquent children.

ORS 162.340 prohibits aiding an inmate of a state institution to escape, specifying seven state institutions, including MacLaren and Hillcrest.

An analysis of these statutes indicates that:

(1) Escape from civil arrest or detention is not a criminal offense.

(2) Escape by a juvenile from a juvenile training school is not a criminal offense.

(3) Escape from the custody of a peace officer or from a detention facility is a crime.

(4) The escape from custody based on a court order not charging a crime is not punishable as escape, with the exception of a deportation or extradition order.

(5) Aiding a juvenile to escape from juvenile detention is punishable as a misdemeanor.

Application of the proposed definitions would make some changes in existing law.

Escape from civil arrest will be punishable. Escape from custody based upon a court order will be subject to prosecution.

A juvenile will not be chargeable for escape from a juvenile training school, although he would be liable for any independent criminal offenses committed thereby. A juvenile in custody pursuant to an arrest or court order may be guilty of escape regardless of the means employed.

The general rules applicable to this Article on the issue of "constructive" confinement and custody are expressed in 30A CJS, Escape, §5c (1):

> "Constructive confinement. Any convict held in custody under commitment for service of penitentiary sentence is at least constructively confined in the penitentiary within statutes prescribing punishment for escape of persons so confined, whether he is going to the penitentiary, is in it, or is outside under guard. A prisoner who has been made a trusty, and who has been given a degree of liberty by employment outside the prison walls, is still in lawful control and custody for purposes of determining whether his conduct constitutes escape from a penitentiary or other place of confinement.
>
> "Constructive custody. A departure by a prisoner from mere custody constitutes the crime of escape, and custody, within the meaning of statutes defining the crime, has been said to consist of the detention or restraint of a person against his will. It is not necessary that the prisoner be confined by physical force, and the fact that he was unguarded at the time of his escape is immaterial...."

TEXT OF REVISIONS OF OTHER STATES

TEXT OF MODEL PENAL CODE

Section 242.6. Escape.

(1) Escape. A person commits an offense if he unlawfully removes himself from official detention or fails to return to official detention following temporary leave granted for a specific purpose or limited period. "Official detention" means arrest, detention in any facility for custody of persons under charge or conviction of crime or alleged or found to be delinquent, detention for extradition or deportation, or any other detention for law enforcement purposes; but "official detention" does not include supervision of probation or parole, or constraint incidental to release on bail.

(2) Permitting or Facilitating Escape. A public servant concerned in detention commits an offense if he knowingly or recklessly permits an escape. Any person who knowingly causes or facilitates an escape commits an offense.

(3) Effect of Legal Irregularity in Detention. Irregularity in bringing about or maintaining detention, or lack of jurisdiction of the committing or detaining authority, shall not be a defense to prosecution under this Section if the escape is from a prison or other custodial facility or from detention pursuant to commitment by official proceedings. In the case of other detentions, irregularity or lack of jurisdiction shall be a defense only if:

(a) the escape involved no substantial risk of harm to the person or property of anyone other than the detainee; or

(b) the detaining authority did not act in good faith under color of law.

(4) Grading of Offenses. An offense under this Section is a felony of the third degree where:

(a) the detainee was under arrest for or detained on a charge of felony or following conviction of crime; or

(b) the actor employs force, threat, deadly weapon or other dangerous instrumentality to effect the escape; or

(c) a public servant concerned in detention of persons convicted of crime purposely facilitates or permits an escape from a detention facility.

Otherwise an offense under this section is a misdemeanor.

# # # #

TEXT OF NEW YORK REVISED PENAL LAW

§ 205.00 Escape and other offenses relating to custody; definitions of terms

The following definitions are applicable to this article:

1. "Detention facility" means any place used for the confinement, pursuant to an order of a court, of a person (a) charged with or convicted of an offense, or (b) charged with being or adjudicated a youthful offender, wayward minor or juvenile delinquent, or (c) held for extradition or as a material witness, or (d) otherwise confined pursuant to an order of a court.

2. "Custody" means restraint by a public servant pursuant to an authorized arrest or an order of a court.

3. "Contraband" means any article or thing which a person confined in a detention facility is prohibited from obtaining or possessing by statute, rule, regulation or order.

4. "Dangerous contraband" means contraband which is capable of such use as may endanger the safety or security of a detention facility or any person therein.

# # # #

TEXT OF MICHIGAN REVISED CRIMINAL CODE

[Definition of Terms]

Sec. 4601. (1) The definitions contained in section 4501 are applicable in this chapter unless the context otherwise requires.

(2) "Custody" means detention by a public servant pursuant to an arrest, conviction or a contempt citation. It shall not include, however, the detention of an accused or convicted person in a facility under the direction of the department of mental health except where such detention is for diagnostic purposes pursuant to section 1220 (2).

(3) "Detention facility" means any place used for the confinement, pursuant to law, of a person:

(a) Charged with or convicted of a criminal offense.

(b) Charged with being or adjudicated a neglected minor or juvenile delinquent.

(c) Held for extradition.

(d) Otherwise confined pursuant to an order of a court.

