See: Minutes of Subcommittee No. 1
10/9/69, p. 6, Vol. X, Tape #82

10/30/69, p. 1, Vol. X, Tape #86

11/6/69, p. 4, Vol. X, Tapes #86 & 88

CRIMINAL LAW REVISION COMMISSION
311 Capitol Building
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ARTICLE 24. OBSTRUCTING GOVERNMENTAL ADMINISTRATION

Preliminary Draft No. 1; June 1969

Reporter: Roger D. Wallingford Subcommittee No. 1

ARTICLE 24. OBSTRUCTING GOVERNMENTAL ADMINISTRATION

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Section 1. Obstructing governmental administration; definitions. As used in this Article, unless the context requires otherwise:

Existing Law
ORS 192.005 (5)
41.030
43.010
133.170

(1) The definitions contained in Article 19, section 1, and Article 20, section 1, are applicable to this Article.

(2) "Peace officer" means any public servant vested with legal authority to maintain public order and to make arrests for crimes.

(3) "Fireman" means any fire department officer or any other person vested by law with the duty of extinguishing fires.

(4) "Testimony" means oral or written statements, documents or any other evidence that may be offered by a witness or party in an official proceeding.

(5) "Physical evidence" means any article, object, document, record or other thing of physical substance.

(6) "Public record" means all official books, documents, records or other written evidence affording notice or information to the public, or constituting a memorial of an act or transaction of a public office or public servant.

COMMENTARY - OBSTRUCTING GOVERNMENTAL ADMINISTRATION; DEFINITIONS

A. Summary

The proposed definitions are applicable to sections 2 through 10. The Article contains additional definitions which for reasons of increased clarity have been placed in close proximity to the statutory sections to which they relate.

Under subsection (2) a peace officer must be a public servant vested with legal authority and not just the power to maintain public order and make arrests. This would exclude private citizens such as store detectives and security guards who sometimes have the power to arrest but are not vested with the duty to make an arrest. The definition of a peace officer is essentially limited to sheriffs, deputies, constables and state and municipal police officers.

Subsection (3) is intended to encompass all persons with a statutory duty to extinguish fires. Coverage would extend to regular fire department personnel, rural and volunteer firemen, state and local fire marshalls and their deputies and state forestry employes.

Subsection (4) defines "testimony" as it relates to bribing and tampering with witnesses. The definition is broad enough to cover bribes relating to the production of records as well as oral or written statements by a witness.

Subsection (5) as it relates to tampering with physical evidence is self-explanatory.

Public records in subsection (6)are broadly defined to include all written records filed with, deposited in, or otherwise legally recorded by a public office.

B. Derivation

With some minor changes the proposed definitions were derived from the following sources:

Subsection (2), Peace officer, from Wisconsin Criminal Code section 939.22 (22).

Subsection (3), Fireman, from Michigan Revised Criminal Code section 4525.

Subsection (4), Testimony, from Michigan Revised Criminal Code section 5001 (3).

Subsection (5), Physical evidence, from Michigan Revised Criminal Code section 5045 (2).

Subsection (6), Public record, from Michigan Revised Criminal Code section 4555 (2) and Black's Law Dict.(1957) p. 1438.

C. Relationship to Existing Law

These definitions, as used in the context of a criminal code, are new to Oregon law.

ORS 41.030, Kinds of evidence, enumerates: (3) Writings, and (4) Other material objects presented to the senses.

The definition of "physical evidence" includes both these species of evidence.

ORS 43.010, Public writings, defines them as: Public writings are the written acts, or records of the acts, of the sovereign authority, official bodies and tribunals and public officers , legislative, judicial and executive, of this state, the United States, a sister state or a foreign country.

In 14 Op. Att'y Gen. p.133 (28-30) it was held that the power of arrest given to a water master did not constitute him a peace officer within the express definition of a peace officer contained in section 1745, Oregon Laws (now ORS 133.170): "The term 'peace officer' is defined in section 1745, Oregon Laws, as follows: 'A peace officer is a sheriff of a county or constable of a precinct, marshall or policeman of a town, and a warrant of arrest must be directed to and executed by such officer'."

ORS 133.170 defines a peace officer as: "...a sheriff, a constable, a marshall, a policeman of a town or a member of the Oregon State Police..."

There would appear to be no conflict between the present statutory definition of "peace officer" and that proposed in subsection (2).

TEXT OF REVISIONS OF OTHER STATES

Text of Wisconsin Criminal Code

Section 939.22 (22): "Peace Officer" includes any public servant vested by law with a duty to maintain public order or to make arrests for crime, whether that duty extends to all crimes or is limited to specific crimes.

Text of Michigan Revised Criminal Code

[Refusing to Assist in Fire Control]

Sec. 4525. (1) A person commits the crime of refusing to assist in fire control when:

(a) Upon command by a person known to him to be a fireman, he unreasonably refuses to aid in extinguishing a fire and protecting the property thereat; or

(b) Upon command by a person known to him to be a fireman or peace officer, he intentionally disobeys an order or regulation relating to the conduct of persons in the vicinity of a fire.

(2) "Fireman" includes any officer of a fire department or any other person vested by law with the duty to extinguish fires.

(3) Refusing to assist in fire control is a Class C misdemeanor.

[Definition of Terms]

Sec. 5001 (3) "Testimony" includes oral or written statements, documents or any other material that may be offered by a witness in an official proceeding.

[Tampering with Physical Evidence]

Sec. 5045 (2) "Physical evidence," as used in this section, includes any article, object, document, record or other thing of physical substance.

[Tampering with Public Records]

Sec. 4555. (2) For purposes of this section, "public record" includes all official books, papers or records created by or received in any governmental office or agency.

Section 2. Obstructing governmental administration. A person commits the crime of obstructing governmental administration if he:

(1) Intentionally obstructs, impairs or hinders the administration of law or other governmental function by means of intimidation, force, physical interference or obstacle.

(2) This section shall not apply to the obstruction of unlawful governmental action or interference with the making of an arrest.

Existing Law
ORS
145.020
162.550
164.840
164.871
164.880
209.990(1)
209.150
433.020
433.115
433.990(4)
431.990
476.080
476.990(1)
479.170
479.990(4)
616.080
616.990
561.200
561.990
477.730
597.280
597.991
479.820(5)
479.990(5)
374.305
374.990
376.140
376.990(1)
276.990(3)
431.990
471.675
471.990
483.049
483.140
483.990(1)
659.110
659.990(1)

COMMENTARY - OBSTRUCTING GOVERNMENTAL ADMINISTRATION

A. Summary

The proposed section is designed to serve as a general provision directed at suppression of the unlawful obstruction of governmental functions. It is a natural extension of the common law prohibition against obstruction of justice:

> "At an early date, the punishment of acts obstructing the due administration of justice was recognized as absolutely essential to the existence of the courts and their efficiency in performing the functions for which they were created...the obstruction of the administration of justice is declared to be an indictable offense under the common law and by statute in many jurisdictions." (39 Am. Jur., Obstructing Justice, Sec. 1)

> "The obstruction of or resistance to a public officer in the performance of his duties is an offense at common law. It was an offense by statute in all jurisdictions by the first decade of this century." (See Tryon v. Pingee, 112 Mich., 338, 70 N.W. 905(1897), Am. Ann. Cas. 402(1909), Miller on Crim. Law, 153(1934))

The word "obstruct" has been extensively discussed in the law and is used in the context of its accepted judicial meaning:

> "To impede, to interpose impediments, to the hindrance or frustration of some act or service; as to obstruct an officer in the execution of his duty." (Black's Law Dict.(4th ed 1951) p. 1228)

> "Obstruction: A term derived from the Latin verb 'obstruere', and variously defined as meaning a barrier, hindrance, impediment, or obstacle. An obstruction is that which impedes progress, and it has been defined as a blocking up; filling with obstacles or impediments. Obstruction does not necessarily imply prevention." (67 C.J.S., Obstruction, pp.69-70)

> "Under statutes providing that any person who willfully delays or obstructs any public officer in the discharge or attempted discharge of any duty of his office shall be guilty of a misdemeanor, 'obstructs' means to hinder or prevent from progress; check, stop; also to retard the progress of; make the accomplishment of difficult and slow." (See Bathke v. Myklebust, 69 S.D. 534, 12 N.W. 2d 550)

To avoid an unreasonable extension of coverage the section requires that the prohibited conduct be manifested by threats, violence or physical interference. Certain constitutional safeguards are recognized by this limitation, e.g., freedom of speech and assembly. Judicial interpretation of the reach of obstruction statutes is discussed in 48 A.L.R. 749:

> "It may be stated as a general rule that under statutes containing the words 'obstructs, resist, or oppose', or 'resist, obstruct, or abuse', or the single word 'resist', the offense of resisting an officer can be committed without the employment of actual violence or direct force.
>
> "In U.S. v. McDonald, 8 Biss. 439, Fed. Cas. No. 15,667 (1879), the court construed the federal statute which contained the descriptive words 'obstruct, resist, or oppose':
>
> "The statute, however, does not limit the offense to resistance alone, it includes also wilful acts of obstruction or opposition, and to obstruct is to interpose obstacles or impediments to hinder, impede, or in any manner interrupt or prevent, and this term does not necessarily imply the employment of direct force or the exercise of direct means.

"It includes any passive indirect, or circuitous impediments to the service or execution of process, such as hindering or preventing an officer by not opening a door or removing an obstacle, or concealing or removing property. So that, although,to establish a case of resistance, it must appear that the party was personally present and personally resisting, liability to the charge of obstructing may be established by showing that the party has wilfully caused any impediment or hindrance to be interposed, though not personally present and actively cooperating in the direct act of obstructing. It should appear, however, that such party, in some manner and at some stage, aided or abetted the act of obstructing."

Subsection (2) exempts from the scope of coverage two areas of interference with governmental action. The first exempted area is interference with the unlawful action of a public servant. The test of illegality, however, is objective, and is not determined by the actor's subjective belief as to the validity of the contested action. The defense of illegality is not given equivalent recognition in the section prohibiting interference or obstruction with an arrest.

This section is intended to supplement other proposed provisions dealing with specific acts tending to subvert the proper administration of government, e.g.,perjury, bribery. Since certain policy decisions were incorporated into those sections they are given expression by means of limitation in this provision. Having determined in the Article on bribery that the corrupt influencing of public servants should be confined to particular proceedings it would be inconsistent to prohibit in this section all activities intended to obstruct governmental administration. Your reporter felt that it was essential to avoid the use of broadly generalized prohibitory language that might be construed as a restriction upon the lawful exercise of political agitation in opposition to governmental policy.

The section is therefore limited to obstructive threats or violent or physical interference. The use of intimidation is not specifically proscribed unless it creates an unlawful obstruction or governmental process.

The subject is discussed in 6 Ark. L. Rev. 46 (1951):

"Any conduct which induces sufficient restraint on the part of the officer lawfully attempting to discharge his duties may amount to illegal obstruction and resistance in the contemplation of the law. Hence, threats communicated by signs, by tone of voice, or by actions, as well as by explicit language, have been held to constitute unlawful interference even though unaccompanied by force. (See Armstrong v. Vicksburg S. & P.R.R., 46 La. Ann., 1448, 16 So. 468 (1894).

> "All jurisdictions agree that the use of actual force in resisting lawful official acts of an officer constitutes a criminal offense, (See State v. Keehn, 135 Minn. 211, 160 N.W. 666 (1916); State v. Heimbigner, 137 Wash. 409, 242 P. 654 (1926)).
>
> "One using force to hinder the arrest of another is equally guilty of interfering with an officer or of resisting, obstructing, or opposing the execution of legal process. (See State v. Goyins, 252 Wisc. 77, 30 N.W. 2d 199 (1947))."

As to the quality of threats sufficient to create an unlawful obstruction, see U.S. v. Smith, 1 Dill. 212, Fed. Cas. No. 16,333 (1870), wherein the court commented:

> "Threats and acts intended to terrify, or calculated by their nature to terrify, a prudent and reasonable officer, are sufficient to constitute the offense of resisting an officer, even though he is not prevented thereby from executing his process."

The proposed section reaches assaults on public officials while engaged in official duties, violence and disorderly conduct that disrupts the orderly operation of legislature, courts and other tribunals, the use of "non-violent" demonstration techniques such as the creation of physical obstacles to impede the legitimate administration of government, and all other intentional impediments to governmental activity actuated by intimidation or physical interference.

A comprehensive view of the types of activity considered by this type of provision may be found in U. of Pa. L. Rev., 108, 388-413 (1960). In an article titled "Types of Activity Encompassed by the Offense of Obstructing a Public Officer"the following topic outline is followed:

I. Verbal Conduct

- (a) Intervention for another in difficulty with an officer.
- (b) Protestation in one's own defense.
- (c) Misinformation.
- (d) Counseling a third person to resist.
- (e) Warning others of the presence of police.

II. Physical Acts

- (a) Minor scuffling and flight.
- (b) Blocking access by an officer.
- (c) Refusal to follow an officer's order.
- (d) Destroying or tampering with evidence.
- (e) Removing, refusing to point out, or hiding property or person subject to process.

A review of the cases discloses a number of fact situations that have been judicially construed to be either within or beyond the ambit of kindred obstruction statutes. A brief summary follows:

Acts Constituting the Offense:

--Refusal of the driver of a motor boat to heave to when lawfully ordered to do so by a revenue officer in a patrol boat. (The Gander, 54 F.2d 505 (Under Tariff Act of 1922, 18 USCA 122))

--Blocking with the body the door of a room and preventing a policeman from entering when it was his duty to enter. (People v. Frank, 73 N.Y. Misc. 1, 130 N.Y. Supp. 807)

-- The owner of cattle taking them from a pound against the protests of the officer who had put them there. (Campf V. State, 80 Ohio 321, 88 N.E. 887)

--Refusal of automobile driver when stopped for excessive speed to give his name, and pushing officer from the car. (People v. Mortensen, 76 Cal. App. 763, 245 Pac 1101)

--Interference and abuse by a third person when officer is properly performing his duty to other persons. (Perkins v. Wilcox, 294 Mo. 700, 242 S.W. 974)

--Urging an assembly of persons to disobey officers who are enforcing a law forbidding the use of a park for a public meeting. (People v. King, 226 Mich 405, 210 N.W. 235)

--Causing unlawfully a crowd to gather and refusing to leave when requested by a police officer. (Pankhurst v. Jarvis, (1910), 101 L.T. 946)

Acts Not Constituting the Offense:

--The act of fleeing from officers to avoid arrest for violation of Prohibition laws. (Jones v. Comm, 141 Va. 471, 126 S.E. 74 (1925))

--Defendant laid his hand upon the shoulder of officer and asked that he release a third party into his custody. (State v. Knudsen, 27 S.D. 400, 131 N.W. 401 (1911))

--Refusal by ship captain to stop ship and allow fish warden to board and inspect lobsters. (State v. LeBlanc, 115 Me. 142, 98 Atl. 119 (1916)

--Remonstrating with an officer on behalf of another, or criticizing an officer while he is performing his duty. (Chicago v. Brod, 141 Ill. App. 500 (1908); People ex rel Koehler v. Magnes, 187 N.Y. Supp. 913 (1921))

Chapter 73, U.S.C.A., sections 1501-1510, covers obstruction of justice:

U.S.C.A.:

1501: Assault on process server.

