

Tapes #19 and 20
#19 - Side 2 only
#20 - Side 1 only

OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 3

Fourth Meeting, September 20, 1968

Minutes

Members Present: Representative Dale M. Harlan, Chairman, Subcommittee
No. 3
Judge James M. Burns
Mr. Frank D. Knight
Senator Anthony Yturri, Commission Chairman

Absent: Mr. Donald E. Clark

Also Present: Professor George M. Platt, Reporter, University of
Oregon Law School
Professor Courtney Arthur, Reporter, Willamette
University College of Law
Mr. Donald L. Paillette, Project Director
Dr. Joseph H. Treleaven, Oregon State Hospital
Mr. Jacob B. Tanzer, Member, Bar Committee on
Criminal Law and Procedure
Justice Gordon Sloan, Chairman, Bar Committee on
Criminal Law and Procedure (arr. 4:10 p.m.)
Miss Jeannie Jo Lavorato, Research Counsel

The meeting was called to order by Chairman Dale M. Harlan at
1:30 p.m. in Room 309 Capitol Building, Salem.

Responsibility; Preliminary Draft No. 2; September 1968; including
Partial responsibility due to impaired mental condition; and
Incapacity due to immaturity (Article 5)

Section 1. Partial responsibility due to impaired mental
condition. Chairman Harlan asked Professor Platt to comment on the
draft. Professor Platt first pointed out that the phrase in section 1,
"specific intent or purpose which is an element of the crime," was
designed primarily to indicate that only where a specific intent was
involved would the partial responsibility doctrine apply. The
California law evolving from the Wells-Gorshen doctrine, he said, was
quite broad and might be even broader than the language employed in
the proposed draft. While the Model Penal Code commentary contained
no discussion with respect to specific intent crimes, such as burglary
or premeditation, Professor Platt said his personal opinion was that
the best course would be to limit the partial responsibility doctrine
in Oregon to the specific intent element. He said there were two
questions to be considered in connection with section 1 of the draft:

(1) If the partial responsibility doctrine is adopted in Oregon,
should the defense be required to give notice to the state before the
trial that this particular defense would be raised?

(2) If a defendant succeeds in the partial responsibility defense, thereby successfully reducing a first degree murder charge to a second degree conviction, should the court have the discretionary power to commit that defendant to the State Hospital because of his mental defect or illness?

Judge Burns commented that a court could not be certain that the reduction from first to second degree murder was rendered by the jury because of the defendant's mental state. Since the jury was not required to articulate its reasons, their verdict might have been reached on some other basis.

Judge Burns then noted that Model Penal Code section 4.02 used the term "state of mind" and asked if there was a difference between that phrase and "specific intent or purpose" as employed in the proposed draft. Professor Arthur replied that he thought there was a difference. California equated state of mind with malice and malice could be something other than or in addition to specific intent or purpose, he said.

Mr. Knight was of the opinion that section 1 should be limited only to a possible reduction from a first to a second degree murder charge where, because of the defendant's mental condition, he was not able to premeditate and should not be applicable to other crimes. Professor Platt explained that the defense of partial responsibility went directly to an element of the crime and was distinguished from the defense of insanity in that respect because the courts universally looked at M'Naghten as a pure defense not unlike the statute of limitations.

Chairman Harlan reported that he had just had lunch with a group of judges where the question was discussed as to the advisability of confining to an institution a person acquitted under the partial responsibility defense. Those present, he said, felt there should be a mandatory commitment in that situation.

Mr. Tanzer commented that in the case of a conviction of second degree murder the judge was in a position to make some disposition of the defendant because there was a conviction, but in the crimes that did not deal with premeditation, the issue was the defendant's ability to form specific intent. Such cases generally concerned instances where the defendant was drunk and therefore didn't know what he was doing. Such a person, he said, was not ordinarily dangerous to society and these cases did not equate with the seriousness of cases tried under the M'Naghten rule. Professor Platt agreed that a person in this category would not be particularly dangerous to society and there was probably more reason to return him to the community than to incarcerate him.

Judge Burns commented that if alcoholism was later declared by the courts to be a mental disease or defect, the responsibility

defense would be opened further and this might cause a more severe problem, particularly in some of the petty type offenses engaged in by alcoholics such as shoplifting or theft and use of a credit card. It was conceivable in the future for a psychiatrist to testify that alcoholism was a mental disease and therefore the defendant could not have formed a specific intent.

In response to a question by Mr. Knight, Dr. Treleaven said that from the point of view of the behavioral scientist the amount of responsibility varied in the individual case from zero to any number representing the maximum responsibility of which that person was capable. Even the vaguest patients, he said, were capable of some degree of responsibility.