(4) "Penal facility" means any maximum or medium security correctional institution for the confinement of persons charged with or convicted of a criminal offense, including but not necessarily limited to the following maximum or medium security facilities: the state prison and any branch thereof; the state house of correction and reformatory; the Detroit house of correction, the Michigan training unit; and any county or city jail. For the purposes of this chapter only, minimum security correctional institutions, such as probation-recovery camps and correction-conservation camps, shall not be considered "penal facilities."

# # # #

Section 2. Escape in the third degree.

(1) A person commits the crime of escape in the third degree if he escapes from custody.

(2) It is a defense to a prosecution under this section that the person escaping or attempting to escape was in custody pursuant to an illegal arrest.

Existing Law
ORS
162.322
162.324
162.326
162.330
162.340
169.340
144.500

Section 3. Escape in the second degree. A person commits the crime of escape in the second degree if:

(1) He uses or threatens to use physical force in escaping from custody; or

(2) Having been convicted of a felony, he escapes from custody; or

(3) He escapes from a detention facility.

Section 4. Escape in the first degree. A person commits the crime of escape in the first degree if:

(1) Aided by another person actually present he uses or threatens to use physical force in escaping from custody or a detention facility; or

(2) He uses or threatens to use a dangerous or deadly weapon in escaping from custody or a detention facility.

COMMENTARY - ESCAPE IN THE THIRD DEGREE; ESCAPE IN THE SECOND DEGREE; ESCAPE IN THE FIRST DEGREE

A. Summary

In drafting penal statutes on escape three factors should be considered:

(1) The risk to society represented by the underlying offense giving rise to the restraint.

(2) The form of restraint from which the escape is made; custodial or institutional.

(3) The means employed to effect the escape.

Measuring the severity of the offense by the use or non-use of force was embodied in the common law distinction between "prison breach" and "escape" as separate offenses. A prison break by force was designated "prison breach" and was a felony punishable by death until the statute de frangentibus prisonam in 1307. Simple escape, a common law misdemeanor, was the "unlawful departure of a prisoner, without any act of force on his part, from lawful custody, before his lawful discharge." (Burdick, Law of Crime, 305 (1946)).

The New York grading approach is characterized by the seriousness of the underlying offense with which the escapee is charged. The Michigan approach is to measure the use of force in determining degrees of the offense. The Model Penal Code recommends three factors which if present will aggravate the offense:

(1) The use of force;

(2) Arrest for a felony; or

(3) Detention following conviction for a crime.

The grading scheme represented by this draft attempts to take cognizance of those factors that aggravate the risk of harm to those entrusted with the custody and detention of potential escapees.

Escape in the third degree, section 2, applies to persons held in custody on a misdemeanor or felony charge who escape without resort to the use of force or a deadly weapon.

The grade is raised one level, to escape in the second degree, when either (1) the escapee uses physical force, (2) the escapee has been convicted of a felony, or (3) the escape was from a detention facility.

First degree escape applies to two situations: (1) the escapee is aided by one or more persons actually present who use physical force in escaping from custody or a detention facility, and (2) a dangerous or deadly weapon is used in escaping from custody or a detention facility.

While the proposed grading scheme takes into consideration the common law distinctions, and other elements recognized by current legislation, its basic rationale is founded upon the risk to others created by the escape.

The least risk is presented by the person charged with a misdemeanor or felony who escapes from custody prior to incarceration and without resort to force or a deadly weapon.

Factors that raise the offense to second degree escape each represent an additional risk-producing element:

(1) An escape from a detention facility evidences increased planning and premeditation. Such conduct threatens the security of detention facilities by increasing the risk of escapes by other detained persons.

17 SC L Rev 568 (1965) comments on the misdemeanant who escapes from a detention facility:

> "The crime of escape has no special relationship to the crime for which the prisoner is held. A misdemeanant in the process of escaping is equally as dangerous as an escaping felon. It is also apparent that length of time served and duration of sentence remaining bear no relationship to the creation of danger and that the propriety of confinement is also irrelevant to the offense."

In United States v. Brown, 33 US 18 (1948), the U.S. Supreme Court stated some of the considerations leading to the adoption of the Federal Escape Act (18 USCA 751 (1952)):

> "Escapes and attempted escapes from penal institutions...present a serious problem of penal discipline. They are often violent, menacing... lives of guards and custodians, and carry in their wake other crimes attendant upon procuring money, weapons, transportation, and upon resisting recapture...."

(2) A person convicted of a felony is more apt to create harmful social consequences by escape. A convicted felon has more to gain by a successful escape than a person in custody. Therefore, a stronger deterrent is required.

(3) The use of force in escapes obviously increases the hazards imposed on those obligated to resist such conduct.

The aggravating factor raising the offense to first degree escape in subsection (1) is advanced by the Michigan Revised Criminal Code. The commentary notes:

> "The additional factor of assistance by others is unique to this Code. It is based on the premise that an organized jail break by three or more persons who utilize force presents the most serious problem, both in terms of immediate danger to prison guards and the general undermining of the prison's security system." (Michigan Revised Criminal Code Commentary to sections 4605 to 4607, p 354 (1967)).

