Tape No. 16

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OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 3

August 7, 1968

A G E N D A

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OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 3

Second Meeting, August 7, 1968

Minutes

Members Present: Representative Dale M. Harlan, Chairman
Judge James M. Burns
Mr. Donald E. Clark
Mr. Frank D. Knight

Also Present: Professor Courtney Arthur, Reporter, Willamette University College of Law
Professor George M. Platt, Reporter, University of Oregon Law School
Mr. Donald M. Paillette, Project Director
Miss Kathleen Beaufait, Deputy Legislative Counsel
Justice Gordon Sloan, Chairman, Bar Committee on Criminal Law and Procedure
Mr. Desmond D. Connall, Member, Bar Committee on Criminal Law and Procedure
Judge Roland K. Rodman, Member, Bar Committee on Criminal Law and Procedure
Mr. Daniel R. Remily, Student Research Assistant
Mr. Dave Neeb, Multnomah County Sheriff's Office

The meeting was called to order by Chairman Dale M. Harlan at 9:15 a.m. in Room 309 Capitol Building, Salem.

Minutes of Meeting of July 20, 1968

Judge Burns moved that the minutes of the meeting of July 20, 1968, be approved as submitted. Mr. Clark seconded and the motion carried unanimously.

Classes of Crimes; Violations; Preliminary Draft No. 2; August 1968

Section 2. Professor Arthur explained that section 2 of Preliminary Draft No. 2 on classes of crimes set forth several courses a judge could follow after a defendant had been convicted of a so-called "indictable misdemeanor" and provided that when the defendant was convicted of a crime which could either send him to the penitentiary or to the county jail, he was in effect convicted of a felony, but the court could sentence him to the county jail or impose a fine, and the crime would then be a misdemeanor. He noted that subsection (f) was derived from the Minnesota Criminal Code and would in effect reward the defendant for successful completion of probation. Subsection (g), he said, had been included to grant the power to the court to declare an offense to be a misdemeanor without having to search for a lesser included offense which might not exist and to discharge the defendant in circumstances where the court deemed it expedient not to impose a fine, sentence or probation.

Judge Burns pointed out that under the draft if there were some disposition of a case other than the possibilities listed in subsections (a) through (g), the crime would be a felony. Miss Beaufait replied that the question was discussed during the drafting process of whether imposition of a felony sentence and suspension of execution of that sentence should be a felony. Both Professor Arthur and Mr. Paillette were of the opinion that it should be a felony in that circumstance and the proposed statute was accordingly drafted in that manner.

Judge Burns said that if a man was sentenced to seven years in the penitentiary for burglary, execution of sentence was suspended and he was placed on probation and, as a condition of that probation, he was required to serve 30 days in the county jail, the committee might decide that offense was properly a felony. On the other hand, if a man was convicted of taking and using a vehicle and the court gave him probation and a fine under subsection (2) of section 2 or if the court probated him and imposed a jail sentence as a condition of probation, the crime would be a felony under the draft. Professor Arthur pointed out that the California distinction as defined in their case law was where the fine or jail sentence was imposed as a condition of probation and not the ultimate punishment, the man was guilty of a felony. If the ultimate sentence was to the county jail or was a fine, the crime was a misdemeanor. Under that interpretation, Judge Burns said, if a man were fined $500 and placed on probation, it would be a misdemeanor whereas if he were placed on probation and fined $500 as a condition of probation, the crime would be a felony, and he stated he could see no rational basis for such a result.

Mr. Paillette replied that if the defendant was fined or sentenced to the county jail, whether or not the punishment was a condition of probation, the court's findings would be made under the provisions of subsection (1). Judge Burns said he was not objecting to the breadth of the power given to the court but was objecting to the drafting inadequacies. Subsection (1), he noted, said that the crime was a misdemeanor if the court imposed a punishment other than imprisonment in the penitentiary or Oregon Correctional Institution, but a sentence imposed under subsection (2) could be a felony if that sentence were imposed as a condition of probation and he contended this was an absurd result.

Judge Rodman expressed the opposing view and said that the judge would make the decision knowingly and if the consequence of the decision was that the crime resulted in a felony conviction, it would be because the judge considered that to be the proper punishment.

Miss Beaufait expressed some concern over the language of the proposed statute and commented that some courts might not make this sensitive distinction between imposition of sentence preceding probation as opposed to a fine or jail sentence as a condition of probation, the consequence of the decision being the difference between a felony or misdemeanor conviction.