1502: Resistance to extradition agent.

1503: Influencing or injuring officer, juror or witness generally.

1504: Influencing juror by writing.

1505: Obstruction of proceedings before departments, agencies, and committees.

1506: Theft or alteration of records or process; false bail.

1507: Picketing or parading.

1508: Violating secrecy of grand or petit jury.

1509: Obstruction of court orders.

1510: Obstruction of criminal investigations.

The Model Penal Code, Section 242.1, includes as an incident of obstructing governmental functions the breach of an official duty. This type of official misconduct is covered in Section 6, Article 19, of the proposed Oregon criminal code.

The Model Penal Code extended coverage also to "any other unlawful act." This language was incorporated into the New York Revised Penal Code section 195.05 as "any independently unlawful act." The term was not included in Michigan Revised Criminal Code section 4505. The rationale for the Michigan revisor's rejection of this extension of coverage is stated in their committee commentary:

> "This provision would, of course, bar such acts of non-physical obstruction as the impersonation of another in taking a civil service examination on his behalf. But many such independently unlawful acts are already made illegal by special provisions dealing with the particular matter involved... moreover, many others are of minor significance...the failure to file a report required by law, for example, is an unlawful act which may obstruct government operations, but it hardly belongs on a par with obstruction by physical interference. The same can be said for the failure to perform various other legal obligations, including, perhaps, the failure to pay a parking ticket." (See Michigan Revised Criminal Code, Committee Commentary, p. 328)

Your reporter concurs with the rationale behind the Michigan approach.

The section imposes a uniform mens rea requirement for all illegal obstructions; that the person's conduct be intentional and directed towards the obstruction of governmental administration. "Intentional" is defined in section 1, Article 2, and requires in this context that the person act with a conscious objective to cause the result.

B. Derivation

The proposed section is a composite of:

Michigan Revised Criminal Code Section 4505
New York Revised Penal Code Section 195.05
Model Penal Code Section 242.1

C. Relationship to Existing Law

ORS 33.010 lists twelve acts or omissions that are considered contempt of the authority of the court. ORS 1.020 grants the court the power to punish by contempt proceedings for the effectual exercise of their specified powers. Interference with the judicial authority has usually been dealt with by recourse to this form of action.

There are a number of existing ORS provisions that relate to specific acts tending to obstruct the administration of government,e.g., resisting arrest,which will be discussed in connection with proposed sections dealing with that specific conduct.

The following statutes are directed generally at interference with official governmental activity:

ORS:

145.020: Dispersal of unlawful or riotous assemblages.

162.550: Disguising oneself with intent to obstruct execution of law or hinder officer.

164.840: Tearing down or defacing posted notice put up pursuant to law.

164.871: Injuring, removing or destroying boundary monuments or signs, lamps, railings, posts, barricades or warning devices.

164.880: Destroying or defacing surveyor's markings or markers.

209.150: Unauthorized interference with corner or witness established by county surveyor.

209.990 (1): Penalty provision for violation of ORS 209.150.

433.020: Disturbing notice of State Board of Health prohibited.

433.115: Alteration or removal of quarantine notices prohibited.

433.990(4): Penalty provision for violation of ORS 433.020.

431.990: Penalty provision for violation of ORS 433.115.

476.080: Entry and inspection of premises by State Fire Marshal and his deputies; interfering with or preventing entry prohibited.

476.990(1): Penalty provision for violation of ORS 476.080.

479.170: Ordering repair of, or removal of material from, building by State Fire Marshal or his deputies.

479.990(4): Penalty provision for failure to comply with ORS 479.170.

616.080: Interference with Food & Other Commodities Department or personnel.

616.990: Penalty provision for violation of ORS 616.080.

561.200: Prohibition against the obstruction of officers, agents or employees of the Department of Agriculture.

561.990: Penalty provision for violation of ORS 561.200.

477.730: Wilful injury to or removal of notice posted by state forester.

597.280: Interference with State Veterinarian Department personnel.

597.991: Penalty provision for violation of ORS 597.280.

579.820(5): No person shall obstruct or interfere with the Labor Commissioner in performance of his duties.

479.990(5): Penalty provision for violation of ORS 479.820(5).

374.305: Necessity of permission to build on public rights of way.

374.990: Penalty provision for violation of ORS 374.305.

376.140: Obstruction of public road or gateway prohibited.

376.990(1): Penalty provision for violation of ORS 376.140.

276.990(3): Intentional damage to or obstruction of water line of a public institution.

431.990: Penalty provision for violation of ORS 276.990(3).

471.675: Resisting lawful arrest or interfering or hindering officer or inspector with OLCC.

471.990: Penalty provision for violation of ORS 471.675.

483.049: Fleeing or attempting to elude traffic or police officer when signaled to stop.

483.140: Damaging or removing traffic sign or signal.

483.990(1): Penalty provision for violation of ORS 483.140.

659.110: Wilful interference with administration of law and violation of orders of Labor Commissioner in performance of duties under Civil Rights Act.

659.990(1): Penalty provision for violation of ORS 659.110.

The maximum penalty for violation of these provisions varies from $50.00 each occurrence to one year imprisonment.

Due to the misdemeanor nature of the offenses involved in this area there are no reported Oregon cases directly in point. A number of Oregon cases have discussed the power of the judiciary to punish interference with the court's process by contempt proceedings. The law of contempt is relevant to the obstruction of governmental administration inasmuch as certain conduct would offend both the proscription of this section and the inherent dignity of the court. It is therefore necessary to recognize certain inherent powers of the court, characterized by contempt proceedings whose sources of authority rest beyond legislative abridgement.

State v. Downing, 40 Or 309, 58 Pac. 563 (1902) defined criminal contempt:

> "A criminal contempt consists of disrespect of the court or disobedience of its process, whereby the administration of justice is obstructed, or in any act or language of a person which tends to bring the court into disrespect."

Rust v. Pratt, 157 Or 505, 72 P.2d 533 (1937) discussed the court's authority to punish by contempt proceedings:

> "The power to punish for contempt is a power not derived from any statute, but is inherent in all courts, and arises from necessity. It is implied because it is necessary to the exercise of all other powers. Its existence is essential to the preservation of order in judicial proceedings, and to enforce judgments, orders and writs of the courts, and consequently to due administration of justice. The power of the court to punish summarily for contempt has existed from the earliest period of the common law and is not within the application of the constitutional provisions guaranteeing a trial by jury or providing against or depriving persons of liberty without due process of law. A defendant in a contempt proceeding is not entitled to a trial by jury." (See also: State v. McClain, 136 Or 60, 298 P.212 (1913)

In State ex rel Oregon State Bar v. Lenske, 243 Or 477,405 P.2d 510, 407 P.2d 250 (1966) the court commented on legislative authority in this area:

> "...The legislature cannot unreasonably abridge or destroy the judicial power to punish for contempt because the legislature cannot take away a power which it does not give. (See Annotation, 121 A.L.R. 215, 216-217(1939))...We hold that the power of a constitutionally established court to punish for contempt may be regulated within reasonable bounds by the legislature but not to the extent that the court's power is substantially impaired or destroyed...."

The proposed section makes no attempt to abridge the court's power to punish by contempt proceedings. It merely provides an alternative measure to punish conduct inimical to social order and stability.

TEXT OF REVISIONS OF OTHER STATES

Text of Michigan Revised Criminal Code

[Obstructing Government Operations]

Sec. 4505. (1) A person commits the crime of obstructing government operations in the second degree if he intentionally obstructs, impairs or hinders the performance of a governmental function by using or threatening to use violence, force, or physical interference or obstacle.

(2) This section shall not apply to:

(a) The obstruction, impairment or hindrance of unlawful action by a public servant.

(b) The obstruction, impairment or hindrance of the making of an arrest.

(c) The obstruction, impairment or hindrance of any governmental function in connection with a labor dispute with the government.

(3) Obstruction of government operations is a Class B misdemeanor.

New York Revised Penal Law

Section 195.05 Obstructing governmental administration

A person is guilty of obstructing governmental administration when he intentionally obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from performing an official function, by means of intimidation, physical force or interference, or by means of any independently unlawful act.

Obstructing governmental administration is a class A misdemeanor.

Text of Model Penal Code

Section 242.1 Obstructing Administration of Law or Other Governmental Function

A person commits a misdemeanor if he purposely obstructs, impairs or perverts the administration of law or other governmental function by force, violence, physical interference or obstacle, breach of official duty, or any other unlawful act, except that this Section does not apply to flight by a person charged with crime, refusal to submit to arrest, failure to perform a legal duty other than an official duty, or any other means of avoiding compliance with law without affirmative interference with governmental functions.

Section 3. Refusing to assist a peace officer. A person commits the crime of refusing to assist a peace officer if upon command by a person known by him to be a peace officer he unreasonably refuses or fails to assist in effecting an authorized arrest or preventing another from committing a crime.

Existing Law
ORS
145.020
145.990(1)
166.050
145.030
165.530
162.540
206.050
133.230
137.340
137.990
483.048

COMMENTARY - REFUSING TO ASSIST A PEACE OFFICER

A. Summary

There is extensive historical justification in the law for this type of legislation.

Burdick, Law of Crime, 1, Sec. 286 (1946):

"...Disobedience not only to lawful judicial orders but also to the lawful orders of a ministerial officer in the execution of his duty is an obstruction of justice and a common law misdemeanor. One lawfully called upon to assist a peace officer, who needs help in making an arrest or in quelling a disturbance of the peace, and refuses to do so is guilty of a misdemeanor, unless he is physically unable to assist." (See Greenwood v. Smothers, 103 Ark 158, 146 S.W. 109; Anderson on Sheriffs, Vol. 1, Sec. 143 (1941))

67 C.J.S.: Obstructing Justice, Section 4:

"In accordance with statutory provisions a private person duly summoned by an officer, having legal authority, to assist him in the execution of process may be guilty of a criminal offense for refusing to obey the summons...unless it appears...the requested person is practically unable to assist through sickness."

22 Mich. L. Rev., 798 (1923):

"An officer having authority to make an arrest may, orally or otherwise, call upon any citizen to aid him, and in emergencies, such as riots, mobs, etc., may raise the posse comitatus, or power of the county to help him...every citizen so called upon by a known public peace officer, having apparent authority, to aid him, and who refuses without good excuse is guilty of a misdemeanor, and it is not a sufficient excuse that his aid would be insufficient to accomplish the arrest." (See People v. Dallem, 21 Cal. App. 770, 132 P. 1064 (1913); Coyles v. Hurtin, 10 Johns. (N.Y.) 85; Regina v. Brown, Car. & M. 314)

The proposed section requires as elements of the offense:

(1) A refusal or failure to assist a peace officer.
(2) After a recognized command for assistance.
(3) From a person known by the actor to be a peace officer.
(4) With no reasonable excuse for refusing or failing to render assistance, such as illness or physical disability.

The definition of "peace officer" is contained in section 1, subsection (2) of this Article, and includes all persons vested with legal authority to maintain public order or make arrests for crimes.

The section limits the duty to render assistance to emergency situations, i.e., securing an arrest and the prevention of crime.

The provision would not apply if the refusal to assist was "reasonable." All the possible grounds for "reasonable" refusal cannot be catalogued, but it is submitted that the language "unreasonably refuses or fails" is preferable to an absolute requirement to render assistance upon command.

Perkins comments on this subject: (Perkins on Criminal Law, Foundation Press, Second Ed. (1969), p. 511)

"[A person]...is not entitled to delay while he conducts an inquiry into the officer's authority in the particular case, or to demand an inspection of the warrant if the officer is undertaking to arrest by virtue of such process. He has no right to refuse to give the requested assistance merely because some danger is involved, but if the effort would be futile as well as dangerous his refusal may be excused in extreme circumstances." (See Dougherty v. State, 106 Ala. 63, 17 So. 393 (1895))

The concept of an "ideal" statute in this area is discussed in 14 DePaul Law Rev 159 (1964):

"By statute, 46 states have specifically recognized the power of the sheriff to request the assistance of a private citizen or to call a posse comitatus.

"An ideal statute defining the duty to aid a peace officer should take into account the age and sex of those who may be summoned, the nature of the sanction to be imposed as well as the problem of possible civil liability. It should also determine whether a reasonable ground for refusing is allowable as a defense and whether or not the person requesting assistance must be known as a peace officer to the party summoned...it should be stated in the statute that one who assists will not incur liability if the aid rendered is reasonable under the circumstances. The concept that persons should not be punished for refusing assistance if a valid reason for doing so exists should be incorporated in the enactment. And finally, the sanction imposed should be one strict enough to discourage non-compliance."

A subsection exempting persons rendering assistance to peace officers from civil and criminal liability has not been included. It may be necessary to consider such a provision if it is not covered in the Article on justification.

B. Derivation

The section is derived from Michigan Revised Criminal Code Section 4520.

C. Relationship to Existing Law

The power of peace officers to command assistance from private citizens is reflected by existing Oregon statutes:

ORS:

145.020: Dispersal of unlawful or riotous assemblages.

(2) For the purpose of arresting or causing the arrest of persons who fail to disperse when so commanded, the arresting officer or officers may command the aid of persons present or within the county, except members of the National Guard. No person, when so commanded, shall fail to give such aid, and, if he does fail so to do, he shall be deemed one of the rioters and may be treated accordingly.

145.990(1): Violation of subsection (2) of ORS 145.020 is punishable as provided in ORS 166.050.

166.050: Punishment for participating in riot. Felony.

145.030: Justification of persons aiding officer. When the officers of justice act in the prevention of crime, other persons who by their command act in their aid are justified in so doing.

165.530: Punishment of person refusing to assist officer:

(1) Maximum 30 days imprisonment or $500 fine.
(2) If refusal to assist pertains to execution of his office, preservation of peace, arrest of any person for breach of peace or service of process, maximum is 6 months imprisonment or $500 fine.

162.540: Assuming to be magistrate or peace officer and requiring assistance.

206.050: Sheriff commanding assistance in process serving. Exempts members of the National Guard.

133.230: Aiding officer in execution of warrant.

137.340: Authority of sheriff to require assistance while conveying defendant to prison in execution of judgment of imprisonment.

(2) No person shall refuse or neglect to assist the sheriff when so required.