The subcommittee finds merit in this position. An analysis of recent events in the Oregon penal system lends credence to the view that the most serious problem, both in terms of physical injury and substantial property damage, is presented by the organized mass escape from medium and maximum security institutions. The subcommittee decided that the aid of one other person was sufficient to pose the increased hazard.

It should be noted that irrespective of the means used to make an escape the actor is not relieved of criminal liability for any harm caused by his resort to force. In addition to a criminal charge for the unlawful escape he would be subject to prosecution for assault, homicide, theft of an automobile, etc.

The Michigan code provides a defense to escape in the third degree. Subsection (2) of section 4607 provides:

> "This section shall not apply to a person escaping or attempting to escape from detention pursuant to an illegal arrest."

New York Penal Law, section 205.00 (2), defines the term "custody" to mean restraint pursuant to an authorized arrest or court order. Therefore, under the New York Penal Law, any escape from illegal custody, as distinguished from a detention facility, would not constitute a crime.

The Model Penal Code, section 242.6 (3), provides that lack of authority is no defense to a prosecution for escape if made from a prison or other custodial facility. This is then qualified to the extent that irregularity of detention or lack of jurisdiction in arrest is a defense if:
(a) the escape involved no substantial risk of harm, or
(b) the detaining authority did not act in good faith under color of law.

This defense applies only to custodial situations. It is universally recognized that irregularity in commitment is not a valid defense to a prosecution for escape from a penal institution.

163 ALR 1137:

> "A prisoner may not legally escape from prison on the theory that he is being illegally detained by reason of an unconstitutional statute. In People v. Hunt, 229 App Div 419, 242 NYS 105 (1930), the court held, 'It was the duty of the relator to submit to confinement under the burglary charge until discharged by due process of law....To say that a prisoner may legally escape from prison on the theory that he was being illegally detained is to strike a blow at the very foundation of law and order.'"

A decision in OAG 72 (1960-62) held that an inmate who escapes from a penal institution must serve the sentence imposed for escape even though it is subsequently ruled that the initial incarceration was invalid and void.

Oregon presently recognizes the defense of irregularity in effecting custody where the escape involves no substantial risk of harm to anyone other than the person detained, or where the detaining authority fails to act in good faith under color of law. This defense is not available to a person detained in a detention facility. (See ORS 162.326).

The proposed section on resisting arrest (See section 10, Article ___, Obstructing Governmental Administration) denies a person the right to resist by force or violence an arrest he believes to be illegal. In the judgment of the subcommittee, the same rationale did not apply to escape in the third degree. The use of force or violence in effecting an escape will be punishable under first and second degree escape. If an arrest and subsequent custody is illegal, a person should not be deprived of this defense if he merely "runs away" from the detaining officer.

Subsection (2) of section 2 therefore gives the escapee a defense if he was in custody pursuant to an illegal arrest. This, of course, applies an objective test. If the person escaping is mistaken in his belief that the arrest is illegal, he would be chargeable with escape.

Not resolved in subcommittee was the issue of retaining a section expressly negating the defense of irregularity in detention, although no sentiment was voiced indicating an intention to make such a defense available. A proposed section has therefore been prepared for consideration by the Commission:

[Section ___. Escape from a detention facility; irregularity in commitment no defense. It shall not be a defense to a prosecution for escape from a detention facility that there was an irregularity in effecting commitment or that there was a lack of jurisdiction by the committing authority.]

An attempt to escape is not made a part of these sections since such conduct will be covered in the Inchoate Crimes Article.

The Michigan Criminal Code contains two provisions on facilitating escape. Ordinarily, the offense of facilitating an escape would be left to the general provisions relating to accomplice liability under the Article on Parties to Crime. But, in the field of escape, Oregon has seen fit to apply special legislation to juvenile detention facilities and other specified state institutions.

This draft therefore proposes similar provisions to reach those aiding and abetting escape from certain detention facilities, even though the escapee is not subject to criminal liability, e. g., a mentally ill person confined by court order to the State Hospital; a minor female committed to Hillcrest School.

B. Derivation

Section 2 is derived from Michigan Revised Criminal Code section 4607.

Section 3 is derived from Michigan Revised Criminal Code section 4606.

Section 4 is derived from Michigan Revised Criminal Code section 4605.

The rationale for sections 2 and 3 is derived from Model Penal Code section 242.6

C. Relationship to Existing Law

ORS 162.322 defines "escape" and "official detention".

ORS 162.324. Escape from official detention.

"(1) No person shall:

"(a) Knowingly escape from official detention.

"(b) Knowingly cause or facilitate an escape from official detention.

"(c) Being a public servant concerned in official detention, knowingly or recklessly permit an escape from official detention.

"(2) Violation of subsection (1) of this section is punishable as a misdemeanor or by imprisonment in the penitentiary for not more than five years."

Subsection (1) (a) of ORS 162.324 makes no distinction between escape from custody or a penal institution, between violent and nonviolent escape, or between a felon or misdemeanant. The penalty provision in subsection (2) is probably applied to make the distinction in the latter instance. Subsection (1) (b) refers to accomplice liability. Subsection (1) (c) imposes complicity liability on a public servant now covered by Article ___, section 2, subsection (2) (c), on Parties to Crime, which states:

"A person is criminally liable for the conduct of another person constituting a crime if with the intent to promote or facilitate the commission of a crime he, having a legal duty to prevent the commission of the crime, fails to make an effort he is legally required to make."