Mr. Knight asked if it was necessary to set forth in detail all the ways in which a crime could be classified as a misdemeanor and suggested that the draft merely say that the crime would be a felony until the court expressly treated it as a misdemeanor. Mr. Paillette was of the opinion that the judges might prefer a statute which would give them a specific guideline in this area rather than a general statement where there would be some question as to what their discretion and authority was in a given situation.

Judge Rodman concurred with Mr. Knight that it might be simpler to say that unless certain events occurred, the crime would be treated as a felony. Judge Burns suggested that subsection (1) of section 2 be retained with the addition of a statement that the imposition of a sentence to the penitentiary or OCI followed by suspension of execution thereof would not make the crime a felony. Whatever the judge then did with respect to probation, he said, the crime would still be a misdemeanor. Mr. Knight said such a provision, when probation was revoked, would cause a problem as to whether the defendant could then be sentenced to the penitentiary and Judge Burns said that drafting a modification to take care of this point should not pose an insuperable difficulty.

Chairman Harlan suggested that an amendment to subsection (2) (g) might solve the problem by adding "or any other sentence short of imposition of sentence to OCI or the penitentiary." Mr. Knight pointed out that his objection to the first draft on classes of crimes had been that the judge at the time of the original sentencing had to determine whether the sentence was for a felony or misdemeanor.

Judge Burns suggested that the reference to subsection (3), section 1, be deleted from subsection (2), section 2. He explained that the intent of section 2 was to enlarge upon the options available to the judge in an indictable misdemeanor situation and to state which of those options would thereafter be accompanied by the felony tag and which would be accompanied by the misdemeanor tag. Justice Sloan indicated he could not see how it was possible to list the numerous options or situations that might confront a judge.

Chairman Harlan said most of the material he had read on the subject of parole, probation and sentencing favored the indeterminate sentence with a parole board or some other agency working to equalize sentences. He asked what course the other states with newly revised codes had taken. Mr. Paillette replied that although he had not researched the question, it was his impression that states generally were moving away from the indeterminate sentence. The National Council on Crime and Delinquency contended that in practice the indeterminate sentence had resulted in longer sentences rather than shorter ones. He advised that the general direction appeared to be toward granting the courts and judges greater discretion and greater authority at the time of dealing with the offender. He expressed the view that the draft under consideration was a modest proposal in comparison with the Model Penal Code, for example. Under that

approach if the court felt that the crime should be handled as a lesser degree felony or as a misdemeanor, it would have the power to do so.

Professor Arthur commented that the American Bar Association draft on Standards Relating to Sentencing Alternatives and Procedures went further than the draft under consideration and adopted an approach very similar to the Model Penal Code. It said that for all crimes, if the defendant had been convicted of a felony and if the court concluded it would be unduly harsh to sentence the defendant to the term normally applicable to the offense, the court should be authorized to reduce the offense to a lower degree of felony or to a misdemeanor and to impose sentence accordingly.

Professor Arthur pointed out that the draft did not solve the question in the present law as to whether conviction for possession of marijuana was a felony or misdemeanor. Justice Sloan noted that Judge Sloper had ruled that since the law permitted a fine only, the crime should be classified as a misdemeanor but the Supreme Court had not yet ruled on the question.

Professor Platt expressed approval of the California approach where the judge was not required to make the crime a felony or misdemeanor at the time of imposition of sentence. He asked if under the proposed draft a judge would be tied to a misdemeanor sentence if the offender violated his probation and Mr. Paillette replied that the judge could not thereafter increase the penalty. Judge Burns asked if the judge could revoke probation and sentence the offender to the penitentiary and received a negative reply from Professor Arthur. Judge Burns expressed disapproval of this provision, and Professor Platt commented that courts might hesitate to say the crime was a misdemeanor at the time of sentencing because they wouldn't want to restrict their authority in the event the defendant later violated probation.

Mr. Paillette asked, with respect to subsection (2) (g), if it was contemplated that the court, without granting probation and without declaring the offense to be a misdemeanor, could discharge the defendant and the crime would stand as a felony even though no imprisonment had been imposed. Professor Arthur replied affirmatively and added that he was of the opinion, however, that additional provision would be required to give the court that power.

Mr. Clark urged that the committee adopt the philosophy that offenders should be committed to the Corrections Division rather than to the penitentiary or to OCI. Professor Arthur agreed and called attention to page 4 of the draft where this matter was discussed and noted that provision would be made to accomplish this in another article of the code.