137.990: Penalty provision for violation of ORS 137.340(2).

483.048: Duty to obey traffic officers.

The proposed section would repeal those provisions dealing with the refusal to assist a peace officer. Interference with a sheriff conveying a defendant to prison or interference with process serving would both be covered as such conduct would constitute a crime, i.e., obstruction of governmental administration and escape.

The requested aid would therefore be required to prevent another from committing a crime.

The provision relating to those persons who refuse to assist in riot situations will be dealt with in the section on riot and unlawful assemblies.

TEXT OF REVISIONS OF OTHER STATES

Text of Illinois Criminal Code of 1961

Section 31-8. Refusing to Aid an Officer

Whoever upon command refuses or knowingly fails reasonably to aid a person known by him to be a peace officer in:

(a) Apprehending a person whom the officer is authorized to apprehend; or

(b) Preventing the commission by another of any offense, shall be fined not to exceed $100.

Text of New York Revised Penal Law

Section 195.10. Refusing to aid a peace officer

A person is guilty of refusing to aid a peace officer when, upon command by a peace officer identifiable or identified to him as such, he unreasonably fails or refuses to aid such peace officer in effecting an arrest, or in preventing the commission by another person of any offense.

Refusing to aid a peace officer is a class B misdemeanor.

Text of Michigan Revised Criminal Code

[Refusing to Aid a Peace Officer]

Sec. 4520. (1) A person commits the crime of refusing to aid a peace officer when, upon command by a person known to him to be a peace officer, he unreasonably refuses or fails to aid such peace officer, in:

(a) Effectuating or securing an arrest; or

(b) Preventing the commission by another of any offense.

(2) Refusing to aid a peace officer is a Class C misdemeanor.

Existing Law
ORS
476.750
476.990 (6)
477.993 (1)
477.370

Section 4. Refusing to assist in firefighting operations. A person commits the crime of refusing to assist in firefighting operations if:

(1) Upon command by a person known by him to be a fireman he unreasonably refuses or fails to assist in extinguishing a fire or protecting property threatened thereby; or

(2) Upon command by a person known by him to be a fireman or peace officer he intentionally disobeys a lawful order relating to his conduct in the vicinity of a fire.

COMMENTARY - REFUSING TO ASSIST IN FIREFIGHTING OPERATIONS

A. Summary

The definition of fireman in section 1 of the Article covers all persons who have a statutory duty to extinguish fires. This would include all forest service personnel assigned to firefighting operations.

Subsection (1) applies the test of reasonableness to the actor's refusal to assist, which is consistent with the section on refusing to assist a peace officer. Subsection (2) makes it a crime to disobey lawful orders issued by fireman and peace officers in the vicinity of a fire. Peace officers are included in this subsection since they are often responsible for maintaining spectator safety under these circumstances. No test of reasonableness is applied to subsection (2) on the premise that the public welfare demands prompt and effective discipline in emergency situations.

The Model Penal Code did not propose a similar provision. Such a provision was felt by your reporter to be an essential legislative policy expression in a state particularly dependent upon forest wood products.

B. Derivation

The proposed section was derived from Michigan Revised Criminal Code Section 4525.

C. Relationship to Existing Law

ORS 476.750 prohibits obstructing firefighting equipment or personnel. ORS 476.990 (6) declares that violation of ORS 476.750 shall be a misdemeanor.

New York Revised Penal Law Section 195.15 was designed specifically to proscribe obstructing firefighting operations. Your reporter felt that section 2 of this Article, obstructing governmental operations, would reach every imaginable form of interference in this area.

ORS 477.370 prohibits an able bodied man from refusing to assist a fire warden in firefighting. ORS 477.993 (1) sets the penalty for violation of ORS 477.370 as a maximum $1,000 fine and 60 days imprisonment.

The two noted existing statutes would be repealed by this section. The provision would be new to Oregon law to the extent that it reached all firefighting operations. It might be noted that it would be one of the few criminal laws punishing a failure to act.

TEXT OF REVISIONS OF OTHER STATES

Text of New York Revised Penal Law

Section 195.15. Obstructing firefighting operations

A person is guilty of obstructing firefighting operations when he intentionally and unreasonably obstructs the efforts of any fireman in extinguishing a fire, or prevents or dissuades another from extinguishing or helping to extinguish a fire.

Obstructing firefighting operations is a class B misdemeanor.

Text of Michigan Revised Criminal Code

[Refusing to Assist in Fire Control]

Sec. 4525. (1) A person commits the crime of refusing to assist in fire control when:

(a) Upon command by a person known to him to be a fireman, he unreasonably refuses to aid in extinguishing a fire and protecting the property thereat; or

(b) Upon command by a person known to him to be a fireman or peace officer, he intentionally disobeys an order or regulation relating to the conduct of persons in the vicinity of a fire.

(2) "Fireman" includes any officer of a fire department or any other person vested by law with the duty to extinguish fires.

(3) Refusing to assist in fire control is a Class C misdemeanor.

Section 5. Bribing a witness. A person commits the crime of bribing a witness if he offers, confers or agrees to confer any pecuniary benefit upon a witness or a person he believes may be called as a witness in any official proceeding upon an agreement or understanding that:

(1) His testimony as a witness will thereby be influenced; or

(2) He will avoid legal process summoning him to testify; or

(3) He will absent himself from any official proceeding to which he has been legally summoned.

Existing Law
ORS
1.240 (3)
33.020
162.210 (1)
162.110 (2)
162.130
162.140 (2)
162.310
33.010
44.010
44.190
45.190
171.990
419.498 (3)
146.170
146.180
146.500
146.510
146.990
139.240
167.525

Section 6. Bribe receiving by a witness. A witness or person who believes he may be called as a witness in any official proceeding commits the crime of bribe receiving by a witness if he solicits, accepts or agrees to accept any pecuniary benefit upon an agreement or understanding that:

(1) His testimony as a witness will thereby be influenced; or

(2) He will avoid legal process summoning him to testify; or

(3) He will absent himself from any official proceeding to which he has been legally summoned.

COMMENTARY - BRIBING A WITNESS and BRIBE RECEIVING BY A WITNESS

A. Summary

The definitions of "pecuniary benefit" in Article 19, section 1, and "official proceeding" in Article 20, section 1, are made applicable to this provision by reference in the definition section of this Article.

These two sections are counterparts to the provisions contained in Article 19 dealing with bribery of public servants. Minor changes have been made to adjust the language to the subject of witness testimony and witness amenability to legally required process.

The mens rea requirement is an intent to influence improperly the course of official proceedings. The definition of "testimony" in section 1 of this Article extends coverage to bribes connected with the production of records as well as to written and oral statements by a witness.

The section does not contemplate proscription of special fee arrangements with expert witnesses, the basis of which is presumably not to "influence" such testimony.

There is historical precedent for making bribery of a witness a distinct offense.

> "Inducing, or attempting to induce, by bribery or other means, a witness to absent himself, or to avoid a subpoena, and thus prevent his appearance as a witness in a judicial proceeding, is a distinct offense...it is an offense against the administration of justice...and is indictable at common law regardless whether the testimony of the witness would have been material or not. The offense is also punishable... under the statutes. The consent of a witness to his abduction from the jurisdiction is no defense."(1 Burdick, Law of Crime, p. 337 (1946)).

Criminal statutes penalizing bribery of a witness are liberally construed by the courts:

> "The language of a statute which penalizes a witness who receives or offers to receive a bribe on the agreement or understanding that his testimony shall be influenced thereby should not be unduly restricted in its construction by the courts." (See Wilson v. U. S., (C.C.A. Ark.), 77 F.2d, 236, cert. den. 55 S. Ct., 926, 295 U.S. 769, 79 L. Ed. 1701).

B. Derivation

Section 5 is derived from Michigan Revised Criminal Code section 5005 and New York Revised Penal Law section 215.00.

Section 6 is derived from Michigan Revised Criminal Code section 5010 and New York Revised Penal Law section 215.05.

C. Relationship to Existing Law

There is no existing Oregon criminal statute dealing directly with bribe taking or bribe receiving by a witness.

ORS 162.210 (1) defines "judicial officer" as it is used in the bribery statutes. The definition does not include witnesses. The definition of "public servant" in Article 19, section 1 (3), of the proposed Bribery Article also excludes witnesses.

ORS 162.110 (2) is our present subornation of perjury statute.

ORS 162.130 prescribes the penalty for attempting to procure another to commit perjury.

ORS 162.140 (2) is our present subornation of false swearing statute.

These existing statutes relating to procuring or attempting to procure another to commit perjury or false swearing will be repealed by the proposed section on criminal solicitation. (See Inchoate Crimes, P.D. No. 1, March 1969).

ORS 162.310, compounding or concealing crime for gratuity or consideration, includes the act of withholding evidence. This area will be covered in succeeding sections on Compounding crime and tampering with physical evidence.

ORS 33.010 defines conduct giving rise to civil or criminal contempt.

Subsection (c): Misbehavior in office, or other wilful neglect or violation of duty, by an attorney, clerk, sheriff or other person appointed or selected to perform a judicial or ministerial service.

Subsection (e): Disobedience of any lawful judgment, decree, order or process of the court.

Subsection (h): Unlawfully detaining a witness or party to an action, suit or proceeding, while going to, remaining at, or returning from the court where the same is for trial.

Subsection (i): Any other unlawful interference with the process or proceedings of a court.

Subsection (j): Disobedience of a subpoena duly served, or refusing to be sworn or answer as a witness.

ORS 44.010 defines witness: A witness is a person whose declaration is received as evidence for any purpose, whether it is made on oral examination, by deposition or by affidavit.

There are a number of other existing statutes that relate indirectly to bribe receiving by a witness:

ORS 44.190: Penalty for disobedience to subpoena or refusal by witness to be sworn.

45.190: Compelling attendance of witnesses.

171.990: Penalty for witness failing to appear or to give testimony in legislative proceedings. Misdemeanor.

419.498 (3): Conduct of juvenile court proceedings; witnesses.

146.170: Witnesses: disobedience of coroner's order or process.

146.180: Power of coroner over witnesses.

146.500: Witnesses: disobedience of district attorney's order or process.

146.510: Power of district attorney over witnesses.

146.990: Penalty provision for Chapter 146.

139.240: Immunity of witness from arrest or service of process.

167.525: Witness failing to appear at gambling trial.

There are two Oregon cases involving interference with witness testimony. The circumstances of each case support a finding that a "pecuniary benefit" was the motivating factor which induced the witness to disrupt judicial process.

In State v. Brownell, 79 Or 123, 154 P. 428 (1916), defendant attorney arranged for the complaining witnesses in a rape case to leave the state to avoid trial testimony. The attorney paid the witnesses money for current and future living expenses. Defendant was convicted of contempt of court and fined $100.00, the statutory maximum under what is now ORS 33.010.

In State v. Walter B. Jones, 111 Or 295, 226 P. 433 (1924), the Court held, on facts similar to the Brownell case:

> "Any attorney, who urged a mother to absent her children, who were witnesses from the jurisdiction, paying as inducement, money on a note he owed her, and transportation for a son to accompany the children, though they returned and testified, was guilty of constructive contempt at common law and as defined by Section 670, Oregon Laws [now ORS 33.010] and not an attempt only.
>
> "Our statute, in defining contempt in respect to unlawful interference with the process or proceeding in a court of justice is largely, if not entirely, declaratory of the common law.
>
> "In Underhill on Criminal Evidence (3 ed.), section 657, the law is laid down thus:
>
> "'A willful and corrupt attempt to prevent the attendance of a witness before a lawful tribunal is an offense at common law. The essence of the offense is the attempt to interfere with and obstruct the administration of justice. No physical act of intervention is necessary to constitute the crime, but it may be committed by persuasion, advice or threats. At common law it need not be proved that the witness was under a subpoena, that he was called in behalf of either party, or that his evidence was material.'
>
> "It is stated in 13 C.J. 38, Section 51, in substance as follows: In general it is contempt to prevent the attendance of witnesses who have been duly subpoenaed, to advise a witness to absent himself from court, or to induce, or attempt to induce him to go beyond the jurisdiction of the court."

ORS 33.020 provides that the maximum penalty a court can impose for contempt is a $300 fine and six months imprisonment. This maximum penalty is restricted to three forms of contempt: (1) to preserve and enforce order in the judge's immediate presence, (2) disorderly, contemptuous or insolent behavior toward the judge while holding court, and (3) a breach of the peace tending to interfere with the due course of a trial. In all other instances of contempt, unless it appears that the right or remedy of a party to an action, suit or proceeding was defeated or prejudiced, the maximum penalty is a $100 fine.

It is submitted that bribe giving or bribe receiving involving witnesses demands more stringent criminal sanction than that now available under existing Oregon law.

TEXT OF REVISIONS OF OTHER STATES

Text of Illinois Criminal Code of 1961

Section 31-4. Obstructing Justice

A person obstructs justice when, with intent to prevent the apprehension or obstruct the prosecution or defense of any person, he knowingly commits any of the following acts:

(a) Destroys, alters, conceals or disguises physical evidence, plants false evidence, furnishes false information; or

(b) Induces a witness having knowledge material to the subject at issue to leave the State or conceal himself; or

(c) Possessing knowledge material to the subject at issue, he leaves the State or conceals himself.

Penalty.

A person convicted of obstructing justice shall be fined not to exceed $1,000 or imprisoned in a penal institution other than the penitentiary not to exceed one year or in the penitentiary from one to 3 years, or both fined and imprisoned.

Text of New York Revised Penal Law

Section 215.00. Bribing a witness

A person is guilty of bribing a witness when he confers, or offers or agrees to confer, any benefit upon a witness or a person about to be called as a witness in any action or proceeding upon an agreement or understanding that (a) the testimony of such witness will thereby be influenced, or (b) such witness will absent himself from, or otherwise avoid or seek to avoid appearing or testifying at, such action or proceeding.

Bribing a witness is a class D felony.

Section 215.05. Bribe receiving by a witness

A witness or a person about to be called as a witness in any action or proceeding is guilty of bribe receiving by a witness when he solicits, accepts or agrees to accept any benefit from another person upon an agreement or understanding that (a) his testimony will thereby be influenced, or (b) he will absent himself from, or otherwise avoid or seek to avoid appearing or testifying at, such action or proceeding.

Bribe receiving by a witness is a class D felony.

Text of Michigan Revised Criminal Code

[Bribing a Witness]

Sec. 5005. (1) A person commits the crime of bribing a witness if he offers, confers or agrees to confer any pecuniary benefit upon a witness or a person he believes is about to be called as a witness in any official proceeding with intent to:

(a) Influence the testimony of that person;

(b) Induce that person to avoid legal process summoning him to testify; or

(c) Induce that person to absent himself from an official proceeding to which he has been legally summoned.