Professor Platt explained that the partial responsibility doctrine was designed to give the jury a place to go other than acquitting the defendant under the M'Naghten rule or finding him guilty. The jury might feel he shouldn't be convicted of murder in the first degree and yet believe he should not be discharged completely. Partial responsibility would provide a ground for compromise where the community feelings and the purposes of the criminal law could be served by finding the defendant guilty of a lesser offense.

Dr. Treleaven said his reaction was that this course might be going in the wrong direction by evading the question as to whether the defendant was responsible and should be punished. Society wanted protection from his repeating this sort of behavior; therefore, he would be sent to the State Hospital until he ceased to be a threat or a nuisance to society.

Mr. Tanzer commented that he would be wary of committing persons to a mental institution under a partial responsibility type of acquittal because this process would not sort out people who were suitable for treatment and who would make valid patients at the State Hospital. This group, he said, should not be considered analagous to those acquitted under M'Naghten. If the committee wanted to have some hold on this type of defendant, Mr. Tanzer suggested this be accomplished through the definitions of the crimes so that a crime without specific intent would remain a lesser included offense.

Mr. Paillette pointed out that some of these types of problems would be solved by adoption of the proposed crimes against property drafts. He commented that jurors were called upon to make value judgments and reach verdicts on the question of intent or on the question of premeditation and deliberation and, in support of the draft, he said that a rule which would allow the jury to have the benefit of more evidence and testimony, including expert testimony which would go to the issues of premeditation and deliberation, would assist the juries in discharging their responsibilities. Professor Platt added that the draft would not only enable the jury to have

greater breadth of discretion but the defendant himself, given a commitment proceeding of some sort, would be better off as would society, and he cited the case of State v. Van Kleeck, 85 Ad. Sh. 319 (1967), as an example of the type of situation in which the partial responsibility defense would have been of benefit to both the defendant and society.

Mr. Paillette commented that California was codifying the partial responsibility doctrine to require notice to the state of intent to use the partial responsibility defense in the same manner as notice was required in the insanity defense. Mr. Tanzer said he did not think the prosecutor was as interested in knowing ahead of time that the partial responsibility defense was going to be used as it was in being alerted to the fact that expert testimony was going to be brought in.

Judge Burns suggested that both sides be required to give notice if an expert witness was to be called and suggested this would solve the problem of using the partial responsibility defense as a substitute for the insanity defense.

Professor Platt called attention to the material contained in the members' notebooks taken from Tentative Draft No. 2 of the California Committee for Revision of the Penal Code which discussed, among other things, the problem of notice. He pointed out that this question was a procedural matter which the committee might not wish to consider at this time.

Senator Yturri observed that he did not see how it was possible to segregate the procedural aspects of this problem from the substantive. They were, he said, so interrelated that a proper decision could not be made on substantive questions without also deciding on procedural matters. Professor Platt concurred and added that the disposition of cases in these categories was more important than the rule adopted by the Commission.

Professor Platt again called attention to T.D. #2 of the California draft and advised that the drafts and commentary were so well done he felt it would be unnecessary to do an extensive amount of additional work on the subject. He said the only supplemental material the committee would need would be the present status of the Oregon law and that would be relatively easily determined. He recommended that the committee members study the California material before the next meeting.

Senator Yturri commented that when Governor Hatfield vetoed the legislative enactment of the ALI formulation in 1961, one of the reasons given in his veto message was that Oregon didn't have adequate facilities to care for the increased number of persons who would be sent to the State Hospital. If this formulation were now adopted, he asked if anyone was aware of how great a burden this would place upon the state. Judge Burns replied that he was not sure Governor Hatfield had sufficient factual basis to make that assertion. He said he had tried but had been unsuccessful in determining how many instances there had been in Multnomah County where the defense of insanity had

been raised. Senator Yturri said he understood Governor Hatfield's executive assistant had made that information available to the Governor and it might be possible for the committee to obtain those statistics.

Professor Platt said he doubted that adoption of the ALI formulation would substantially increase the number of patients in mental institutions because it would not cause a much greater number to qualify for the defense of insanity than qualified under the present rule, but adoption of the partial responsibility doctrine might cause more of an impact because those people had not been headed toward mental institutions.

Dr. Treleaven commented that a prison was traditionally considered to be a place to send someone for punishment and if he was not guilty, he couldn't be sent there. This concept, he said, did not make sense today because prisons had excellent rehabilitation programs. He indicated he would like to see the laws written so the institutions could be fully utilized to help people. He noted that if someone was mistakenly sent to the penitentiary, it was possible to transfer him to the State Hospital. On the other hand, if a person was sent to the Hospital who didn't fit into their program and who could be better treated at the penitentiary, it was impossible to transfer him to the prison facility. He recommended that some manner be established to accomplish this result.

