OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 3

First Meeting, July 20, 1968

Minutes

Members present: Judge James M. Burns, Acting Chairman
Mr. Donald E. Clark
Mr. Frank D. Knight
Senator Anthony Yturri

Absent: Representative Dale M. Harlan, Chairman

Also present: Professor Courtney Arthur, Reporter
Mr. Donald L. Paillette, Project Director
Professor George M. Platt, Reporter
Miss Kathleen Beaufait, Deputy Legislative Counsel
Mr. Dave Neeb, Multnomah County Sheriff's Office

The meeting was called to order by Judge James M. Burns, Acting Chairman, at 9:30 a.m. in Room 309 Capitol Building, Salem.

Classes of Crimes; Violations; Preliminary Draft No. 1; July 1968 (Art. 1)

Professor Courtney Arthur explained that the draft he had prepared on classes of crimes maintained Oregon's traditional classification of crimes as felonies and misdemeanors and also maintained Oregon's indictable misdemeanor classification providing for a crime punishable either as a felony or a misdemeanor and vesting the sentencing judge with discretion to fit the treatment of the offender to the nature of the individual. The draft, he advised, also contained a classification for petty misdemeanors plus a violation category to be used as a means of enforcing a civil violation. Professor Arthur pointed out that the draft provided that if a sentencing judge had before him a person who had been indicted for a crime which could be either a felony or a misdemeanor, and if that individual was placed on probation, the judge at that time was required to designate whether the crime was a felony or a misdemeanor. In contrast to this approach he noted that California in 1963 provided that the crime could be designated as a felony or misdemeanor on the motion of the accused or the prosecutor at the time the offender was placed on probation, at the time the probation was revoked, or at any time during probation. Senator Yturri questioned whether the fact that the man acted in a particular way during the probationary period should be the basis on which his offense should be called a felony or misdemeanor.

Judge Burns remarked that as society became more complex, the disabilities attaching to a felony conviction were increasing and because so many disabilities attached to a felony conviction which in and of themselves hampered the rehabilitation of the individual, many judges were reluctant to impose a felony sentence. He suggested that

the judge who was placing a man on probation be permitted to make the crime a misdemeanor at that time. If the offender's parole was later revoked, the judge should then have the freedom to make the crime a felony. Normally the offender would at that time be sentenced to the penitentiary and the crime would be a felony in any event but Judge Burns urged that maximum freedom be allowed the judge and that the Code be completely clear in this respect. Oregon case law at the present time, he said, was not clear on this point particularly with respect to whether a narcotics violation was or was not a felonious offense.

Both Senator Yturri and Miss Beaufait pointed out that a constitutional question was raised when the severity of the penalty was based on a man's conduct during probation. Mr. Knight proposed that the crime should be a felony up until the time the judge said it was a misdemeanor and Miss Beaufait replied that reducing the penalty for the crime on the basis of post-criminal conduct was not the same as increasing the penalty.

Mr. Knight described the practice followed by Judge Mengler in Corvallis with, for example, a youthful first offender caught in the act of burglary or other type of indictable misdemeanor offense. The judge placed him on probation, suspended imposition of sentence, and if the offender behaved well on probation, the offense was treated as a misdemeanor. If he misbehaved and the judge found that probation was not going to be effective, the probation was revoked and the offender sent to the correctional institution for treatment. This course, he said, placed the burden on the defendant to determine, by his behavior, whether his crime would be treated as a felony or a misdemeanor and in this respect had some rehabilitative effects.

Judge Burns agreed that this technique was widely used and was all right where the crime charged could be reduced to a lesser included offense but problems arose when that option was not present. Oregon cases, he said, had tended to say that even when a man was put on probation with no sentence imposed, certain crimes were still a felony. He expressed the view that it was important to make clear that whenever probation was granted, whether with no sentence imposed or with a sentence imposed and execution of sentence suspended, even though the offender could have been sentenced to the penitentiary, the crime was a misdemeanor as long as he was placed on probation.

Mr. Knight disagreed that a crime should automatically be a misdemeanor if probation was granted. There would be persons, he said, who clearly committed felonies but who could succeed on probation and the only way the felony could be placed on his record was to send him to the penitentiary. He was of the opinion that a burglar placed on probation and a burglar who had spent two years in the penitentiary should be treated equally if they were subsequently picked up for carrying a concealed weapon. He expressed approval of the California statute referred to earlier by Professor Arthur.

Judge Burns pointed out that when a man was called a felon, ancillary consequences thereby attached and if he was not going to be committed to an institution for the crime he committed, he should not be tagged as a felon. Senator Yturri agreed that Judge Burns' statement was a basic premise which a majority of people would accept.