(2) Bribing a witness is a Class C felony.

[Bribe Receiving by a Witness]

Sec. 5010. (1) A witness or a person believing he is about to be called as a witness in any official proceeding commits the crime of bribe receiving by a witness if he solicits, accepts or agrees to accept any pecuniary benefit upon an agreement or understanding that:

(a) His testimony will thereby be influenced;

(b) He will attempt to avoid legal process summoning him to testify; or

(c) He will attempt to absent himself from an official proceeding to which he has been legally summoned.

Existing Law
ORS
33.010
33.020

Section 7. Tampering with a witness. A person commits the crime of tampering with a witness if he knowingly induces or attempts to induce a witness or a person he believes may be called as a witness in any official proceeding to:

(1) Offer false testimony or unlawfully withhold any testimony; or

(2) Absent himself from any official proceeding to which he has been legally summoned.

COMMENTARY - TAMPERING WITH A WITNESS

A. Summary

This section deals with the same type of improper conduct covered by preceding sections 5 and 6, although the means of effecting the unlawful objective represents a less sinister influence.

Sections 5 and 6 involve the corrupt influencing of witnesses by bribery, whereas this section reaches those instances where persuasion or argument induce the witness to testify falsely or disobey legal process.

This type of legislation is discussed in Underhill's Criminal Evidence, (5th ed. 1956), section 526:

> "At common law, and now frequently by statute in many of the states, any attempt to retard or to prevent the attendance of witnesses called to testify in either civil or criminal proceedings...is a crime. It is immaterial that the attempt was unsuccessful, or that the obstructor refrained from the employment of violence or force and confined himself wholly to threats or scurrilous language, got the witness intoxicated so that he was unable to attend, or employed the machinery of the criminal law to prevent his attendance by preferring an unfounded charge against him, and, in collusion with a magistrate, procured his imprisonment....

"Intimidating a witness from testifying against one accused of a felony, though a misdemeanor, does not make the offender an accessory to the felony...the rules and principles laid down...are usually invoked in cases where private persons attempt to influence witnesses who were called to testify against the accused. They are, of course, equally applicable where police officials or public prosecuting officers practice similar methods of intimidation upon a witness for the accused...." (See also, Prosecutor's Duty to Call Witnesses, Wash. Un. L.Q., p. 68 (1966)).

The proposed provision is limited to three prohibited objectives:

(1) Inducing a witness to testify falsely.

(2) Inducing a witness to withhold testimony lawfully required to be given.

(3) Inducing a witness to violate the legal dictates of process.

It is not necessary for completion of the crime that the attempt to wrongfully influence the witness be successful:

"It is not necessary that defendant succeed in his attempt to unlawfully endeavor to influence a witness under subpoena to appear for a grand jury for a conviction for obstructing justice to be sustained." (See U. S. v. Knohl, (C.A.N.Y.), 379 F.2d 427 (1967)).

"Influencing, or attempting to influence a witness in regard to testimony he will give, or inducing or attempting to induce a witness to absent himself and therefore not to give any testimony, is an obstruction of justice...it is a misdemeanor under the common law and an offense by statute in many jurisdictions." (See State v. Hamshaw, 61 Wash. 390, 392, 112 P. 379).

It would not be a violation of this section to persuade a witness to lawfully refuse to testify on grounds of personal privilege or to induce a witness to avoid process by leaving the jurisdiction of the court. The latter conduct, if engaged in by an attorney, may raise certain ethical questions but should not be subject to criminal liability since neither the means used or the end sought is independently unlawful.

It is anticipated that this section would be graded a lesser offense than sections 5 and 6.

B. Derivation

The section is derived from Michigan Revised Criminal Code section 5020, which used as its source New York Revised Penal Law section 215.10 and Model Penal Code section 241.6.

C. Relationship to Existing Law

There is no existing Oregon statute directly in point. Violations of this type would probably be punished under ORS 33.010 and 33.020, the civil and criminal contempt provisions. The discussion of existing Oregon law in connection with sections 5 and 6 would be equally applicable to this section.

That this type of legislation is recognized in Oregon is illustrated by 11 Op. Att'y. Gen. (22-24) 296:

> "It is too well established to need citation of authorities that a witness before a court or grand jury shall not be intimidated or prevented from testifying to facts within his knowledge, and that any person guilty of acts calculated or intended to intimidate or prevent such witness from testifying is amenable to the law, and merits severe punishment."

TEXT OF REVISIONS OF OTHER STATES

Text of Model Penal Code

Section 241.6. Tampering With Witnesses and Informants; Retaliation Against Them.

(1) Tampering. A person commits an offense if, believing that an official proceeding or investigation is pending or about to be instituted, he attempts to induce or otherwise cause a witness or informant to:

(a) testify or inform falsely; or

(b) withhold any testimony, information, document or thing; or

(c) elude legal process summoning him to testify or supply evidence; or

(d) absent himself from any proceeding or investigation to which he has been legally summoned.

The offense is a felony of the third degree if the actor employs force, deception, threat or offer of pecuniary benefit. Otherwise it is a misdemeanor.

(2) Retaliation Against Witness or Informant. A person commits a misdemeanor if he harms another by any unlawful act in retaliation for anything lawfully done in the capacity of witness or informant.

(3) Witness or Informant Taking Bribe. A person commits a felony of the third degree if he solicits, accepts or agrees to accept any benefit in consideration of his doing any of the things specified in clauses (a) to (d) of Subsection (1).

Text of New York Revised Penal Law

Section 215.10. Tampering with a witness

A person is guilty of tampering with a witness when, knowing that a person is or is about to be called as a witness in an action or proceeding, (a) he wrongfully induces or attempts to induce such person to absent himself from, or otherwise to avoid or seek to avoid appearing or testifying at, such action or proceeding, or (b) he knowingly makes any false statement or practices any fraud or deceit with intent to affect the testimony of such person.

Tampering with a witness is a class A misdemeanor.

Text of Michigan Revised Criminal Code

[Tampering with a Witness]

Sec. 5020. (1) A person commits the crime of tampering with a witness if he attempts to induce a witness or a person he believes is about to be called as a witness in any official proceeding to:

(a) Testify falsely or unlawfully withhold any testimony; or

(b) Absent himself from any official proceeding to which he has been legally summoned.

(2) Tampering with a witness is a Class B misdemeanor.

Section 8. Tampering with physical evidence. A person commits the crime of tampering with physical evidence if, with intent that it be used, introduced or suppressed in a pending or prospective official proceeding, he:

(1) Destroys, mutilates, alters, conceals or removes physical evidence impairing its verity or availability; or

(2) Knowingly makes, produces or offers any false physical evidence; or

(3) Prevents the production of physical evidence by an act of force, intimidation or deception against any person.

COMMENTARY - TAMPERING WITH PHYSICAL EVIDENCE

A. Summary

This section is intended to complement preceding provisions designed to provide protection against the intentional subversion of "official proceedings". Section 9 of this Article prohibits tampering with "public records" and applies to the alteration or destruction of documents already legally recorded. This section extends that coverage to material that is intended to be introduced as evidence in an official proceeding.

Physical evidence is defined in section 1 (5) of this Article to mean anything of physical substance.

There is a uniform mens rea requirement applicable to all three subsections: an intent that the physical evidence be used, introduced or suppressed. There could conceivably be some close issues on whether a person has the right to destroy evidence prior to seizure or subpoena. If a legal right or authority to destroy such evidence exists, an actor would not be criminally liable unless he was motivated by the specific intent to suppress the evidence.

Under subsection (2), which bars the fabrication of physical evidence, the prosecutor must show both knowledge of the falsity and the intent that it be used or introduced in a pending or prospective official proceeding.

The section does not require either that the physical evidence be admissible or that it be material. This is consistent with the code's overall rejection of the defense of impossibility to criminal liability.

The crime of tampering with physical evidence is well established in American jurisprudence:

> "...Knowingly falsifying, fabricating, or suppressing material evidence is...an obstruction of justice.... In a number of states it is made a statutory offense to suppress evidence, either by wilfully destroying any book,paper, or other matter or thing which may be required in evidence, or to prevent by means of deceit or fraud, or by the use of any threat, menace, or violence, any party to an action or proceeding from obtaining or producing therein any book, paper, or other thing or matter that may be evidence...the falsification and fabrication of records, documents, certificates, and other written instruments which may be used for evidence, are also punishable both at common law and under statutes, as forgery." (1 Burdick, Law of Crime, §300 (1946)).

It has been held that specific intent to defraud is not a required element of the crime of offering false evidence:

> "By force of statute it may be an offense to prepare false evidence, or to offer in evidence a book or instrument in writing which has been forged or fraudulently altered, or to file a forged instrument; specific intent to defraud has been held not to be an element of such offense." (People v. McKenna, 11 Cal. 2d 327, 79 P.2d 1065).

For a discussion on the prosecutions duty to disclose all known evidence relevant to criminal prosecutions, see 14 U.C.L.A. Law Rev. 670 (1967) and 17 Baylor Law Rev. 400 (1965).

B. Derivation

The section is a composite of Michigan Revised Criminal Code section 5045 and New York Revised Penal Law section 215.40.

C. Relationship to Existing Law

The proposed provision would be new to Oregon law. An examination of existing statutes and reported cases reveal no comparable authority. As evidenced by the authorities cited in the summary there is ample support found in the common law for such legislation.

TEXT OF REVISIONS OF OTHER STATES

Text of Model Penal Code

Section 241.7. Tampering With or Fabricating Physical Evidence.

A person commits a misdemeanor if, believing that an official proceeding or investigation is pending or about to be instituted, he:

(1) alters, destroys, conceals or removes any record, document or thing with purpose to impair its verity or availability in such proceeding or investigation; or

(2) makes, presents or uses any record, document or thing knowing it to be false and with purpose to mislead a public servant who is or may be engaged in such proceeding or investigation.

Text of New York Revised Penal Law

Section 215.40. Tampering with physical evidence

A person is guilty of tampering with physical evidence when:

1. With intent that it be used or introduced in an official proceeding or a prospective official proceeding, he (a) knowingly makes, devises or prepares false physical evidence, or (b) produces or offers such evidence at such a proceeding knowing it to be false; or

2. Believing that certain physical evidence is about to be produced or used in an official proceeding or a prospective official proceeding, and intending to prevent such production or use, he suppresses it by any act of concealment, alteration or destruction, or by employing force, intimidation or deception against any person.

Tampering with physical evidence is a class E felony.

Text of Michigan Revised Criminal Code

[Tampering with Physical Evidence]

Sec. 5045. (1) A person commits the crime of tampering with physical evidence if, believing that an official proceeding is pending or about to be instituted and acting without legal right or authority, he:

(a) Destroys, mutilates, conceals, removes or alters physical evidence with intent to impair its verity or availability in the pending or prospective official proceeding.

(b) Knowingly makes, presents or offers any false physical evidence with intent that it be introduced in the pending or prospective official proceeding.

(2) "Physical evidence," as used in this section, includes any article, object, document, record or other thing of physical substance.

(3) Tampering with physical evidence is a Class A misdemeanor.

Section 9. Tampering with public records.

A person commits the crime of tampering with public records if, knowing that he lacks lawful authority, he knowingly destroys, mutilates, conceals, removes, makes a false entry in or falsely alters any public record.

Existing Law
ORS
162.620
165.105 (1)
181.420
181.990 (2)
171.410
171.430
192.005
192.020
192.030
192.080
192.105
192.110
192.120
192.310
192.140
192.150
192.160
192.170
651.150
357.875
357.855
46.750
46.760
43.010
43.020 (4)

COMMENTARY - TAMPERING WITH PUBLIC RECORDS

A. Summary

"Public record" is defined in section 1 (6) of this Article to include all official written material created by or received in any governmental office. The section applies to all records so defined and requires that the actor know that his conduct is unlawful and that he act intentionally.

The provision is designed to maintain the integrity of governmental administration. Its central purpose is not the protection of potential victims of altered records. If the alteration of records is accompanied by an intent to defraud the provisions of Article 17, section 3 (4) would apply, which makes the false alteration of a public record forgery in the first degree. If the false statement is submitted to a govern-

mental office or agency with the intent to mislead a public servant sections 2, 4 and 5 of Article 20, dealing with perjury, false swearing and unsworn falsification would apply.

The mens rea requirement of intent to mislead a public servant has been omitted from this section on two grounds: (1) a person who knowingly falsifies a public record is fully cognizant that his conduct will mislead those relying on the verity of the records; and (2) regardless of the actor's motive, such conduct has a deleterious effect in that it subverts general reliance on public records.

A review of the authorities discloses substantial support for criminal sanction in this area:

"Under statutory provisions, various acts done with respect to, or affecting, public records are made criminal offenses, such as the act of alteration, stealing, withholding or detaining public records from a successor in office, or refusing access to, or inspection of, public records...removing or secreting records...and forgery of public records or documents....Statutes punishing various offenses incident to public records have been held to apply to all public records and not merely to court records, to papers which a public officer is required to obtain in the discharge of his official duties, which have public importance and are of permanent value, and to include records of official business which an officer is not required to make, but which in fact he does make." (See 76 C.J.S., Sec.___, pp. 72-75).

B. Derivation

The basic language and structure of the section is derived from New York Revised Penal Law Section 175.20.

C. Relationship to Existing Law

There are a number of existing Oregon statutes that govern the custody and disposition of public records. The first two cited statutes deal directly with the unlawful destruction or alteration of public records:

ORS:

162.620: Destruction of public records. Any person who has legal custody of any public record, or any attorney, who wilfully destroys, secretes, mutilates, takes from the person having legal custody, or having possession wrongfully refuses or neglects to return or produce when required by law subject to maximum penalty of 1 year imprisonment or $500 fine.

ORS:

165.105 (1): Forgery of a public record declared a felony. Intent to defraud required.

181.420: Removing, destroying or mutilating records of Department of State Police.

181.990 (2): Penalty provision for violation of ORS 181.420. 1 year imprisonment or $500 fine.

171.410: "Legislative record" defined.

171.430: Disposal of legislative records by certain committees.

192.005: Definitions. (5) defines "Public record".

192.020: Public officers bound to give citizen copies of public writings.

192.030: Right to inspect public records.

192.080: Notice to State Archivist prior to destruction of records by state agency.

192.105: Authorization for state agency to dispose of its records.

192.110: State Board of Control's disposition of its valueless records.

192.120: Secretary of State's disposition of old vouchers.

192.310: Disposition of valueless records in custody of State Archivist.

192.140: Request by county for authority to dispose of its valueless records.

192.150: Disposition of valueless county records.

192.160: Disposition of valueless records in custody of governing body of county.

192.170: Disposition of materials without authorization.

651.150: Periodic destruction of records of Labor Bureau.

357.875: Access to public records by State Archivist.