Mr. Knight suggested that the draft might be simplified if it said that certain crimes which the judge could treat as either a

felony or a misdemeanor were "indictable misdemeanors" and such crimes would be felonies until the judge said in the record, "This is a misdemeanor." Chairman Harlan expressed concern that not everyone would be aware that he needed to apply to the court to have his crime determined to be a misdemeanor and suggested that the court be required to act one way or the other on each sentence so that no crime would be left in indefinite suspension as a felony. Judge Rodman agreed that under subsection (2) (e) it appeared there was no restriction placed on the period of time within which the court was to act on the sentence if the crime was to be changed from a felony to a misdemeanor conviction and asked if it was intended that a defendant should be able to return five or ten years later and request the court to declare his crime a misdemeanor.

In response to the Chairman's request for his comments, Mr. Connall remarked that the committee was apparently attempting to restate the law as it presently existed and to clarify what would happen if the court suspended imposition of sentence in a felony case where the option existed to impose a misdemeanor sentence. He criticized the use of the term "indictable misdemeanor" and noted that every misdemeanor was indictable. He said he was in favor of the court making a determination only after it had received a complete "work-up" on the defendant and then, if it decided to sentence him, he should be placed with the Division of Corrections which should have a wide range of options. What the committee appeared to be striving for, he said, was to erase the record of a young defendant convicted of stealing a car after he had successfully completed his probationary period.

Mr. Paillette pointed out that what the draft was endeavoring to accomplish was to classify the kinds of crimes the State of Oregon would recognize. This draft did not attempt to set out the different ways in which an offender could be dealt with by the court. The draft was an attempt to clarify each class of crime and not to set forth the full range and scope and authority of the court. The MPC, he said, dealt with those questions in a completely separate article. The fundamental policy question the subcommittee was faced with, he said, was whether or not they wanted to go in the direction proposed by the Model Penal Code, the ABA and the Model Sentencing Act which was to give much more discretion to the sentencing judge than presently existed in this state. Assuming that the Commission was so inclined to make that policy judgment, the question concerning indictable misdemeanors became moot. The rationale behind the MPC and the Model Sentencing Act, he said, was to fit the punishment to the offender rather than to the crime and this was what the present law attempted to do in a limited way with the so-called indictable misdemeanor.

Judge Burns said that it might be a better course to take at this time for the committee to recognize that the handling of the indictable misdemeanor was a policy decision that would have to be made later and to move ahead with section 1 of the draft. The

Commission might later decide, he said, to adopt the Model Penal Code approach and grant the court authority to reduce the sentences for all crimes in which case section 2 of the draft would become unnecessary. He suggested that for the time being the committee defer any action on section 2 of the draft recognizing that later on, depending on the power granted to judges, the committee may or may not have to reconsider the section.

Section 1. Justice Sloan reviewed recent United States Supreme Court decisions relating to the point at which a man's constitutional rights to an attorney, trial by jury, etc. attached. He said it was impossible to know whether the Supreme Court would extend these rights to a crime for which the punishment was a jail sentence of six months or less. When a man was taken to the police station, he said, it was impossible for the police officer to know whether the judge would eventually say his crime was a misdemeanor or a felony and if he was picked up for a petty offense, the officer could not know whether his constitutional rights would attach. He suggested that in place of the terms "felony" and "misdemeanor," "penal offense" and "non-penal offense" be substituted. Under a "penal offense," he explained, constitutional rights would attach because the defendant could be deprived of his liberty; under a "non-penal offense," they would not attach.

Professor Platt said that one of the reasons the "either/or" felony/misdemeanor category was used in the Oregon law was because of negligent homicide caused by automobile accidents. Many juries, he said, would not convict a driver of manslaughter where death resulted from an automobile accident and as a response to this problem, the legislature created the "either/or" category to allow the jury to return a felony or misdemeanor conviction as they deemed appropriate. He suggested that the committee adopt the felony and misdemeanor classifications but not the "either/or" classification.

Judge Burns commented that it was an oversimplification to suggest that the "either/or" classification stemmed from negligent homicide. He said there was a host of such statutes widely used by prosecutors -- to name two, "taking and using" as opposed to larceny of an automobile; larceny in a building which was a step down from burglary. He said to the extent the crimes could be categorized as first, second and third degree felonies or misdemeanors, it would undoubtedly solve many problems to adopt that approach.

Professor Arthur remarked that there was some merit in continuing to use terms with which everyone was familiar and the code might fare better with the legislature if the felony - misdemeanor terms were retained. He referred to Justice Sloan's concern with constitutional rights of defendants and said that by setting imprisonment for petty misdemeanors at 30 days or less, he was pushing the sentence down low with the thought in mind that constitutional limits might later be applied downward to that 30 day period.