ORS 162.326 provides a defense to prosecution for escape from official detention. Subsection (2) states that irregularity in effecting detention, or lack of jurisdiction of the committing or detaining authority, is a defense if:

> "(a) The escape involved no substantial harm or risk of harm to the person or property of anyone other than the individual detained; or
>
> "(b) The detaining authority did not act in good faith under color of law."

ORS 162.330 relates to aiding imprisoned or committed persons to escape. This offense would be covered by the Parties to Crime Article in the proposed draft.

ORS 162.340 prohibits aiding or assisting inmates of specified state institutions to escape, i.e., MacLaren School for Boys, Hillcrest School of Oregon, Oregon State Hospital, F. H. Dammasch State Hospital, Columbia Park Hospital and Training Center, Eastern Oregon Hospital and Training Center and the Fairview Hospital and Training Center.

This complicity liability will be covered in the sections on facilitating escape.

ORS 169.340 provides a civil liability of a sheriff for escape of a defendant in a civil action.

ORS 144.500 (2) (b) provides that unauthorized absence of a person from a work release program assignment constitutes an escape from official detention.

ORS 169.340 provides a civil liability of a sheriff for escape of a defendant in a civil action.

ORS 144.500 (2) (b) provides that unauthorized absence of a person from a work release program assignment constitutes an escape from official detention.

In State v. Daly, 41 Or 515, 70 P 706 (1902), the court held that an information for aiding a prisoner in an intent to escape need not allege the facts showing the prisoner's guilt; it is sufficient to state that the prisoner was lawfully detained in the stated place of confinement.

In Kelley v. Meyers, 124 Or 322, 263 P 903 (1928), defendant was convicted of first degree murder for the killing of a prison guard during an escape from the Oregon State Penitentiary. Defendant sought a writ of habeas corpus on the ground that the statute under which he was first convicted and imprisoned was unconstitutional. The court sustained a judgment dismissing the writ, stating:

> "....It is a more serious crime and one far more dangerous to the public to effect the escape of a prisoner who is charged with or has been convicted of highway robbery than of one who has been merely charged or convicted of a misdemeanor. While it is true that the crime of assisting a prisoner to escape, regardless of the gravity of the offense with which the prisoner is charged, may be committed by the same identical means, there is a difference in the enormity of the offense, depending upon the atrocity of the crime with which the prisoner is charged and a recognition by the legislature of this difference in prescribing a different punishment in one case from that in another case is not arbitrary but is based upon the difference of the degree of the crime with which the prisoner whose escape was sought was charged, and hence the classification in the penalties prescribed by this statute does not contravene any of the requirements of the Constitution...." (at 329).

> "....Even if the statute under which prisoner was convicted was unconstitutional, such fact did not afford justification to prisoner to make escape prior to judicial determination of unconstitutionality or to assist escape of others legally confined in penitentiary...." (at 331).

This is the majority rule even though it is later held that the imprisonment was void from the very beginning. (See People v. Jones, 163 Cal App2d 118, 329 P2d 37 (1958)).

The issue of what constituted "official detention" was raised in State v. Gilmore, 236 Or 349, 388 P2d 451 (1964). In affirming a conviction for escape from the Jackson County Farm Home, an adjunct of the Jackson County Jail, the court held:

> "The Jackson County Jail is a 'facility for custody of persons' under charge or conviction of crime within the statute making escape from official detention a crime, even though the county jail might also

be used for imprisonment of municipal offenders....An escape from the county farm by prisoner serving county jail sentence constituted escape from county jail...." (at 353, 355).

Two recent state court cases have discussed irregularity in confinement as a defense to escape from a penal institution:

People v. Mullreed, 166 NW2d 820 (Mich 1969), held:

"Under the modern view, a defendant may not successfully contend that an escape from lawful confinement is not a crime because the conviction leading to his imprisonment was allegedly faulty. One does not challenge the law by violating its mandates....An individual is not justified in escaping from prison if he was validly sentenced and confined under color of law."

In State v. Warren, 166 SE2d 858 (NC 1969), the court held:

"Under North Carolina law, escape by a prisoner from imprisonment under a void judgment constitutes a crime."

TEXT OF REVISIONS OF OTHER STATES

TEXT OF MODEL PENAL CODE

See Text of Revisions of Other States under section 1, Escape and related offenses; definitions, page 7 of this draft.

# # # #

TEXT OF NEW YORK REVISED PENAL LAW

§ 205.05 Escape in the third degree

A person is guilty of escape in the third degree when he escapes from custody.

Escape in the third degree is a class A misdemeanor.

§ 205.10 Escape in the second degree

A person is guilty of escape in the second degree when:

1. He escapes from a detention facility; or

2. Having been arrested for, charged with or convicted of a felony, he escapes from custody.

Escape in the second degree is a class E felony.

§ 205.15 Escape in the first degree

A person is guilty of escape in the first degree when, having been charged with or convicted of a felony, he escapes from a detention facility.