Section 2. Incapacity due to immaturity. Professor Platt explained that his intent in drafting section 2 was to leave the present Juvenile Code completely untouched by this provision and not to affect the rule established in State v. Little, 241 Or 557 (1965). Section 2, he advised, dealt only with those offenders who for some reason had not been taken into the juvenile court for disposition of a criminal act committed at an age less than 14 years. It incorporated the common law rule to the effect that a person under seven is not criminally responsible for any conduct; between the ages of seven and 14 the child is presumed not criminally responsible but there is a rebuttable presumption which becomes weaker as he approaches the age of 14; over 14 he would be completely responsible for his act.

Chairman Harlan asked how the court would instruct on a rebuttable presumption which became weaker as the defendant grew older and was told by Professor Platt that no instruction would be given on this point.

Professor Arthur objected to a child being even partially responsible at age seven and was told by Professor Platt that it was not his or the committee's intention to advocate that particular age but simply to get the question before the members.

Mr. Knight observed that if the presumption of non-responsibility was raised to age 14, there would be a problem as to whether the

juvenile could be brought within the jurisdiction of the juvenile court. Professor Platt replied that it was the intent of the draft to state that the provision applied to trials in a court of criminal jurisdiction. The section dealt only with the small number of cases where an offender was under 16 when he committed an offense and was not apprehended until he was 18. He would be entitled to some kind of defense based on immaturity and the question before the committee was the age below which a child would be considered incapable of legally committing a crime.

Senator Yturri pointed out that when discussing adoption of a rule for insanity defense, the committee was trying to protect the defendant by determining what his mental capacity was at the time he committed the act; in section 2 the draft was saying that regardless of the mental ability of the individual, he could not be tried. The two, he said, appeared to be inconsistent.

Professor Arthur suggested that subsection (b) of the draft be eliminated and the age limit in subsection (a) raised to 15 rather than seven. Professor Platt said this proposal would eliminate the possibility of problems arising from language used in subsection (b) which was similar to language in the insanity defense section even though subsection (b) was not intended to be identified with the insanity defense.

Mr. Paillette commented that the higher the age limit was raised, the more important it became to retain the rebuttable presumption rather than to make incapacity a rule of law. He noted that some of the F.B.I. statistics showed that the greatest number of juvenile crimes were committed by 15 year olds.

Mr. Knight was opposed to including section 2 in the draft. Mr. Tanzer said that in the absence of the section, the common law would control and, as drafted, the proposal was a restatement of the common law. Judge Burns said he did not see how any court could mistake the purpose of the section when it clearly stated it was dealing with two very select groups of situations and nothing else.

Mr. Tanzer suggested section 2 (1) read "A person who is tried as an adult in a court of criminal jurisdiction:".

A recess was taken at this point after which Judge Burns moved, seconded by Chairman Harlan, that section 2 be amended to read:

"(1) A person who is tried as an adult in a court of criminal jurisdiction is not criminally responsible for any conduct which occurred when the person was less than 14 years old.

"(2) (No change from draft.)"

Judge Burns explained that the Little rule plus the speedy trial requirements solved the problems for those 14 and above and for those under 14, if they were not handled by a juvenile court before they reached age 19, the number of cases would be too small to cause concern. In reply to a question by Mr. Tanzer, Judge Burns said that under the amendment a person over 14 would not be criminally responsible, assuming he was handled as a juvenile, unless he was of a remandable age or unless his case fell under the Little rule in which case he could be held until he was old enough to be remanded.

Mr. Tanzer was critical of phrasing the statute in the negative and asked if the proposed amendment would automatically mean that a person over the age of 14 was criminally responsible. Judge Burns replied it would not have that result and he felt it was unnecessary to include a specific provision to that effect. If the amendment were adopted, he said, and a boy 14 1/2 years old killed his girl friend and was apprehended reasonably soon thereafter, he would probably be handled as a juvenile. If he was not caught until he was of a remandable age, he would be tried as an adult. Professor Platt expressed the view that the proposed amendment was quite clear and Mr. Paillette agreed. Vote was then taken on the motion to amend which carried with Mr. Knight abstaining.

Section 2, subsection (2). Affirmative defense. Judge Burns posed a situation where a boy was indicted and said he was 13 years, 9 months, when the offense was committed. He asked if his age had to be proven by a preponderance of the evidence. Mr. Knight said that under an affirmative defense if the defendant testified he might have been under the age of 14, it would be up to the state to prove he actually was 14 beyond a reasonable doubt. Professor Platt confirmed this statement and explained that the draft incorporated by reference section 1.12 of the Model Penal Code and the draft anticipated that the definition of "affirmative defense" contained therein would be adopted by the Commission. Under that provision, he said, proof of age would be a question of fact, but there remained a question as to where the burden of proof would lie. He indicated he was not certain he would recommend retention of subsection (2) in light of the amendment which the committee had just adopted. This was discussed briefly and the committee decided to retain subsection (2).