ORS:

357.855: Advice and assistance on public record problems by State Archivist.

46.750: Destruction of files in civil actions.

46.760: Destruction of files in criminal actions.

In State of Oregon v. Brantley, 201 Or 637, 271 P.2d 668, (1954), the Court held that an unfiled certificate of nomination was not within the purview of ORS 165.105 making forgery of a public record a crime. The Court offered a judicial definition of "public record":

> "A 'public record', strictly speaking, is one made by a public officer in pursuance of a duty, the immediate purpose of which is to disseminate information to the public, or to serve as a memorial of official transactions for public reference."

In MacEwan v. Holm et al, 226 Or 27, 359 P.2d 413 (1961), the Court again discussed the problem of defining "public record":

> "....It would serve no useful purpose to attempt to frame a general definition of a public record. Whether a record is to be regarded as a public record in a particular instance will depend upon the purposes of the law which will be served by so classifying it. A record may be a public record for one purpose and not for another....It may be a public record sufficient to warrant judicial notice thereof, yet not be such a record as to require its retention under a statute permitting the destruction of certain records....It is sometimes said...that a writing is not a public record unless it is intended to serve as a memorial of some official action or, as it is frequently put, 'as evidence of something written, said, or done'...or that it is a writing prepared for the purpose of making information available to the public....It is sometimes said that to constitute a public record the writing must be one which is expressly required or authorized to be kept by law....According to the better view,...a writing need not be a document that is required by law to be kept as a memorial of official action in order to come within the definition of a 'public record'....
>
> "....It has been held that writings are regarded as a 'public writing' only if they fulfill two require-

ments: (1) they must be 'official documents' and (2) they must be 'the written acts or records of acts' of public officials....This narrow construction has been criticized. Pickerell, Secrecy and The Access to Administrative Records, 44 Cal. Law Rev. 305 (1956). We believe that the criticism is justified. The terms 'records and files' and 'public writings' as used in defining the scope of the right of inspection must be given a liberal construction consistent with the greatest public interest."

The purpose of this proposed provision is to maintain the reliability of governmental records. It is submitted that this objective will be best served by a liberal construction of the definitive scope of "public record" as made applicable to this section.

TEXT OF REVISIONS OF OTHER STATES

Text of Model Penal Code

Section 241.8. Tampering With Public Records or Information.

(1) Offense Defined. A person commits an offense if he:

(a) knowingly makes a false entry in, or false alteration of, any record, document or thing belonging to, or received or kept by, the government for information or record, or required by law to be kept by others for information of the government; or

(b) makes, presents or uses any record, document or thing knowing it to be false, and with purpose that it be taken as a genuine part of information or records referred to in paragraph (a); or

(c) purposely and unlawfully destroys, conceals, removes or otherwise impairs the verity or availability of any such record, document or thing.

(2) Grading. An offense under this Section is a misdemeanor unless the actor's purpose is to defraud or injure anyone, in which case the offense is a felony of the third degree.

Text of Illinois Criminal Code of 1961

Section 32-8. Tampering with Public Records

A person who knowingly and without lawful authority alters, destroys, defaces, removes or conceals any public record shall be fined not to exceed $1,000 or imprisoned in a penal institution other than the penitentiary not to exceed one year or in the penitentiary from one to 5 years, or both fined and imprisoned.

Text of New York Revised Penal Law

Section 175.25. Tampering with public records in the first degree.

A person is guilty of tampering with public records in the first degree when, knowing that he does not have the authority of any one entitled to grant it, and with intent to defraud, he knowingly removes, mutilates, destroys, conceals, makes a false entry in or falsely alters any record or other written instrument filed with, deposited in, or otherwise constituting a record of a public office or public servant.

Tampering with public records in the first degree is a class D felony.

Text of Michigan Revised Criminal Code

[Tampering with Public Records]

Sec. 4555. (1) A person commits the crime of tampering with public records if:

(a) He knowingly makes a false entry in or falsely alters any public record; or

(b) Knowing he lacks the authority to do so, he intentionally destroys, mutilates, conceals, removes or otherwise impairs the availability of any public records; or

(c) Knowing he lacks the authority to retain the record, he refuses to deliver up a public record in his possession upon proper request of a public servant lawfully entitled to receive such record for examination or other purposes.

(2) For purposes of this section, "public record" includes all official books, papers or records created by or received in any governmental office or agency.

(3) Tampering with public records is a Class A misdemeanor.

Section 10. Resisting arrest. A person commits the crime of resisting arrest if:

Existing Law
ORS
133.280
Ch. 34
164.392
206.050
206.060
206.070
477.365 (d)
401.150
483.112 (4)
484.100
145.110
163.010 (2)

(1) By using or threatening to use violence, physical force or any other means creating a substantial risk of physical injury to any person he intentionally prevents or attempts to prevent a person he knows to be a peace officer from making an arrest.

(2) It is no defense to a prosecution under this section that the peace officer lacked legal authority to make the arrest, provided he was acting under color of his official authority.

COMMENTARY - RESISTING ARREST

A. Summary

Section 2 of this Article deals generally with the obstruction of law enforcement activities. Subsection (2) of that provision expressly exempts interference with the making of an arrest. That exemption reflects recognition of the variable elements involved in resisting an arrest, e.g., the degree and kind of resistance manifested and the legality or illegality of the arrest.

The most common form of resistance to arrest involves physical violence directed at the arresting officer. Coverage is therefore limited to the use, or threatened use, of physical violence or other acts producing a "substantial risk of physical injury". As pointed out by the Michigan revisors:

> "Neither flight from arrest nor passive resistance should be made crimes in themselves. Ordinarily, the officer's authority to use force to effectuate an arrest provides an adequate remedy without any need for additional sanctions." (Mich. Rev. Crim. C., Committee Commentary (1967) p. 365).

Actual physical injury inflicted on a peace officer in the course of an arrest would, of course, constitute the crime of assault.

Subsection (1) incorporates the mens rea requirement of section 3, Refusing to assist a peace officer, that the actor be aware that the person he resists is a peace officer. This requirement is founded on legal precedent:

> "In order to constitute the offense of resisting or obstructing an officer in the performance of his duty, the person resisted must be an officer within the protection of the laws, actually performing a duty pertaining to his office at the time of the resistance or obstruction, and his status as an officer must be known to the person resisting or obstructing....
>
> "The offense of obstructing or interfering with an officer in the performance of his duty may be committed without any physical obstruction or interference, but it has also been held that in order to constitute the offense there must be some opposition by direct action and forcible or threatened means." (67 C.J.S., Sec. ___).

Subsection (2) denies a defendant charged under this section the defense that the arrest resisted was unlawful, provided the peace officer was acting "under color of his official authority".

"Color of authority" is defined to mean: "That semblance or presumption of authority sustaining the acts of a public officer which is derived from his apparent title to the office or from a writ or other process in his hands apparently valid and regular." (Black's Law Dictionary 331 (4th ed. 1957)).

The adoption of subsection (2) would be a departure from the common law rule and the majority view in the United States today on a person's right to resist by force an illegal arrest. There has been extensive examination and discussion of the prevailing law in this area in recent years:

Waite, The Law of Arrest, 24 Tex. L. Rev. 279,304 (1946):

> "The right of an arrestee to resist unlawful arrest is uncertain in its ultimate extent. One has no right at all to resist a lawful arrest. And inasmuch as an absolutely innocent person may be lawfully arrested under certain conditions, it follows that innocence is no justification for resistance. The man who was not guilty of any crime may make himself a criminal by unlawful resistance to lawful arrest....

"On the other hand, oddly enough...the arrestee's actual guilt of the offense for which arrest is attempted does not of itself make the arrest lawful. Hence, though a perfectly innocent arrestee may sometimes be punishable for his resistance, a guilty arrestee may sometimes be excused for his resistance...."

A most comprehensive discussion of the problem is found in 3 Tulsa L.J. 40 (1966), in an article titled "Criminal Law: The Right to Resist an Unlawful Arrest: An Out-Dated Concept?":

"The recent 'civil rights' demonstrations have brought into sharp focus some of the problems inherent in the law of arrest....The right to be free of an unlawful arrest has been inherent in our Anglo-American jurisprudence since the signing of the Magna Carta in 1215....A majority of states recognize the right to resist an unlawful arrest...the guilty person may also resist an unlawful arrest. Professor John B. Waite, writing in the Michigan Law Review, commented:

> 'As a matter of common sense, the average man may feel startled at the idea that a person guilty of a felony or misdemeanor possesses a legal right to resist the police officer who endeavors to arrest him; but such appears to be the law.' (Waite, Public Policy and The Arrest of Felons, 31 Mich. L. Rev. 749, 754-55 (1933)).

'In a recent Washington case, the Court said:

> 'Every man, however guilty, has a right to shun an illegal arrest by flight.' (State v. Rousseau, 40 Wash. 2d 92, 241 P.2d 447,449 (1952)).

"....In the majority of the United States, the person sought to be arrested can resist that which he believes to be an unlawful arrest; an officer is bound, and under legal sanctions should he fail, to act aggressively and carry through with an arrest once he commences it.

"....The right to resist an unlawful arrest is recognized in 45 of the 50 states....The Uniform Arrest Act is an attempt, on the part of the educated, informed persons to provide a compromise between unbounded liberty and an ordered society. Section 5 of the Act provides:

> 'If a person has reasonable ground to believe that he is being arrested by a peace officer, it is his duty to refrain from using force or any weapon in resisting arrest regardless of whether or not there is a legal basis for the arrest.' (Uniform Arrest Act, §5, set out in full in 28 Va. L. Rev. 315, 343 (1942)).

"In...N.J....a court of appeals recently ruled that resistance to an unlawful arrest is unlawful. 'Self-help', said the court, 'is anti-social in an urbanized society.' (See Time, Nov. 12, 1965, p.61). Acting where the state legislature had not, the court said:

> 'We declare it to be the law of this state that a private citizen may not use force to resist arrest by one he knows or has good reason to believe is an authorized police officer, whether or not the arrest is illegal.'

"A person unlawfully arrested still has access to the traditional tort remedies for false imprisonment or false arrest....

"We submit that the legal right to resist an unlawful arrest is an outdated concept; it is founded on considerations perhaps valid centuries ago, but which should have no effect on the modern law of arrest.... What is acknowledged by every authority in the field is the desirability of maximum public security with minimum interference with public liberty. The law has the duty to mediate these opposites within the framework of American liberties...fully realizing that imposition by the law of Section 5 of the Uniform Arrest Act will lower the minimum allowable interference with individual liberties, it is nonetheless urged as the necessary compromise to protect both the individual and the officer from injury and even death....To temper the use of this non-absolute freedom to arrest, based on reasonable belief, legislation should be enacted, concurrent with this section of the Uniform Arrest Act, allowing the wronged individual to bring action in tort against both the arresting officer and the political subdivision by which he is employed."

A position in opposition to this view is expressed in 6 Ark. L. Rev. 53 (1951):

> "Several modern writers have suggested that the liberal common law theory which justifies physical resistance to unlawful arrest is no longer sound, i.e.,

> that a rule developed in an age when even temporary arrest was usually followed by extreme suffering is not now appropriate, since adequate protection is today generally afforded arrested persons by both civil and criminal courts....It has been argued, therefore, that peaceful submission to any arrest by an identified law enforcement officer should be mandatory irrespective of reasonableness. (See, Warner, Investigating the Law of Arrest, 26 A.B.A. J. 151,153 (1940); 23 Tulane L. Rev. 277 (1948)).
>
> "The advocates of such a doctrine apparently feel that any injury caused by ill-based or even capricious arrests would be more than counterbalanced by increased efficiency in law enforcement. Although it must be conceded that punishment should be exacted for obstructive interference with a peace officer's lawful performance of duty, effectuating the proposal to abolish the privilege of defending against unlawful arrest...would tend only to augment the likelihood of abuse by allowing law enforcement officers an unbridled power of arrest at the time it is made."

It is your reporter's position that self-help as a means of resisting an arrest made under color of authority should be discouraged. Such resistance tends to promote by response an escalation of force from the peace officer, which is likely to result in more serious consequences than would the improper arrest. In response to the expanding social problems created by an urbanized society the traditional tort remedies have been broadly liberalized in favor of the individual citizen. This current trend is reflected by the application of broad form liability insurance for state, county and minicipal police departments and the establishment of civil service review boards to pass judgment on the conduct of law enforcement personnel.

In those instances where the citizen believes an arrest to be illegal it is submitted that it would be conducive to the orderly administration of justice for the citizen to submit to arrest and seek redress through existing legal remedies.

B. Derivation

The section is derived, with substantial structural changes, from Michigan Revised Criminal Code Section 4625 and New York Revised Penal Law Section 205.30.

C. Relationship to Existing Law

There is no specific existing Oregon statute making it a substantive crime to forcibly resist an arrest. The requirements for a lawful arrest are set out in ORS Chapter 133. That chapter authorizes a peace officer to arrest a person under a warrant or without a warrant (1) for a crime committed or attempted in his presence; (2) when the person has committed a felony, although not in his presence; (3) when a felony has in fact been committed; or (4) when notified by telegraph, telephone or other means of communication by another peace officer that he holds a duly issued warrant for arrest.

ORS 133.280 provides that if after notice of intention to arrest the defendant, he either flees or forcibly resists, the officer may use all necessary and proper means to effect the arrest. ORS 133.270 and ORS 133.330 require that the arresting officer disclose his authority when proceeding under warrant and without a warrant.

ORS Chapter 34 codifies the common law remedy of the writ of habeas corpus, available to person unlawfully held in custody.

ORS 164.392 provides that "reasonable cause" shall be a defense to an action for false arrest arising out of the detention and interrogation of persons suspected of shoplifting.

ORS 206.050: Commanding assistance in process serving by sheriff.

ORS 206.060: When sheriff justified in executing process.

ORS 206.070: Excusing liability of sheriff in executing process.

ORS 477.365 (d): Power of fire wardens to make arrests.

ORS 401.150: Powers of peace officers from other states in emergencies. "Have and may perform in this state all police duties and functions and exercise police powers, including power of arrest, as bestowed on peace officers of this state as fully as such person might perform like duties and exercise like powers in the state of his residence."

ORS 483.112 (4): Arrest without warrant in radar cases.

ORS 484.100: Authority of police officer to arrest or issue citation.

ORS 145.110: Use of force to prevent crimes to person of property. Resistance to the commission of a crime may be lawfully made by a person about to be injured or by any other person in his aid or defense:

(1) To prevent a crime against his person.

(2) To prevent an illegal attempt by force to take or injure property in his possession.

It should be noted that resistance to an unlawful arrest is usually manifested by homicide or an assault and battery directed against the arresting officer. The defense raised by a defendant to criminal charges arising from such resistance is therefore self-defense, predicated on the theory that the crime of assault and battery was being committed against his person by the arresting officer. It would be necessary to amend ORS 145.110, or its comparable proposed justification provision, to reflect the change in the law represented by subsection (2) of this section.