Escape in the first degree is a class D felony.

# # # #

TEXT OF MICHIGAN REVISED CRIMINAL CODE

[Escape in the First Degree]

Sec. 4605. (1) A person commits the crime of escape in the first degree if, aided by 2 or more persons actually present, he employs physical force, a deadly weapon or a deadly instrument in escaping or attempting to escape from a penal facility.

(2) Escape in the first degree is a Class B felony.

[Escape in the Second Degree]

Sec. 4606. (1) A person commits the crime of escape in the second degree if:

(a) He employs physical force, a threat of physical force, a deadly weapon or deadly instrument in escaping or attempting to escape from custody; or

(b) Having been convicted of a felony he escapes or attempts to escape from custody imposed pursuant to that conviction; or

(c) He escapes or attempts to escape from a penal facility.

(2) Escape in the second degree is a Class C felony.

[Escape in the Third Degree]

Sec. 4607. (1) A person commits the crime of escape in the third degree if he escapes or attempts to escape from custody.

(2) This section shall not apply to a person escaping or attempting to escape from detention pursuant to an illegal arrest.

(3) Escape in the third degree is a Class A misdemeanor.

# # # #

Section 5. Facilitating escape. A person not an inmate therein commits the crime of facilitating escape if he intentionally aids or attempts to aid the unlawful departure of a person confined by court order from a juvenile training school or a state hospital.

COMMENTARY - FACILITATING ESCAPE

A. Summary

Section 5 penalizes giving aid and assistance in the escape of persons confined in juvenile training schools and state hospitals. The escape sections do not punish students who escape from juvenile training schools, or patients in state hospitals confined therein by civil commitment unrelated to criminal proceedings. These exemptions result in an absence of complicity liability for those who aid in an escape of such persons.

The rationale for according special treatment in this area does not extend to facilitating escape. The gravity of escape from juvenile training schools and state hospitals is viewed primarily in terms of its general impact upon the security of the institution, rather than in terms of the threat to society posed by the individual aided. This does not overlook the fact that certain delinquent minors and mental incompetents, if at large, may pose a serious threat to the community.

B. Derivation

Section 5 is derived from Michigan Revised Criminal Code section 4610.

C. Relationship to Existing Law

ORS 162.330 prohibits aiding imprisoned or committed persons to escape. It is directed at conveying articles useful to an escape into detention facilities with the intent to effect or facilitate an escape.

ORS 162.340 is a similar statute, but is limited to seven specified institutions.

The sections on escape, with attendant complicity liability, and promoting contraband would repeal ORS 162.330. The section on facilitating escape would replace ORS 162.340.

TEXT OF REVISIONS OF OTHER STATES

TEXT OF MICHIGAN REVISED CRIMINAL CODE

[Facilitating Escape in the First Degree]

Sec. 4610. (1) A person commits the crime of facilitating escape in the first degree if, with intent to aid the escape of any person confined in a penal facility or a state institution for the mentally ill:

(a) He conveys or attempts to convey to such person any instrument or thing that might be useful in making an escape; or

(b) He aids or attempts to aid such person by other means to make an escape.

(2) Facilitating escape in the first degree is a Class C felony.

[Facilitating Escape in the Second Degree]

Sec. 4611. (1) A person commits the crime of facilitating escape in the second degree if, with intent to aid an escape:

(a) He conveys or attempts to convey to any person in custody any instrument or thing that may be useful in making an escape or aids or attempts to aid such a person by other means to make an escape; or

(b) He conveys or attempts to convey to any person confined in a detention facility any instrument or thing that may be useful in making an escape or aids or attempts to aid such a person by other means to make an escape.

(2) Facilitating escape in the second degree is a Class A misdemeanor.

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Section 6. Supplying contraband in the second degree. A person commits the crime of supplying contraband in the second degree if:

(1) He knowingly introduces any contraband into a detention facility, juvenile training school or state hospital; or

(2) Being confined in a detention facility, juvenile training school or state hospital he knowingly makes, obtains or possesses any contraband.

Existing Law
ORS
166.275
166.510
162.330
475.090
169.130

Section 7. Supplying contraband in the first degree. A person commits the crime of supplying contraband in the first degree if:

(1) He knowingly introduces any dangerous contraband into a detention facility, juvenile training school or state hospital; or

(2) Being confined in a detention facility, juvenile training school or state hospital he knowingly makes, obtains or possesses any dangerous contraband.

COMMENTARY - SUPPLYING CONTRABAND IN THE SECOND DEGREE; SUPPLYING CONTRABAND IN THE FIRST DEGREE

A. Summary

Sections 6 and 7 do not require proof of an intent to aid in an escape. The only requirement is that the actor "knowingly" introduce contraband into one of the specified institutions. "Knowingly" is defined in Article ___, Culpability, section 1 (8), to mean that a person acts with an awareness that his conduct is of a nature so described or that a circumstance so described exists. "Contraband" is defined as any article that is prohibited by statute, rule, regulation or order. The "knowing introduction of contraband" would therefore require proof of knowledge on the part of the actor that the article was, in fact, classified as contraband.