Mr. Knight pointed out that there were many other situations which applied to the felony - misdemeanor classification other than imposition of sentence. For example, he said, the law of arrest was based around the felony - misdemeanor distinction and he indicated he would not favor abolition of the felony - misdemeanor classifications for that reason.

Mr. Paillette read the following commentary from Tentative Draft No. 2 of the Model Penal Code after the ALI had decided to retain the felony - misdemeanor classifications:

> "While the retention of these categories has some disadvantages, in that the felony concept tends to be used for many, varied, unrelated purposes, their abandonment involves so large a dislocation of procedure that the gain would not offset the loss. Retaining the felony concept does not, of course, preclude critical attention to specific consequences of the classification, as in the law of arrest or murder. That is a question to be faced as those consequences are examined."

Judge Burns also favored retention of the felony - misdemeanor divisions and said there was some value in adding a petty misdemeanor subdivision but expressed concern over the constitutional questions delineated by Justice Sloan. The United States Supreme Court had laid down certain guidelines, he said, for a misdemeanor sentence but with respect to a 30 day sentence he thought the committee might possibly be getting into trouble on the questions of necessity of assignment of counsel, necessity of jury trial plus the ancillary feature of a petty misdemeanor as a crime for purposes of impeachment, etc.

A recess was taken at this point after which Chairman Harlan suggested the committee give Professor Arthur some guidelines for redrafting the sections under consideration.

Mr. Clark asked if the draft excluded the possibility of including degrees of felonies in the code and was told by Professor Arthur that subject would be treated in another part of the code but this draft contemplated that both felonies and misdemeanors would carry varying degrees.

Judge Burns moved that the subcommittee tentatively approve section 1 of the draft on classes of crimes and that further consideration of section 2 be deferred with the understanding that Professor Arthur would redraft that section along the lines discussed by the committee. Mr. Clark seconded and the motion carried unanimously.

Purposes; Principles of Construction; Preliminary Draft No. 1; July 1968

Professor Arthur stated that the proposed draft on purposes and principles of construction was very much like the New York and Michigan codes but was considerably shorter than the Model Penal Code provisions covering this subject. He indicated he had included subsection (e), which was not found in the MPC, because he was of the opinion most people felt that public protection was one of the purposes of a penal code and it would be difficult to get a code adopted without some expression of purpose to that effect.

Professor Arthur called attention to subsection (c) and said that some of the greatest difficulties in the criminal law were caused by the use of terms such as "wilfully" and "maliciously" and crimes where no mental element was stated and urged that the code clarify the elements of each offense as far as the accompanying mental state was concerned. The draft, he noted, said "limit the condemnation of conduct as criminal when it is without fault" whereas the MPC went further and said "prevent the condemnation of conduct as criminal when it is without fault" but there was now so much in the law penalizing conduct which was "without fault" that it was difficult to state the purposes of the code without including the phrase. He was of the opinion that the code should at least limit situations where the conduct was without fault.

Mr. Knight remarked that if the conduct was negligent to the point that it became criminal, the act would be with fault whether or not it was with intent. Professor Arthur replied that the purpose of the code should be to say what the mental element was. If no element was stated or if the code did not say the conduct was criminal in the absence of a mental element, one of the stated elements in the general principles of liability would have to be found by the court before liability could be imposed, he said.

With respect to the principles of construction, Professor Arthur advised that the present law did away with the principle of strict construction that was the common law which said that the criminal statute was to be strictly construed in favor of the accused. He contended that the legislative intent in this regard should be continued and this formulation in the draft in subsection (2) was derived from the MPC, New York and Michigan.

Professor Platt observed there was somewhat of a contradiction in terms between subsection (1) (b), requiring that fair warning be given, and subsection (2). If the courts became too liberal, they could so construe the statute that the accused could not have been said to have received fair warning of what his crime was. He thought the court should have leeway in construing the act in the light of justice and fair import of terms but the draft would cast the defendant upon the discretion of the court not to violate the fair warning provision stated as one of the purposes of the code.

Professor Arthur observed that this was a criticism that had been made of the proposed formulation; yet he felt it was a proper and necessary part of the purposes of the code, and Professor Platt agreed.