ORS 163.010: First degree murder. (2) Any person who, without lawful excuse or justification, purposely kills any peace officer of this state or any municipal corporation or political subdivision thereof, when the officer is acting in the line of duty and is known to such person to be an officer so acting, is guilty of murder in the first degree.

The first two cited Oregon cases deal with the duties and immunities of public officers.

In Christ v. McDonald, 152 Or 494, 52 P. 655 (1936), the court stated:

> "The welfare of society imperatively demands that those who violate the law shall be promptly and speedily punished, and it is the duty of a policeman to make arrests where there is reasonable cause to believe that a party is guilty. A policeman is presumed to know the law regulating his duty and to act within the law. At the same time the law protects a person from a wrongful arrest or imprisonment."

In A. Antin, Administrator v. Union High School District No. 2 of Clatsop County et al., 130 Or 461, 280 P. 664 (1929), the court discussed a public officer's responsibility for wrongs committed against the public:

> "A public officer...is responsible to a private party for his own negligence or wrongful acts when acting beyond the scope of his authority, or when acting

within the scope of his authority if the wrong done is not a violation of a duty which he owes solely to the public.

"If the duty is solely a duty which the officer owes to the public, then the officer is not subject to the suit of a private party, even though it has resulted in injury to such party. But if the duty is one which the officer owes both to the public and to a private individual, and the private individual is injuriously affected specially, and not as a member of the public, then for such violation the injured party may sue for the wrong done."

The issue of official immunity was subject to the court's scrutiny in State v. Linville, 127 Or 565, 273 P. 338 (1928), wherein that issue in relation to resisting an unlawful arrest was considered:

"It is the policy of the state to clothe its servants with official immunities when engaged in official acts. The immunity belongs, not to the individual, but to the office, and it is the general rule that if the immunity is to be vindicated, the office must be proclaimed or made known to the officer, in order to punish a defendant for resisting an officer. This rule applies to a case of resistance. It should be remembered that an officer in the execution of his official duties, although he be unauthorized, and therefore a trespasser, yet he is not bound to submit to unreasonable and unnecessary violence and may defend himself against the same without being guilty of an assault. It is not necessary that where one is resisting an officer there should be a blow struck or force actually applied, though it is essential that the resistance should imply the application of force, actual or threatened."

There are two Oregon cases that deal specifically with the right of a citizen to employ force in resisting an unlawful arrest:

In State v. Meyers, 57 Or 50, 110 P. 407 (1910), the defendant was convicted of first degree murder for killing a municipal policeman who had taken him into custody without legal cause. In discussing the degree of force permissible in resisting an unlawful arrest the court stated:

"While there are cases holding that one threatened with unlawful arrest may use such force as may be necessary to free himself, and maintain his liberty,

> even to the extent of taking the life of the aggressor, we are inclined to adopt the more humane and civilized rule, that, where the arrest is made by a known officer and nothing is to be reasonably apprehended beyond a mere temporary detention in jail, resistance cannot be carried to the extent of taking life....We do not wish to be understood as holding that cases may not arise in which one may use a deadly weapon to protect himself against an unlawful arrest. Thus where the arresting party himself uses a deadly weapon or signifies his immediate intention to do so, or where an unauthorized person, being armed, attempts to break into one's dwelling to make an unlawful arrest, or where it is attempted in such a way as to put one in fear of death or great bodily harm, in such rare instances one may be justified in using a deadly weapon. But we wish to be understood as holding emphatically that, where the attempted arrest is made by a known officer, and there is nothing apprehended beyond a mere temporary detention, the question of the right of such officer cannot be tried out with a pistol."

In State v. R. B. Swanson, 119 Or 522, 250 P. 216 (1929), the defendant was charged with assault and battery against a municipal police officer during the course of an arrest. The defendant alleged that the arrest had been illegal and defended on grounds of self-defense. In reversing the conviction, the court held:

> "In the matter of self-defense, the defendant requested the following instruction: 'I further instruct you that if in resisting an illegal arrest the person arrested is placed in danger of bodily harm, or in reasonable fear of bodily harm, he may protect himself from such danger or threatened danger with whatever means may be necessary to make that protection effective.'
>
> "It was error to refuse this instruction. A person has a right to defend himself against an illegal arrest and to do so with such force as may be reasonably necessary to repel the assault involved in such wrongful detention, but the force used in defense must not be in excess of proportion to the force unlawfully applied in the attempt to arrest....In charging the jury on the right of self-defense, the court several times stated that the defendant had admitted the assault and battery. The whole theory of the defendant was that what he did was committed in self-defense. If that were true, there was no admission of assault and battery. A person resisting an unlawful

arrest, using no more force than is reasonably necessary to prevent the same, does not commit a crime and, hence, does not commit assault and battery. No crime is committed by lawfully resisting the commission of a crime upon one's person...."

Adoption of the proposed section would serve as evidence of a legislative intent that the right to forcibly resist an arrest effected under color of authority is no longer sanctioned. This change in existing law would be in accord with the modern trend:

"....It seems...that when an arrest is being made by a known peace officer, any disagreement as to the authority to make the arrest should be settled in court rather than by violence on the street. Hence the modern trend is in the direction of some such statutory provision as this: 'If a person has knowledge, or by the exercise of reasonable care, should have knowledge, that he is being arrested by a peace officer, it is the duty of such person to refrain from using force or any weapon to resist such arrest'[1]....in any event if the unlawful arrest is attempted under circumstances which obviously threaten no more than a very temporary deprivation of liberty, the use of deadly force in resistance is not privileged...."

1. West's Ann. Cal. Pen. Code 834a (1957 Amend.). This was adopted from §5 of the Uniform Arrest Act. It is in substance the provision of the Model Penal Code §3.04 (2) (a) (i). (Perkins, Criminal Law 997 (2d ed. 1969)).

TEXT OF REVISIONS OF OTHER STATES

Text of Model Penal Code

Section 3.04. Use of Force in Self-Protection.

(2) Limitations on Justifying Necessity for Use of Force.

(a) The use of force is not justifiable under this Section:

(i) to resist an arrest which the actor knows is being made by a peace officer, although the arrest is unlawful; or

Section 242.2. Resisting Arrest or Other Law Enforcement.

A person commits a misdemeanor if, for the purpose of preventing a public servant from effecting a lawful arrest or discharging any other duty, the person creates a substantial risk of bodily injury to the public servant or anyone else, or employs means justifying or requiring substantial force to overcome the resistance.

Text of Illinois Criminal Code of 1961

Section 31-1. Resisting or Obstructing a Peace Officer

A person who knowingly resists or obstructs the performance by one known to the person to be a peace officer of any authorized act within his official capacity shall be fined not to exceed $500 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both.

Text of New York Revised Penal Law

Section 205.30. Resisting arrest

A person is guilty of resisting arrest when he intentionally prevents or attempts to prevent a peace officer from effecting an authorized arrest of himself or another person.

Resisting arrest is a class A misdemeanor.

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

Section 35.37. Justification; use of physical force in resisting arrest prohibited

A person may not use physical force to resist an arrest, whether authorized or unauthorized, which is being effected or attempted by a peace officer when it would reasonably appear that the latter is a peace officer.

Text of Michigan Revised Criminal Code

[Resisting Arrest]

Sec. 4625. (1) A person commits the crime of resisting arrest if he intentionally prevents or attempts to prevent a peace officer, recognized to be acting under color of his official authority, from effecting an arrest of the actor or another, by:

(a) Using or threatening to use physical force or violence against the peace officer or another; or

(b) Using any other means creating a substantial risk of causing physical injury to the peace officer or another.

(2) It is no defense to a prosecution under this section that the police officer was acting unlawfully in making the arrest, provided he was acting under color of his official authority.

(3) Resisting arrest is a Class A misdemeanor.

[Obstructing a Peace Officer]

Sec. 4506. (1) A person commits the crime of obstructing a peace officer if, by using or threatening to use violence, force or physical interference or obstacle, he intentionally obstructs, impairs or hinders the enforcement of the criminal law or the preservation of the peace by a peace officer recognized to be acting under color of his official authority.

(2) It is no defense to a prosecution under this section that the peace officer was acting in an illegal manner, provided he was acting under color of his official authority.

(3) This section does not apply to the obstruction, impairment or hindrance of the making of an arrest.

(4) Obstruction of a peace officer is a Class A misdemeanor.

Existing Law
ORS
161.230
161.240
161.250
161.210 (2)
131.390

Section 11. Rendering criminal assistance; definition of term. As used in sections 12 and 13 of this Article, a person "renders criminal assistance" if, with intent to hinder the apprehension, prosecution, conviction or punishment of a person for the commission of a crime, or with the intent to assist a person in profiting or benefiting from the commission of a crime, he:

(1) Harbors or conceals such person; or

(2) Warns such person of impending discovery or apprehension; or

(3) Provides or aids in providing such person with money, transportation, weapon, disguise or other means of avoiding discovery or apprehension; or

(4) Prevents or obstructs, by means of force, intimidation or deception, anyone from performing an act which might aid in the discovery or apprehension of such person; or

(5) Suppresses by any act of concealment, alteration or destruction physical evidence which might aid in the discovery or apprehension of such person; or

(6) Aids such person in securing or protecting the proceeds of the crime.

COMMENTARY - RENDERING CRIMINAL ASSISTANCE; DEFINITION OF TERM.

A. Summary

The crime of "hindering prosecution" is derived from the common law and statutory offense commonly designated as being an "accessory after the fact" of a crime. Section 11 defines the crime of hindering prosecution in terms of "rendering criminal assistance" with a specified culpable intent. In establishing with precision the acts required to violate sections 12 and 13 a narrower concept of aid is created than that found in the common law. This difference is discussed in the Model Penal Code Commentary:

> "At common law the accessory after the fact was one who 'receives, relieves, comforts, or assists' the felon...help of any kind would suffice for conviction if the helper had the purpose to aid the principal in eluding justice....
>
> "The issue of policy is whether to forbid specified kinds of aid or aid of any character whatsoever. That there may be need to limit the kinds of aid which will be made criminal appears when we consider the possible application of the Section to a person who merely refuses to answer police questions about the fugitive, or gives misleading answers, or advises the fugitive to flee, or counsels him as to likely refuges of the law of extradition, or supplies bail....Passive failure to report the commission of an offense does not make the actor an accessory after the fact, although it might fall within the definition of misprison. If the community does not desire prosecution in these situations, it would seem preferable not to use the comprehensive term 'aid', but to specify the prohibited forms of aid...."

The mens rea requirement is an intent to hinder apprehension, prosecution, conviction or punishment of a person. The common law rule required that an accessory after the fact have guilty knowledge that the person aided committed the crime. This rule has been eliminated in modern legislation concerned specifically with aiding offenders to avoid arrest. It is submitted that the requirement of intent to hinder law enforcement makes unnecessary the further requirement of knowledge. Knowledge that the person aided has committed a crime is simply evidence of the intent to aid the offender to escape justice.

It might be noted that twenty-two state statutes exempt close relatives who protect a putative offender. This exemption is discussed with approval by Perkins:

"Some statutes...have made a more realistic approach than did the ancient law to the...problem [of] intimate relationships between the felon and one who conceals or otherwise aids him to protect him from the consequences of his crime. The common law was so strict...that the nearest relations are not suffered to aid or receive one another in the effort to save a felon from trial and punishment....

"In view of the moral timbre of our time, however, even if it be viewed as weakness, it is asking too much of a jury to expect a conviction of one who has merely opened his door or given some similar aid to a parent, child or other intimate relation....

"The ends of social discipline will be best served... by removing procedural technicalities from the prosecution and conviction of the accessory after the fact, by providing milder penalties for such a party, and by excluding from this type of accessoryship those who are intimately related to the principal...." (Perkins, Criminal Law 667 (2d ed. 1969).

The common law view in the area is given in 89 Pa. L. Rev. 589 (1941):

"Under the common law rule a wife cannot be accessory after the fact by reason of having concealed her husband or given him other assistance, knowing him to be a felon, but this does not apply to the husband who renders such assistance to his wife, nor to others such as parents or children. The exception has been extended somewhat liberally by some of the modern statutes...."

It is the judgment of your reporter that adoption of such an exemption would not serve the best interests of contemporary society. In a period of increasing social unrest and disorder the legislative imperative should properly be directed towards discouraging all forms of conduct demonstrably inimical to legal process. The intimate relationships of accessorial parties may always be weighed in the balance by those responsible for prosecuting and judging the offense.

B. Derivation

The section is derived from New York Revised Penal Law Section 205.50 and Michigan Revised Criminal Code Section 4635, both of which are patterned after Model Penal Code Section 242.3.

C. Relationship to Existing Law

ORS 161.230 defines an accessory as, "All persons are accessories who, after the commission of a felony, conceal or aid the offender, with knowledge that he has committed a felony, and with intent that he may avoid or escape from arrest, trial, conviction or punishment."

ORS 161.240 provides that an accessory shall be punished by imprisonment in the penitentiary for not more than five years, or by imprisonment in the county jail for not less than three months nor more than one year.

ORS 161.250 provides that an accessory is punishable though the principal is not tried.

ORS 161.210 (2) states that there are no accessories in misdemeanors.

ORS 131.390 requires that in the case of an accessory after the fact the action must be commenced and tried in the county where the crime of the accessory was committed.

In State v. Rosser, 162 Or 293, 86 P.2d 441 (1939),it was held that an accessory after the fact is not an aider and abettor under ORS 161.220, which abrogates the distinction between an accessory before the fact and a principal.

The federal accessory after the fact statute (18 U.S.C.A. 2 (a), 3, 2113 (a.b.)) was discussed in Orlando v. U.S., 377 F.2d 667 (C.A. Or 1967), wherein the court stated:

> "....The accused's presence or actual participation in commission of a bank robbery is not required to be proved to establish commission of the offense of accessory after the fact....All that was required to be proven was that the defendant had actual knowledge of commission of the offense and that he in some way assisted those who committed bank robbery in order to hinder or prevent their apprehension, trial or punishment...."

TEXT OF REVISIONS OF OTHER STATES

Text of Model Penal Code

Section 242.3. Hindering Apprehension or Prosecution.

A person commits an offense if, with purpose to hinder the apprehension, prosecution, conviction or punishment of another for crime, he:

(1) harbors or conceals the other; or

(2) provides or aids in providing a weapon, transportation, disguise or other means of avoiding apprehension or effecting escape; or

(3) conceals or destroys evidence of the crime, or tampers with a witness, informant, document or other source of information, regardless of its admissibility in evidence; or

(4) warns the other of impending discovery or apprehension, except that this paragraph does not apply to a warning given in connection with an effort to bring another into compliance with law; or

(5) volunteers false information to a law enforcement officer.