This shifts the focus of the inquiry from the actor's actual or implied knowledge of the potential use of the article conveyed to the issue of whether the actor knew that the inmate, student or patient was prohibited by institutional rule or regulation from receiving the article.

The section applies to juvenile training schools and state hospitals. It is submitted that smuggling narcotics or dangerous weapons into these institutions presents as serious a problem as introducing such articles into a prison.

The New York revisors included the inmates of these institutions within the statute, while the Michigan Code prohibits only the introduction of contraband by non-inmates. Assuming that the rationale behind such legislation is the maintenance of institutional discipline and security, it seemed logical to adopt the New York approach.

B. Derivation

The two sections are derived from New York Revised Penal Law sections 205.20 and 205.25.

C. Relationship to Existing Law

ORS 166.275 prohibits any person committed to a penal institution from possessing a dangerous instrument, including a blackjack, sling-shot, billy, sand club, mental knuckles, explosive substance, dirk, dagger, sharp instrument, pistol, revolver or other firearm.

ORS 166.510 prohibits the possession of slugging or stabbing weapons.

ORS 475.090 prohibits furnishing inmates of penal or correctional institutions, or state, county or city hospitals, alcoholic beverages or drugs. The penalty provision is ORS 475.990, which provides for a maximum punishment of five years imprisonment.

ORS 162.330 penalizes the conveyance into any penitentiary, jail or house of correction a disguise, material, instrument, tool, weapon or other thing adapted to aiding a person detained therein to escape. Requires an intent to effect or facilitate the escape of such person.

The proposed sections represent new law in three respects:

(1) No existing criminal statute applies directly to the control of unlawful contraband;

(2) The proposed law extends coverage beyond penal institutions to cover juvenile homes and state hospitals; and

(3) It creates two grades of the offense based upon an increased risk factor.

It is recommended that reference be made in the appropriate regulatory chapters to the administrative regulations that determine what articles are classified as "contraband", e.g., ORS chapter 420, Juvenile Training Schools; Youth Care Centers; ORS chapter 421, Penal and Correctional Institutions; ORS chapters 426, 427, 428, 429, 430, Mental Health Institutions. Municipal and county detention facilities should likewise adopt a procedure for providing notice of prohibited contraband.

TEXT OF REVISIONS OF OTHER STATES

TEXT OF MODEL PENAL CODE

Section 242.7. Implements for Escape; Other Contraband.

(1) Escape Implements. A person commits a misdemeanor if he unlawfully introduces within a detention facility, or unlawfully provides an inmate with, any weapon, tool or other thing which may be useful for escape. An inmate commits a misdemeanor if he unlawfully procures, makes, or otherwise provides himself with, or has in his possession, any such implement of escape. "Unlawfully" means surreptitiously or contrary to law, regulation or order of the detaining authority.

(2) Other Contraband. A person commits a petty misdemeanor if he provides an inmate with anything which the actor knows it is unlawful for the inmate to possess.

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TEXT OF NEW YORK REVISED PENAL LAW

§ 205.20 Promoting prison contraband in the second degree

A person is guilty of promoting prison contraband in the second degree when:

1. He knowingly and unlawfully introduces any contraband into a detention facility; or

2. Being a person confined in a detention facility, he knowingly and unlawfully makes, obtains or possesses any contraband.

Promoting prison contraband in the second degree is a class A misdemeanor.

§ 205.25 Promoting prison contraband in the first degree

A person is guilty of promoting prison contraband in the first degree when:

1. He knowingly and unlawfully introduces any dangerous contraband into a detention facility; or

2. Being a person confined in a detention facility, he knowingly and unlawfully makes, obtains or possesses any dangerous contraband.

Promoting prison contraband in the first degree is a class D felony.

# # # #

TEXT OF MICHIGAN REVISED CRIMINAL CODE

[Introducing Contraband in the First Degree]

Sec. 4615. (1) A person commits the crime of introducing contraband in the first degree if he intentionally conveys or attempts to convey a deadly weapon, narcotic drug or dangerous drug to any person confined in a detention facility.

(2) The definitions of "narcotic drug" and "dangerous drug" in sections 6001(1) and 6001(4) apply to this section also.

(3) Introducing contraband in the first degree is a Class C felony.

[Introducing Contraband in the Second Degree]

Sec. 4616. (1) A person commits the crime of introducing contraband in the second degree if he intentionally conveys or attempts to convey contraband to any person confined in a detention facility.

(2) "Contraband" means any article or thing which a person confined in a detention facility is prohibited from obtaining or possessing by statute, rule, regulation or order.

(3) This section shall not apply unless the actor knew or was given sufficient notice so that he reasonably should have known that the article or thing he conveyed or attempted to convey was contraband.

(4) Introducing contraband in the second degree is a Class B misdemeanor.

# # # #

Section 8. Bail jumping in the second degree. A person commits the crime of bail jumping in the second degree if, having by court order been released from custody or a detention facility upon bail or his own recognizance upon the condition that he will subsequently appear personally in connection with a charge against him of having committed a misdemeanor or violation, he intentionally fails to appear as required.