Judge Burns commented that two questions were involved in this discussion. When the offender was before the judge, essentially he would either be confined or supervised. Once that decision had been made, the second question arose as to whether the offender was a felon or misdemeanant.

Senator Yturri proposed that the Commission grant the court authority to impose a sentence for any period of time, place the defendant on probation, and if he observed the rules of his probation, he would be a misdemeanant. If it was necessary to revoke his probation, then, again at the discretion of the judge, a felony sentence could be imposed. He commented that he was in favor of giving the judge a great deal of discretion and, with the exception of a few heinous crimes such as murder and rape, would not be averse to placing all crimes in the category of indictable misdemeanors. If an offender's misconduct was gross, he said, a judge would not say he was a misdemeanant.

Judge Burns suggested that the language in subsection (2) of the draft be expanded to include not only a probation without imposition of sentence but also imposition of sentence and suspension of execution of sentence because both types of treatment were used by judges.

Judge Burns observed that the committee was perhaps being tyrannized by the label of felony or misdemeanor and pointed out that the purpose of the Code should be to rehabilitate the offender so he would fit into society. Mr. Clark suggested that an "unlabeling" process might be helpful if a formal procedure were provided to say that a man was no longer a felon following a period of time in which he had proved himself to be deserving of exoneration. He said it would not be necessary to expunge his record but the purpose would be to let society know that the individual was no longer considered to be a felon. Senator Yturri commented that the law could not wipe felons clean as if the crimes had never been committed, and the best the Commission could do was to take a sensible course based upon the philosophy which went in the direction they thought proper.

Judge Burns asked what concensus there was among the members with respect to Professor Arthur's draft that at the time of probation the judge would probate the offender either as a felon or a misdemeanant. Mr. Knight said he wanted the judge to have that discretion but objected to forcing the court to make the decision at the time of sentence. Mr. Paillette noted that the draft would obviate the

problem discussed earlier that the nature of the punishment was going to be determined by what the man did after conviction; the facts of the crime would determine the classification of the crime rather than whether or not the offender turned out to be a good probation risk.

Judge Burns asked why two types of misdemeanors had been provided in the draft and Professor Arthur replied that the petty misdemeanor category might serve a useful purpose in correcting individuals convicted of petty crimes by being less destructive to them and it might also prove to be a helpful label for the future. Mr. Knight commented that if the Supreme Court were to recognize a category of minor offenses that would not come within the purview of statutes requiring court appointment of counsel, the petty misdemeanor classification might prove useful.

Senator Yturri suggested that crimes giving the court the discretion of imposing a sentence of from 30 days to a maximum of one year could be placed in the category of misdemeanors, and offenses which were not very important but should have some criminal sanction could be placed in the category of petty misdemeanors. Senator Yturri also pointed out that under the draft, a crime could only be a misdemeanor if the sentence imposed was exactly one year because, under subsection (4), it would be a petty misdemeanor if the sentence were less than one year.

Professor Arthur asked if the committee recommended that a misdemeanor carry a maximum sentence of one year and a petty misdemeanor a maximum sentence of 30 days. Judge Burns indicated there might be some petty misdemeanors which should carry a 60 day penalty. Miss Beaufait advised that the Oregon State Bar in recent years had asked that the legislature not set minimums in penalty sections and suggested that the draft avoid using terms such as "less than 30 days and not more than 60 days."

Mr. Paillette pointed out that the Model Penal Code had departed from what many states had done for years; i.e., label a crime by the nature of the penalty provisions defining the crime. Oregon statutes, he said, did not say a certain crime was a felony but said the crime was punishable by a sentence of, for example, ten years and by this designation it became a felony. The Model Penal Code had designated what the range of punishment would be for the various degrees of felonies, misdemeanors and petty misdemeanors and if the Commission adopted this approach, the crimes would be classified not by penalties but by labeling each crime to fit into one of the categories.

Judge Burns observed that it would be helpful to the committee if Professor Arthur would go through Volume I of ORS and make a list of crimes which had a maximum penalty of one year, those which carried a maximum of six months, 60 days, 30 days, etc. Mr. Paillette called attention to 40 Oregon Law Review 1, 71 (1960), containing a study by

Judge Beckett on penalties found in Oregon's penal statutes which might prove useful in preparing such a list. Professor Arthur agreed to prepare the compilation.