The offense is a felony of the third degree if the conduct which the actor knows has been charged or is liable to be charged against the person aided would constitute a felony of the first or second degree. Otherwise it is a misdemeanor.

Text of Illinois Criminal Code of 1961

Section 31-5. Concealing or Aiding a Fugitive

Every person not standing in the relation of husband, wife, parent, child, brother or sister to the offender, who, with intent to prevent the apprehension of the offender, conceals his knowledge that an offense has been committed or harbors, aids or conceals the offender, shall be fined not to exceed $1,000 or imprisoned in a penal institution other than the penitentiary not to exceed one year or in the penitentiary from one to 2 years, or both fined and imprisoned.

Text of New York Revised Penal Law

Section 205.50. Hindering prosecution; definition of term

As used in sections 205.55, 205.60 and 205.65, a person "renders criminal assistance" when, with intent to prevent, hinder or delay the discovery or apprehension of, or the lodging of a criminal charge against, a person who he knows or believes has committed a crime or is being sought by law enforcement officials for the commission of a crime, or with intent to assist a person in profiting or benefiting from the commission of a crime, he:

1. Harbors or conceals such person; or

2. Warns such person of impending discovery or apprehension; or

3. Provides such person with money, transportation, weapon, disguise or other means of avoiding discovery or apprehension; or

4. Prevents or obstructs, by means of force, intimidation or deception, anyone from performing an act which might aid in the discovery or apprehension of such person or in the lodging of a criminal charge against him; or

5. Suppresses, by any act of concealment, alteration or destruction, any physical evidence which might aid in the discovery or apprehension of such person or in the lodging of a criminal charge against him; or

6. Aids such person to protect or expeditiously profit from an advantage derived from such crime.

Text of Michigan Revised Criminal Code

[Rendering Assistance to Hinder Prosecution or Apprehension: Definition]

Sec. 4635. For the purposes of sections 4636, 4637 and 4640, a person renders assistance to another if he:

(a) Harbors or conceals such person;

(b) Warns such person of impending discovery or apprehension, except this does not apply to a warning given in connection with an effort to bring another into compliance with the law;

(c) Provides such person with money, transportation, weapon, disguise or other means of avoiding discovery or apprehension;

(d) Prevents or obstructs, by means of force, deception or intimidation, anyone from performing an act that might aid in the discovery or apprehension of such person; or

(e) Suppresses by an act of concealment, alteration or destruction any physical evidence that might aid in the discovery or apprehension of such person.

Section 12. Hindering prosecution in the second degree. A person commits the crime of hindering prosecution in the second degree if he renders criminal assistance to a person who has committed a felony.

Existing Law
ORS
161.210 (2)
161.230
161.240
161.250
131.390

Section 13. Hindering prosecution in the first degree. A person commits the crime of hindering prosecution in the first degree if he renders criminal assistance to a person known by him to have committed a crime punishable by life imprisonment.

COMMENTARY - HINDERING PROSECUTION IN THE SECOND DEGREE; HINDERING PROSECUTION IN THE FIRST DEGREE

A. Summary

Existing Oregon accessoryship law, ORS 161.240, provides that upon conviction the court may impose punishment rendering the offense a felony or misdemeanor. A five year maximum imprisonment is provided for a felony conviction.

The degree of the offense of "hindering prosecution" is here distinguished by the species of the underlying crime actually committed by the person aided. Insofar as section 12 is concerned it is sufficient if the actor knew or believed that the person aided committed some crime, or that the person aided is sought by law enforcement authorities for the commission of some crime. It is not necessary to a prosecution under section 12 to show that the actor knew or believed the person aided committed the specific felony which had in fact been committed.

To convict under section 13 the state must prove that the actor had knowledge that the person aided had engaged in conduct constituting a crime punishable by life imprisonment. In the absence of such knowledge the actor would still be guilty of hindering prosecution in the second degree on the basis of the felony actually committed.

It is anticipated that the first degree offense will be graded a felony with misdemeanor sanctions applicable to the second degree. As noted by the Model Penal Code Commentary:

> "....As the gravity of the original offense increases, the higher becomes the value set by the community upon successful pursuit of the culprit, so that even his relatives may well feel the moral compulsion to refrain from interfering with, if not actually to cooperate with, law enforcement...." (Model Penal Code Commentary, Tent. Draft No. 9, 202 (1958)).

B. Derivation

The two proposed sections are most closely patterned after New York Revised Penal Law Sections 205.55 and 205.60.

C. Relationship to Existing Law

ORS 161.240 establishes only one degree of accessory after the fact, but provides that it may be punished upon conviction as either a felony or misdemeanor.

The proposed sections would change existing law to the extent that the class of the underlying crime committed by the person aided would be determinative of the maximum penalty authorized.

TEXT OF REVISIONS OF OTHER STATES

Text of New York Revised Penal Law

Section 205.55. Hindering prosecution in the third degree

A person is guilty of hindering prosecution in the third degree when he renders criminal assistance to a person who has committed a felony.

Hindering prosecution in the third degree is a class A misdemeanor.

Section 205.60. Hindering prosecution in the second degree

A person is guilty of hindering prosecution in the second degree when he renders criminal assistance to a person who has committed a class B or class C felony.

Hindering prosecution in the second degree is a class E felony.

Section 205.65. Hindering prosecution in the first degree

A person is guilty of hindering prosecution in the first degree when he renders criminal assistance to a person who has committed murder or kidnapping in the first degree, knowing or believing that such person has engaged in the conduct constituting such murder or kidnapping in the first degree.

Hindering prosecution in the first degree is a class D felony.

Text of Michigan Revised Criminal Code

[Hindering Prosecution in the First Degree]

Sec. 4636. (1) A person commits the crime of hindering prosecution in the first degree if with the intent to hinder the apprehension, prosecution, conviction or punishment of another for conduct constituting murder in the first degree of a Class A or B felony, he renders assistance to such person.

(2) Hindering prosecution or apprehension in the first degree is a Class C felony.

[Hindering Prosecution or Apprehension in the Second Degree]

Sec. 4637. (1) A person commits the crime of hindering prosecution in the second degree if with the intent to hinder the apprehension, prosecution, conviction or imprisonment of another for conduct constituting a Class C felony or Class A misdemeanor, he renders assistance to such person.

(2) Hindering prosecution or apprehension in the second degree is a Class A misdemeanor.

[Securing the Proceeds of an Offense in the First Degree]

Sec. 4560. (1) A person commits the crime of securing the proceeds of an offense in the first degree if, with intent to assist another in profiting or benefiting from criminal activity constituting a Class A or B felony, he aids that person in securing the proceeds of the crime.

(2) Securing the proceeds of an offense in the first degree is a Class C felony.

[Securing the Proceeds of an Offense in the Second Degree]

Sec. 4561. (1) A person commits the crime of securing the proceeds of an offense in the second degree if, with intent to assist another in profiting or benefiting from criminal activity constituting a Class C felony or Class A misdemeanor, he aids that person in securing the proceeds of the crime.

(2) Securing the proceeds of an offense in the second degree is a Class A misdemeanor.

Section 14. Compounding. (1) A person commits the crime of compounding if he accepts or agrees to accept any pecuniary benefit upon an agreement or understanding that:

Existing Law
ORS
162.310
162.320
134.010
134.020
134.030
134.040

(a) He refrain from initiating prosecution for a crime; or

(b) He conceal from law enforcement authorities information relating to the commission of a crime.

(2) It shall be a defense to a prosecution under this section that the pecuniary benefit received did not exceed an amount which the defendant reasonably believed himself to be entitled as restitution or indemnification for harm caused by the crime.

COMMENTARY - COMPOUNDING

A. Summary

"Compounding a felony" is defined as: "The offense committed by a person who, having been directly injured by a felony, agrees with the criminal that he will not prosecute him, on condition of the latter's making reparation, or on receipt of a reward or bribe not to prosecute." (Black's Law Dictionary 358 (4th ed. 1951).

Since the actor, in effect, makes a bargain to thwart prosecution of a crime the offense constitutes an obstruction of justice. A passive failure to act does not constitute compounding unless bound by consideration. As noted in the Model Penal Code Commentary:

> "In the first place, absent consideration, a mere promise not to report the offender, no matter how serious the offense, is not punishable. Even where restitution is made in the hope of forbearance, and after the victim has adverted to possible prosecution, there is no compounding without proof of agreement or understanding to forbear in consideration of the payment.

> Many statutes expressly authorize compromise of criminal liability in designated classes of cases, usually under judicial supervision, and make the compromise a bar to later criminal prosecution...." (Model Penal Code Commentary, Tent. Draft No. 9, 204 (1958)).

The common law offense of compounding was limited to compounding a felony, although modern compounding statutes, coupled with compromise provisions, have departed from this rule. This trend is noted in 89 Pa. L. Rev. 590 (1941):

> "A 'compounder' is one who knows of the crime and agrees for some reward, received or promised, not to prosecute. The compounder of a felony seems anciently to have been regarded as a party to the felony, but in the latter common law his guilt was not that of the original felony but of a misdemeanor known as 'compounding a felony'. Compromising certain misdemeanors is now frequently authorized by statute. Compounding a felony is generally a crime, either felony or misdemeanor, and by some enactments the compounding of any offense is punishable unless a compromise is expressly allowed by law."

The section is limited in its scope to the person who accepts or agrees to accept the consideration. This limitation recognizes the intent of the statute to restrain the making of improper exactions and not to punish persons by whom such benefits are paid.

The law of compounding is succinctly reviewed in 55 Dickinson L. Rev. 356 (1951):

> "....The essential elements of the crime of compounding consist of (1) an agreement not to prosecute the perpetrator, (2) for a consideration to compound a crime, (3) which has already been committed....
>
> "(1) An agreement to forbear from a prosecution or to withhold evidence of the crime is essential...the agreement may be expressed or implied...it is immaterial whether the agreement is performed or not. The offense of compounding is complete on the making of the agreement, and the fact that the wrongdoer is later prosecuted does not affect it....
>
> "(2) The second essential element of the offense is that there must be a consideration for the agreement. The character of the consideration is immaterial. There may be anything of value, even a promise...the consideration need not be given by the person whose wrong is com-

pounded. It is not required that the defendant be benefited by the consideration. It is sufficient if he takes it for the benefit of another or the public.

"(3) The third ingredient of the offense is the actual commission of a crime....

"The perpetrator of the original crime need not be first tried and convicted. The later conviction or acquittal of the wrongdoer of the original offense is not a defense.

"The mental element required by the Pennsylvania statute is knowledge of the actual commission of the offense [Pa. Stat. Ann. Tit. 18, 4307]...and not a knowledge of the person who committed it....At common law the wrongdoer, or the person who pays the consideration, seems not to have been guilty. Some statutes, however, are so worded as to include such persons....

"Under some state statutes, the parties may compound certain offenses with the consent, and within the discretion, of the court....The effect of the settlement... is the recognizance is discharged or the prisoner is discharged by the magistrate, or the indictment is nolle prossed by the court....However, as a matter of fact, a settlement effected in the manner prescribed by the statute has a four-fold effect: (1) it relieves the defendant from criminal liability for the offense settled, (2) it renders valid and enforceable contract's given in effecting settlement, (3) it relieves the defendant from civil liability for the damage or injury, and (4) it relieves the defendant from criminal liability for compounding crime...."

Subsection (3) provides a defense based upon the compromise theory. It is recommended that in its final form reference should be made to companion legislation allowing for compromise of specified criminal transactions. This would, in effect, limit the defense to compounding offenses of a designated class, as misdemeanors involving a "private wrong" as opposed to a "public wrong", e.g., simple assault vs. assault on a public servant, and misdemeanors vs. felonies.

B. Derivation

The section is derived from New York Revised Penal Law section 215.45 and Model Penal Code section 242.5. Michigan rejected the defense provided for in subsection (3), which was characterized by New York and the Model Penal Code as an "affirmative" defense.

C. Relationship to Existing Law

ORS 162.310 is the basic Oregon compounding statute and enumerates essentially the same elements as embodied in the proposed section. Subsection (1) provides that if the crime is punishable by death or life imprisonment compounding may be punished by five years imprisonment. Subsection (2) provides a misdemeanorpenalty for all lesser crimes.

It is suggested that the proposed section be graded to take into recognition different degrees of compounding, i.e., providing both misdemeanor and felony penalties based upon the degree of social harm evidenced by the crime compounded.

ORS 162.320 provides that a person may be indicted for compounding a crime even though the person guilty of the original crime has not been indicted or tried.

ORS 134.010 establishes the crimes subject to being compromised: "When a defendant is held to answer of a charge of misdemeanor for which the person injured by the act constituting the crime has a remedy by a civil action, the crime may be compromised, as provided in ORS 134.020, except when it was committed:

"(1) By or upon an officer of justice while in the execution of the duties of his office;

"(2) Riotously; or

"(3) With an intent to commit a felony."

This statute evidences past legislative intent as to what crimes were felt to be amenable to court approved compromise. The proposed defense in subsection (3) could be drafted to reflect a similar policy:

> [It shall be a defense to a prosecution under this section that the pecuniary benefit received did not exceed an amount which the defendant reasonably believed himself to be entitled as restitution or indemnification for harm caused by a crime constituting a misdemeanor, except when committed riotously or by or upon a public servant while executing the duties of his office.]

This option would, of course, repeal the following provisions, which provide the procedure and legal consequences of a court approved compromise:

ORS 134.020: Satisfaction of injured person; discharge of defendant.

ORS 134.030: Discharge as bar to prosecution.

ORS 134.040: Exclusiveness of procedure. No crime can be compromised nor can any proceeding for the prosecution or punishment thereof be stayed upon a compromise, except as provided in ORS 134.010 to 134.160.

The Oregon statute authorizing compromise of certain crimes was first discussed by the court in Saxon v. Conger, 6 Or 388 (1877), which involved the invalid compromise of a larceny offense:

> "....Under the criminal law of this state certain crimes may be compromised, but the crimes must be of the general class known...as misdemeanors. In order to effect a legal compromise, the defendant in the criminal action must have been held to answer on a charge of misdemeanor, and the same must fall under the category of those for which the law affords a civil remedy as well as a penal judgment....
>
> "In effecting a compromise of a crime...the person whose property has been stolen has no right to exact or demand or receive from the person committing the larceny anything more than the property or its value... that is to say, the law will not permit the process in a criminal case to be used as an instrument, by means of which a person can secure pecuniary benefits to the prejudice of the other creditors charged with a crime...."