Existing Law
ORS 162.450
ch. 140

Section 9. Bail jumping in the first degree. A person commits the crime of bail jumping in the first degree if, having by court order been released from custody or a detention facility upon bail or his own recognizance upon the condition that he will subsequently appear personally in connection with a charge against him of having committed a felony, he intentionally fails to appear as required.

COMMENTARY - BAIL JUMPING IN THE SECOND DEGREE; BAIL JUMPING IN THE FIRST DEGREE

A. Summary

The aim of sections 8 and 9 is to punish persons who intentionally fail to appear in response to a criminal action lodged against them after having been released on bail or their own recognizance. The use of the mens rea term, "intentional" failure to appear, excludes from criminal liability negligent or excusable nonappearance.

The proposed sections apply equally to those released on bail and those released on their own recognizance. An

offender is not afforded a "grace period" after default during which an appearance negatives criminal liability. The rationale giving support to both these positions is well stated by the Model Penal Code commentary:

> "Bail jumping statutes are common and varied. To some extent they seem to be framed with an eye to protecting the bondsman against loss rather than punishing obstructive non-appearance. This would appear to be the explanation for provisions that make criminal liability contingent on previous 'forfeiture' of bail plus failure to appear within 15 or 30 days thereafter; the bondsman thus gets an opportunity to produce the defendant and petition for remission of forfeiture on the ground that not much has been lost. Furthermore, if criminal provisions in this area have any utility in compelling attendance, they ought not be limited to cases where the device of bail has been employed. Bail is a much overworked and abused means of compelling attendance. In many situations it would be much better to release a poor defendant on his own undertaking to appear, without subjecting him to the expense of bail or jailing him in default of bail which he is unable to secure. This could be done more readily if a moderate penal sanction were provided in case of wilful non-appearance." (Model Penal Code, Tent. Draft No. 8, 138 (1958)).

The legislative trend in this area has been the adoption of penal sanctions to deter the nonappearance of criminal defendants. Bail jumping statutes have recently been adopted by New York, Illinois and Michigan. The Oregon legislature passed similar legislation in 1965. The policy behind the Illinois provision is discussed in 59 NW L Rev 687 (1964):

> "The draftsman of the Illinois Code, seeking to encourage release of a prisoner on his own recognizance, suggested that penal sanctions would be a more effective deterrent than financial loss in the prevention of bail-jumping. This attitude is reflected in Section 111-2 (Ill. Rev. Stat. Ch 38, 100-126 (1963))of the enacted Code wherein it is provided that 'criminal sanctions instead of financial loss' should be regarded as the primary means of providing assurance that the accused will appear at trial. A comparison of existing financial deterrents with penal sanctions supports the conclusions of the Illinois legislature...."

The key factor in grading the level of bail jumping is the nature of the criminal charge pending against the defendant. It is anticipated that the second degree offense will be graded a misdemeanor. Bail jumping in the first degree should carry a low level felony penalty. The object here is to avoid exposing a defendant charged with a low level felony to a greater penalty for bail jumping than that possible upon conviction of the pending action.

The New York Revised Penal Law was enacted in 1965. The bail jumping provisions adopted were similar to sections 8 and 9. New legislation in this area was passed in 1968, with the addition of a section on failing to respond to an appearance ticket. The reason for this supplemental revision is given in their practice commentary:

> "Prior to the 1968 amendment, this question often arose: what offense was committed by a person who failed to respond to an 'appearance ticket' (a process confusingly referred to as a summons) issued by a police officer or other authorized public servant (not by a court) requiring the recipient's court appearance upon a future date to answer an information which was to be subsequently filed at some time before the return date? The recipient's failure to attend did not constitute 'criminal contempt' because it was not disobedience of the court or process of a 'court'....Such failure, however, might have constituted 'bail jumping' which was broadly defined in terms of failure of court appearance after release from custody....
>
> "The 1968 amendment clarified this area by confining the crime of bail jumping...to defiance of court mandates only. It also created a new offense...addressed exclusively to the 'ticket' situation based upon a person's alleged commission of a misdemeanor, carrying a penalty (a violation) less than that for bail jumping...."

Chapter 244, Oregon Laws 1969, authorizes the issuance by peace officers of citations in lieu of the continuing detention of persons who are arrested for the violation of minor crimes and offenses. Section 8 (1) provides coverage for violations of county, city and municipal ordinances. Section 9 provides:

> "If any person wilfully fails to appear before a court pursuant to a citation issued and served under authority of this Act and a complaint or information is filed, he is guilty of a misdemeanor."

Chapter 244, Oregon Laws 1969, appears to solve the type of problem sought to be remedied by passage of New York Revised Penal Law section 215.58.

B. Derivation

Section 8 is derived from New York Revised Penal Law section 215.56 and Michigan Revised Criminal Code section 4621.

Section 9 is derived from New York Revised Penal Law section 215.57 and Michigan Revised Criminal Code section 4620.

These two sections were patterned after Model Penal Code section 242.8.

C. Relationship to Existing Law

ORS 162.450: Prior to the enactment of this statute in 1965, the defendant who was free on bail or his own recognizance was not subject to any penalty for his wilful failure to appear as directed by the court. This legislation provides that such conduct constitutes a criminal offense. If the original charge was a felony, he may be sentenced to the penitentiary for a maximum of two years. If the original charge was a misdemeanor, the offense of "bail jumping" is a misdemeanor punishable by imprisonment in the county jail for not more than one year.