Judge Burns referred to subsection (1) (c) and asked if there were any substantive crimes in the present law which would violate the spirit of that language. The committee mentioned statutory rape, contributing, crimes against children and involuntary manslaughter as examples. Professor Arthur advised that as drafting progressed, subsection (c) would cover a recognizable kind of fault that would fit under one of the mental elements. Its purpose was to put a brake on situations where a man could be punished severely where he was in truth without fault. Miss Beaufait added that it was intended to limit rather than prohibit conduct which was without fault.

Judge Burns asked if by using the word "limit" it was intended that the legislature would look at particular statutes and decide whether they were or were not within the spirit of these principles. Professor Arthur replied affirmatively and added that it was his hope that the legislature would not go further and further toward substantial sentences for conduct that was actually without fault.

Judge Rodman noted that in other parts of ORS -- insurance, real estate, securities -- there were hundreds of sections bearing criminal penalties which a person would not be aware of unless he were a lawyer and many of which contained no fault element. Professor Arthur replied that it was not the purpose of subsection (c) to eliminate any of those sections in other portions of ORS. The purpose was not to strike out what existed but to put a brake on future acts passed by the legislature. If there were an offense defined by a statute under the new code which said "intentionally," "knowingly," or "recklessly," for example, no problem would exist. But if the legislature passed a new statute prohibiting certain conduct and omitting a statement of the mental element, by that omission it would be the policy of the criminal code to require that one of those elements be proved. If the legislature does not want a mental element proved in the future, it will have to say so by stating that the particular statute covered a "without fault" situation.

Judge Rodman asked if subsection (c) would require amendment of every section of ORS which contained a penalty provision. Mr. Paillette replied that the draft was talking about the criminal code and amending other codes was beyond the scope of the Criminal Law Revision Commission. Judge Burns agreed that the Commission should not enter into a revision of the real estate or insurance codes, for example. Professor Platt held the opposing view that the entire ORS should be examined for criminal penalties in light of the mental element.

Judge Burns commented that the purposes and principles of construction might later need to be reexamined in light of substantive

decisions yet to be made but the committee had to begin somewhere with a guiding philosophy.

Mr. Paillette read section 15.10 of the New York code, included with the sections on culpability, which was an attempt to deal with the question of strict liability and the absence of the mens rea element in some of the New York penalty statutes:

> "The minimal requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform an act which he is physically capable of performing. If such conduct is all that is required for commission of a particular offense, or if an offense or some material element thereof does not require a culpable mental state on the part of the actor, such offense is one of 'strict liability.' If a culpable mental state on the part of the actor is required with respect to every material element of an offense, such offense is one of 'mental culpability.'"

Mr. Remily commented that there could be a distinction drawn between an "unlawful act" and a "crime" as defined by the code. The crime could contain the mental culpability element and an unlawful act could be the violation of a purely regulatory statute.

Miss Beaufait said she did not see how the committee could avoid going through the 990 penalty sections in ORS and called attention to a section she had found which said that violation of that section was "larceny by bailee" and the crime of larceny by bailee had been eliminated under the proposed theft statute. Mr. Paillette responded that other states had faced this same problem and when they submitted their criminal code to the legislature, they had included a recommendation that a further study be made in other areas of the code. He contended that revising and amending all of ORS was beyond the scope of the Commission and could not possibly be completed in the four years allotted. Judge Burns expressed agreement with Mr. Paillette's position.

Judge Burns then moved that the committee tentatively approve the draft on purposes and principles of construction and that subsection (e) be moved to the top of the list as subsection (a) and the other subsections renumbered accordingly. Mr. Knight seconded and the motion carried unanimously.

Next Meeting

A date for the next meeting of Subcommittee No. 3 was discussed and the members agreed on September 7. Mr. Paillette advised that Professor Platt's draft on responsibility would be considered at that time together with any additional material Professor Arthur might have prepared.

Mr. Connall asked if it would be of value to the committee in discussing the question of responsibility if he were to bring several psychiatric evaluations from the Multnomah County District Attorney's files and Chairman Harlan expressed approval of this suggestion.

Judge Burns asked the committee if they would object to his sending the responsibility draft to several psychiatrists in the Portland area who frequently testified in Multnomah County courts. He expressed the view that this was an area where the subcommittee should have the help of psychiatrists at the outset of their discussion. The members agreed this would be worthwhile and said they would welcome testimony from psychiatrists if they wished to appear. Mr. Paillette told Judge Burns he would distribute copies of the draft upon receipt of a list of names from him.

The meeting was adjourned at 11:30 a.m.

Respectfully submitted,

Mildred E. Carpenter

Mildred E. Carpenter, Clerk
Criminal Law Revision Commission