In State v. Ash, 33 Or 86, 54 P. 184 (1898), defendant police officer was convicted for compounding a crime on the basis of taking a $5.00 gratuity as consideration for failing to prosecute the operator of a bawdy house. In response to the defendant's position that the subsequent prosecution of the prosecutrix for keeping a bawdy house required an acquittal in his case, the court commented:

> "It is no defense to a prosecution for compounding a crime...that the defendant subsequently institutes a prosecution against the party whom he promised to protect....
>
> "Under [our] statute the offense is complete when the consideration or thing of value is received, or promise made, with such understanding or agreement; and a subsequent violation by a guilty party of his agreement is no defense to his prosecution, whatever may have been the rule at common law....

> "If the defendant...corruptly exacted a sum of money from the prosecutrix upon his agreeing to conceal her crime and not to prosecute or give evidence against her, he is guilty under the statute, although he retained no part of the consideration, and it would be no defense that he was acting under instructions of another...."

The only significant departure from existing law is embodied in subsection (3), which proposes a defense to the crime of compounding not heretofore found in Oregon law.

TEXT OF REVISIONS OF OTHER STATES

Text of Model Penal Code

Section 242.5. Compounding.

A person commits a misdemeanor if he accepts or agrees to accept any pecuniary benefit in consideration of refraining from reporting to law enforcement authorities the commission or suspected commission of any offense or information relating to an offense. It is an affirmative defense to prosecution under this Section that the pecuniary benefit did not exceed an amount which the actor believed to be due as restitution or indemnification for harm caused by the offense.

Text of Illinois Criminal Code of 1961

Section 32-1. Compounding a Crime

(a) A person compounds a crime when he receives or offers to another any consideration for a promise not to prosecute or aid in the prosecution of an offender.

(b) A person convicted of compounding a crime shall be fined not to exceed $500.

Text of New York Revised Penal Law

Section 215.45 Compounding a crime

1. A person is guilty of compounding a crime when:

(a) He solicits, accepts or agrees to accept any benefit upon an agreement or understanding that he will refrain from initiating a prosecution for a crime; or

(b) He confers, or offers or agrees to confer, any benefit upon another person upon an agreement or understanding that such other person will refrain from initiating a prosecution for a crime.

2. In any prosecution under this section, it is an affirmative defense that the benefit did not exceed an amount which the defendant reasonably believed to be due as restitution or indemnification for harm caused by the crime.

Compounding a crime is a class A misdemeanor.

Text of Michigan Revised Criminal Code

[Compounding]

Sec. 4530. (1) A person commits the crime of compounding if he accepts or agrees to accept any pecuniary benefit in consideration for:

(a) Refraining from seeking prosecution of an offense; or

(b) Refraining from reporting to law enforcement authorities the commission or suspected commission of any offense or information relating to the offense.

(2) Compounding is a Class A misdemeanor.

Section 15. Simulating legal process. A person commits the crime of simulating legal process if he knowingly issues or delivers to another any document that in form and substance falsely simulates civil or criminal process.

Existing Law
ORS
165.265
697.261

COMMENTARY - SIMULATING LEGAL PROCESS

A. Summary

"Simulate" is defined by Black as: "To assume the mere appearance of, without the reality; to assume the signs or indications of, falsely; to counterfeit; feign, imitate; pretend." (Black's Law Dictionary 1555 (4th ed. 1951)).

The proposed section is designed to discourage creditors from using misleading documents in the debt collection process. The mens rea requirement is the "knowing" issuance or delivery of simulated legal process. Coverage includes both criminal and civil process, and is not limited to legal process issued by a court of this state.

B. Derivation

The proposed section is derived from Michigan Revised Criminal Code Section 5055 and Illinois Criminal Code Section 32-7.

C. Relationship to Existing Law

ORS 165.265 reads: "Use of false pretense in collecting debts. Any person who uses or employs any false pretenses as defined in this section in collecting or attempting to collect any debt or purported debt shall be punished, upon conviction, by a fine of not less than $25 nor more than $500. For the purposes of this section the sending by mail, or the delivery to any person of any document, letter or other paper which falsely appears or purports to be a court order or any other legal process, or which is intended to so purport, shall be conclusively presumed to be a false pretense."

ORS 697.270 states that a conviction for obtaining money under false pretenses is grounds for the suspension, revocation or refusal to renew a collection agency license.

It is submitted that simulation of legal process is more properly classified as a crime involving interference with judicial process. The false simulation of a court order subverts the legitimacy of judicial administration by impairing public confidence in the genuine article. The culpability factor inherent in such conduct is not generally associated with traditional elements of criminal fraud, in that the underlying obligation giving rise to the conduct is itself legally recognizable.

TEXT OF REVISIONS OF OTHER STATES

Text of Illinois Criminal Code of 1961

Section 32-7. Simulating Legal Process

A person who issues or delivers any document which he knows falsely purports to be or simulates any civil or criminal process shall be fined not to exceed $500 or imprisoned in a penal institution other than the penitentiary not to exceed 6 months, or both.

Text of New York Revised Penal Law

Section 190.50 Unlawful collection practices

A person is guilty of unlawful collection practices when, with intent to enforce a claim or judgment for money or property, he knowingly sends,mails or delivers to another person a notice, document or other instrument which has no judicial or official sanction and which in its format or appearance, simulates a summons, complaint, court order or process, or an insignia, seal or printed form of a federal, state or local government or an instrumentality thereof, or is otherwise calculated to induce a belief that such notice, document or instrument has a judicial or official sanction.

Unlawful collection practices is a class B misdemeanor.

Text of Michigan Revised Criminal Code

[Simulating Legal Process]

Sec. 5055. (1) A person commits the crime of simulating legal process if he knowingly delivers or causes to be delivered to another a request for the payment of money on behalf of a creditor that in form and substance simulates any legal process issued by any court of this state.

(2) Simulating legal process is a Class B misdemeanor.

Text of Proposed Minnesota Criminal Code

Section 609.51 Simulating Legal Process

Subdivision 1. Acts Prohibited. Whoever does any of the following may be sentenced to imprisonment for not more than 90 days or to payment of a fine of not more than $100:

(1) Sends or delivers to another any document which simulates a summons, complaint, or court process with intent thereby to induce payment of a claim; or

(2) Prints, distributes, or offers for sale any such document knowing or intending that it shall be so used.

Subd. 2. Exceptions. This section does not prohibit the printing, distribution or sale of blank forms of legal documents for use in judicial proceedings.

COMMENT ON CRIMINAL CONTEMPT LEGISLATION:

The New York and Michigan Criminal Code both have provisions directed at criminal contempt. Michigan Revised Criminal Code section 5050 is entitled Interfering with Judicial Proceedings, while New York Revised Penal Law section 215.50 defines the crime of criminal contempt.

ORS 33.010 defines contempt as made applicable to Oregon law. ORS 33.020 through 33.150 provides the procedure and penalty employed in enforcing contempt proceedings.

Rust v. Pratt, 157 Or 505, 72 P.2d 533 (1937) reiterated the almost universal rule that "the power to punish for contempt of court is inherent in all courts".

In State v. Downing, 40 Or 309, 58 P. 863, 66 P. 917 (1901), the court broadly defined criminal contempt:

> "A criminal contempt consists in disrespect of the court or disobedience of its process whereby the administration of justice is obstructed, or in any act or language of a person which tends to bring the court into disrespect."

In State v. Sieber, 49 Or 1, 88 P. 313 (1907), the court held that a proceeding for criminal contempt is not a criminal prosecution within the meaning of the Constitution, Article 1, 12, which protects a prisoner from testifying against himself.

While certain forms of contempt are punishable by up to six months imprisonment such proceedings have traditionally been considered to be only quasi-criminal in nature. This anomaly in the law is discussed by Perkins:

> "Whether 'criminal contempt' really is or is not a crime is a question as to which there has been much dispute. A prosecution for criminal contempt is not itself a criminal case, it has been said, and in the words of another court, a criminal contempt is 'in the nature of, but not, a crime.' On the other hand, it has been stated without qualification that it is a criminal offense. Certainly the misconduct involved in criminal contempt is of the general character of obstruction of justice, and as such is social harm which is defined and made punishable by law,--which brings it squarely within the definition of crime. And all doubt on this point was removed by [Bloom v. Illinois, 391 U.S. 194, 201, 88 S. Ct. 1477, 1481 (1968)] in which the Supreme Court said: 'Criminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both.'"

In Green v. United States, 356 U.S. 165, 78 S Ct. 632 (1958), the Supreme Court held that the federal constitution confers no right to a jury trial in a contempt case. And then in Bloom, supra, decided just ten years after Green, the Court moved to an entirely new position. "Our deliberations have convinced us", the Court said, "that serious contempts are so nearly like other serious crimes that they are subject to the jury trial provisions of the Constitution, now binding on the States, and that the traditional rule is constitutionally infirm insofar as it permits other than petty contempts to be tried without honoring a demand for a jury trial."

The Court did not define a line of distinction between punishments that may be considered "petty" and those that cannot. In the Bloom case it held that a sentence of 24 months imprisonment clearly defined the contempt as serious. In Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216, 88 S. Ct. 1472 (1968), decided the same day as Bloom, the Court held that a contempt punishable by ten days in jail and a $50 fine was petty. It was said obiter that "it is clear that a six-months sentence is short enough to be petty."

The maximum punishment for "serious contempt" in Oregon is six months imprisonment and a $300 fine. (See ORS 33.020). The limitation would appear to restrict contempt proceedings in Oregon to "petty offenses", as viewed by the United States Supreme Court, negating the constitutional necessity for a jury trial.

The Michigan revisors pointed out that the adoption of a criminal contempt statute provided only an alternative route to punish for contempt. The power to punish for contempt is inherent in the courts and cannot be denied or substantially abridged by the legislature.

The policy question raised is the desirability of providing more serious penalties for certain forms of "serious contempt" than those presently available. If this question is decided affirmatively, a criminal contempt statute as part of the substantive criminal code should be considered.

Text of Existing Oregon Law

ORS 33.010 Contempts defined. (1) The following acts or omissions, in respect to a court of justice, or proceedings therein, are contempts of the authority of the court:

(a) Disorderly, contemptuous or insolent behavior toward the judge, while holding the court, tending to impair its authority or to interrupt the due course of a trial or other judicial proceeding.

(b) A breach of the peace, boisterous conduct or violent disturbance , tending to interrupt the due course of a trial or other judicial proceeding.

(c) Misbehavior in office, or other wilful neglect or violation of duty, by an attorney, clerk, sheriff or other person appointed or selected to perform a judicial or ministerial service.

(d) Deceit, or abuse of the process or proceedings of the court, by a party to an action, suit or special proceeding.

(e) Disobedience of any lawful judgment, decree, order or process of the court, except as provided in ORS 23.020.

(f) Assuming to be an attorney or other officer of the court and acting as such without authority in a particular instance.

(g) Rescuing any person or property in the custody of an officer by virtue of an order or process of the court.

(h) Unlawfully detaining a witness or party to an action, suit or proceeding, while going to, remaining at, or returning from the court where the same is for trial.

(i) Any other unlawful interference with the process or proceedings of a court.

(j) Disobedience of a subpena duly served, or refusing to be sworn or answer as a witness.

(k) When summoned as a juror in a court, improperly conversing with a party to an action, suit or proceeding to be tried at such court, or with any other person, in relation to the merits of such action, suit or proceeding, or receiving a communication from a party or other person in respect to it, without immediately disclosing the same to the court.

(L) Disobedience by an inferior tribunal, magistrate or officer of the lawful judgment, decree, order or process of a superior court or proceeding in an action, suit or proceeding contrary to law, after such action, suit or proceeding

Text of Existing Oregon Law (Cont'd)

has been removed from the jurisdiction of such inferior tribunal, magistrate or officer.

(2) The conduct specified in paragraphs (a) and (b) of subsection (1) of this section, when committed before a judicial officer, or disobedience of the lawful order or process of such officer, made in the cases specified in ORS 1.240, is also to be deemed a contempt of the authority of such officer.

TEXT OF REVISIONS OF OTHER STATES

Text of New York Revised Penal Law

Section 215.50 Criminal contempt

A person is guilty of criminal contempt when he engages in any of the following conduct:

1. Disorderly, contemptuous, or insolent behavior, committed during the sitting of a court, in its immediate view and presence and directly tending to interrupt its proceedings or to impair the respect due to its authority; or

2. Breach of the peace, noise, or other disturbance, directly tending to interrupt a court's proceedings; or

3. Intentional disobedience or resistance to the lawful process or other mandate of a court except in cases involving or growing out of labor disputes as defined by subdivision two of section seven hundred fifty-three-a of the judiciary law; or

4. Contumacious and unlawful refusal to be sworn as a witness in any court proceeding or, after being sworn, to answer any legal and proper interrogatory; or

5. Knowingly publishing a false or grossly inaccurate report of a court's proceedings; or

6. Intentional failure to obey any mandate, process or notice, issued pursuant to articles sixteen, seventeen, eighteen, or eighteen-a of the judiciary law, or to rules adopted pursuant to any such statute or to any special statute establishing commissioners of jurors and prescribing their duties or who refuses to be sworn as provided therein; or

7. On or along a public street or sidewalk within a radius of two hundred feet of any building established as a courthouse, he calls aloud, shouts , holds or displays placards or signs containing written or printed matter, concerning the conduct of a trial being held in such courthouse or the character of the court or jury engaged in such trial or calling for or demanding any specified action or determination by such court or jury in connection with such trial.

Criminal contempt is a class A misdemeanor.

Text of Michigan Revised Criminal Code

[Interfering with Judicial Proceedings]

Sec. 5050. (1) A person commits the crime of interfering with judicial proceedings if:

(a) He engages in disorderly, contemptuous or insolent behavior, committed during the sitting of a court in its immediate view and presence, and directly tending to interrupt its proceedings or impair the respect due to its authority;

(b) He intentionally creates a breach of peace or disturbance under circumstances directly tending to interrupt a court's proceedings;

(c) As an attorney, clerk or other officer of the court, he knowingly fails to perform or violates a duty of his office, or knowingly disobeys a lawful directive or order of a court;

(d) He knowingly publishes a false or grossly inaccurate report of a court's proceedings;

(e) Knowing that he is not authorized to practice law, he represents himself to be an attorney and acts as such in a court proceeding;

(f) He records or attempts to record the deliberation of a jury; or

(g) He knowingly fails to obey any order, process or notice lawfully issued pursuant to chapter 12 of Public Act No. 236 of 1961, as amended, being section 600.1201 and following of the compiled laws of 1948; Public Act No. 17 of 1953, as amended, being section 729.103 and following of the compiled laws of 1948; Public Act No. 83 of 1923, as amended, being section 725.101 of the compiled laws of 1948; or any other statute providing for the selection of jurors, or appropriate rules adopted pursuant to any such statute.

(2) Interfering with judicial proceedings is a Class B misdemeanor.