ORS chapter 140 governs the admission of defendants to bail and the release of defendant on his own recognizance.

Proposed sections 8 and 9 restate the criminal statutes on bail jumping as they exist today. Chapter 244, Oregon Laws 1969, provides additional coverage in the same area where misdemeanant citations are issued in lieu of bail or release on recognizance.

TEXT OF REVISIONS OF OTHER STATES

TEXT OF MODEL PENAL CODE

Section 242.8. Bail Jumping; Default in Required Appearance.

A person set at liberty by court order, with or without bail, upon condition that he will subsequently appear at a specified time and place, commits a misdemeanor if, without lawful excuse, he fails to appear at that time and place. The offense constitutes a felony of the third degree where the required appearance was to answer to a charge of felony, or for disposition of any such charge, and the actor took flight or went into hiding to avoid apprehension, trial or punishment. This Section does not apply to obligations to appear incident to release under suspended sentence or on probation or parole.

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TEXT OF ILLINOIS CRIMINAL CODE OF 1961

§ 32—10. Violation of Bail Bond

Whoever, having been admitted to bail for appearance before any court of record of this State, incurs a forfeiture of the bail and willfully fails to surrender himself within 30 days following the date of such forfeiture, shall, if the bail was given in connection with a charge of felony or pending appeal or certiorari after conviction of any offense, be fined not more than $5,000 or imprisoned in the penitentiary not more than five years, or both; or, if the bail was given in connection with a charge of committing a misdemeanor, or for appearance as a witness, be fined not more than $1,000 or imprisoned in a penal institution other than the penitentiary not more than one year, or both.

Nothing in this section shall interfere with or prevent the exercise by any court of its power to punish for contempt.

# # # #

TEXT OF NEW YORK REVISED PENAL LAW

§ 215.56 Bail jumping in the second degree

A person is guilty of bail jumping in the second degree when by court order he has been released from custody or allowed to remain at liberty, either upon bail or upon his own recognizance, upon condition that he will subsequently appear personally in connection with a criminal action or proceeding, and when he does not appear personally on the required date or voluntarily within thirty days thereafter.

Bail jumping in the second degree is a class A misdemeanor.

§ 215.57 Bail jumping in the first degree

A person is guilty of bail jumping in the first degree when by court order he has been released from custody or allowed to remain at liberty, either upon bail or upon his own recognizance, upon condition that he will subsequently appear personally in connection with a charge against him of committing a felony, and when he does not appear personally on the required date or voluntarily within thirty days thereafter.

Bail jumping in the first degree is a class E felony.

§ 215.58 Failing to respond to an appearance ticket

1. A person is guilty of failing to respond to an appearance ticket when, having been personally served with an appearance ticket, as defined in subdivision two, based upon his alleged commission of a misdemeanor, he does not appear personally in the court in which such appearance ticket is returnable on the return date thereof or voluntarily within thirty days thereafter.

2. As used in this section, an appearance ticket means a written notice, whether referred to as a summons or by any other name, issued by a peace officer or other non-judicial public servant authorized by law to issue the same, directing a designated person to appear in a designated court at a designated future time in connection with a criminal action to be instituted in such court with respect to his alleged commission of a designated offense.

3. This section does not apply to any case in which an alternative to response to an appearance ticket is authorized by law and the actor complies with such alternative procedure.

Failing to respond to an appearance ticket is a violation.

§ 215.59 Bail jumping and failing to respond to an appearance ticket; defense

In any prosecution for bail jumping or failing to respond to an appearance ticket, it is an affirmative defense that:

1. The defendant's failure to appear on the required date or within thirty days thereafter was unavoidable and due to circumstances beyond his control; and

2. During the period extending from the expiration of the thirty day period to the commencement of the action, the defendant either:

(a) appeared voluntarily as soon as he was able to do so, or

(b) although he did not so appear, such failure of appearance was unavoidable and due to circumstances beyond his control.

# # # #

TEXT OF MICHIGAN REVISED CRIMINAL CODE

[Bail Jumping in the First Degree]

Sec. 4620. (1) A person commits the crime of bail jumping in the first degree if, having been released from custody by court order with or without bail, upon condition that he will subsequently appear at a specified time and place in connection with a charge of having committed murder, or any Class A or B felony, he intentionally fails without lawful excuse to appear at that time and place.

(2) Bail jumping in the first degree is a Class C felony.

[Bail Jumping in the Second Degree]

Sec. 4621. (1) A person commits the crime of bail jumping in the second degree if, having been released from custody by court order with or without bail, upon condition that he will subsequently appear at a specified time and place in connection with a charge of having committed any misdemeanor or Class C felony, he intentionally fails without lawful excuse to appear at that time and place.

(2) This section does not apply to a person released from custody on condition that he will appear in connection with a charge of having committed a misdemeanor in violation of Act No. 300 of the Public Acts of 1949, as amended, being chapter 257 of the Compiled Laws of 1948, or any other traffic code.

(3) Bail jumping in the second degree is a Class A misdemeanor.

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