Senator Yturri asked which classification traffic offenses would fall under and suggested this question be explored. Miss Beaufait called attention also to the 990 penalty sections scattered throughout ORS in regulatory statutes. Senator Yturri noted that most of the 990 sections would fall within the petty misdemeanor classification but not necessarily all of them because there were degrees of gravity even in violations of administrative orders. Mr. Knight expressed the view that it was beyond the capabilities of the Commission to go through every section of the building code, for example, and determine whether each violation should be a petty misdemeanor or some other crime.

Mr. Paillette advised that the New York Revised Penal Law divided misdemeanors into Class A and Class B which, in effect, was the same as dividing them into misdemeanors and petty misdemeanors. Under their violations section, in an attempt to recognize some of the problems in other areas of their law, New York provided in section 55.10:

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

In the commentary to section 55.10, the New York code said:

> " . . . There are literally thousands of such offenses defined outside the Penal Law and there is no way to allocate them between the two basic misdemeanor classifications without separately evaluating each of them. Hence, the special category, designated 'unclassified misdemeanor,' was created to leave sentences of imprisonment and fines for these offenses substantially in the status quo."

Senator Yturri asked Miss Beaufait if she could assemble the 990 sections for the committee to give them some idea of the dimensions of the problem and was told that she would attempt such a compilation from a sample volume of ORS.

Miss Beaufait questioned the meaning of the term "this Code" used in the proposed draft and Professor Arthur replied that it was intended to refer to the criminal code. Miss Beaufait noted that subsection (3) referred to statutes enacted "subsequent thereto" and commented that no provision was made for statutes presently in existence.

Judge Burns asked Professor Arthur to redraft subsections (3) and (4) to define misdemeanor and petty misdemeanor in line with the committee's discussion bearing in mind the recent Supreme Court decisions concerning appointment of counsel with respect to serious crimes.

The committee generally agreed that subsection (5) covering a group of lesser crimes to be called "violations" was satisfactory.

Judge Burns questioned the advisability of including subsection (6). Professor Arthur replied that it was in the proposed draft because the Model Penal Code included the provision. Senator Yturri expressed the view that the safest course would be to retain subsection (6) in the event classification of a crime had been overlooked. Miss Beaufait suggested as a drafting technique that subsection (6) could be incorporated in the definition of each crime and said she would give Professor Arthur the exact language to accomplish this objective.

For purposes of the committee's further consideration, Senator Yturri suggested that subsection (2) be revised to expand the authority of the court to permit declaration of the crime as a misdemeanor or a felony at any time prior to the expiration of the probationary period or at the time of revocation of parole.

Mr. Clark suggested that the offender be remanded to the custody of the Director of Corrections so he could determine the best type of treatment for the individual. Miss Beaufait pointed out that the 1965 session of the legislature so provided and Judge Burns requested that the language in subsection (2) be made to conform to ORS 137.124 which provided that persons convicted of felonies be committed to the Corrections Division rather than the court designating the penal or correctional institution in which the defendant was to be confined. He reiterated his earlier suggestion that subsection (2) include provision for the court to either impose sentence and suspend execution of that sentence or to probate the defendant without imposition of sentence.

Professor Arthur outlined the following options which could be included in the redraft in cases where the judge granted probation on the charge of an indictable misdemeanor:

(1) The crime would be an automatic misdemeanor; or

(2) Discretion would be granted to the court to designate the crime a felony or misdemeanor at the time of imposition of sentence; or

(3) Discretion would be granted to the court to designate the crime a felony or misdemeanor at any time during probation or upon revocation.

Professor Arthur pointed out that the one hole that would remain would be the status of the offender during his probationary period. Mr. Knight urged that the revision clearly set out the defendant's status as either a felon or misdemeanant under these circumstances. Mr. Clark said he would be inclined to call the defendant a felon until he was designated otherwise by the judge.

Next Meeting

Judge Burns asked the subject of the next draft to come before Subcommittee No. 3 in addition to the redraft of classes of crimes and was told by Professor Arthur that he had completed a draft on the purposes of the Code and the principles of construction.

Mr. Paillette told the committee that Professor Platt had completed a draft on responsibility which this subcommittee would also consider. Professor Platt indicated that the subjects of Professor Arthur's drafts should take preference over the responsibility article and it was agreed that Professor Platt's drafts would nevertheless be circulated to the members and would be placed on the agenda at the earliest possible date. Professor Platt indicated he planned to attend all meetings of Subcommittee No. 3, whether or not the drafts he prepared were being considered.

A date for the next meeting was discussed and the committee agreed to meet at 9:00 a.m. on August 7, 1968.

The meeting was adjourned at 12:00 noon.

Respectfully submitted,

Mildred E. Carpenter, Clerk
Criminal Law Revision Commission