Judge Burns moved, seconded by Chairman Harlan, that section 2 as amended be adopted and the motion carried.

Section 1. Partial responsibility due to impaired mental condition. The committee then returned to consideration of the partial responsibility doctrine and Judge Burns said he would be in favor of approving the draft as presented in order to get the subject before the full Commission. He said he had talked that morning to Oscar Howlett who had prosecuted for a number of years in the Multnomah County District Attorney's office and since that time had

been almost totally engaged in the practice of criminal law. Mr. Howlett, in discussing the question of partial responsibility, was of the impression that in all of the courts he had been in, the partial responsibility rule was in effect but it probably had no impact in cases other than first degree murder. He felt that as long as the courts allowed a liberal interpretation on presentation of evidence, the rule eventually to be adopted was unimportant.

Mr. Tanzer said he would endorse the use of the phrase "specific intent or purpose" as opposed to "state of mind" which appeared in the Model Penal Code. He further commented that passage of section 1 would not change the practice in the courts a great deal. He did, however, urge inclusion of a notice provision in section 1 if expert testimony was to be used by the defense. Professor Platt agreed with the latter suggestion and said he had found a case where the court said that where there was going to be evidence of a psychiatric nature to show partial responsibility, notice must be given. Judge Burns commented that the Oregon statute presently said that wherever the defendant pleads not guilty and intends to show he was insane or mentally defective at the time of the offense, he must give notice. In that respect the requirement of notice would not be a change from present law. He suggested the proposed statute require notice only when the partial responsibility defense was to be supported by expert testimony.

Professor Platt asked what would happen if there were no notice statute and the partial responsibility testimony of the defendant came from lay witnesses. He asked if the state would not still be in the position of being surprised if the issue of partial responsibility was raised and no notice had been given.

Mr. Tanzer pointed out that if notice was required and the defendant took the stand, said he was drunk and didn't know what he was doing, the prosecutor would immediately move to strike that testimony because no notice of the partial responsibility defense had been given. Professor Platt said that the intoxication problem should be a separate issue.

Judge Burns asserted there weren't many cases where the prosecutor would feel compelled to call in a psychiatrist merely because the defendant brought in his neighbor to testify. He thought it was almost impossible to imagine a case where the defendant could make a serious attempt to diminish responsibility with lay testimony and where such testimony would have any real impact on the jury. Senator Yturri was of the opinion that the state might want to bring in a psychiatrist if the defendant's neighbor testified as to how peculiarly the defendant had been acting in terms that were familiar to members of the jury.

Professor Platt noted that the Oregon Supreme Court had never taken the opportunity to rule specifically on whether the partial

responsibility doctrine was the law in Oregon. He was of the opinion that the Commission should take a stand on the issue. He also said he would like to avoid the problem of defining "expert witness" if the committee decided to adopt the earlier suggestion that notice be required only if an expert witness was to testify. Judge Burns replied that it would not be necessary to define "expert witness" because the court had to determine the expert's qualifications in each individual case, and others agreed.

Judge Burns concurred with Mr. Tanzer that if notice was required in every case, the minute someone said he was too drunk to know what he was doing, the testimony would be stricken. Senator Yturri suggested, as a solution to this problem, that notice be required in cases where the defense would depend upon the testimony of someone other than the defendant. Mr. Tanzer expressed approval of this suggestion and said it would also have the virtue of avoiding a Fifth Amendment problem. Judge Burns also expressed approval of Senator Yturri's suggestion and said the proposal would give the state a fair chance to respond.

Judge Burns proposed that Professor Platt draft alternative notice requirements:

- (1) To require notice where expert witnesses were to be called;
and
- (2) To require notice where witnesses other than the defendant were to be called in support of the partial responsibility contention.

These alternatives, he said, could then be referred to the full Commission for final determination.

Professor Platt asked Senator Yturri if he meant to include the situation where a witness other than the defendant was going to testify that the defendant was too drunk to form a specific intent and received a negative reply. Professor Platt said that the notice requirements would then be effective only with respect to partial responsibility and the committee concurred.

Professor Platt next asked if the committee agreed that a notice section should also be included with the section on defense of insanity which would be applicable no matter what kind of witnesses were to be called, and the committee was in complete accord that notice should be given in every case under that section.

Judge Burns then moved that section 1 on partial responsibility be passed on to the full Commission together with notice provisions drafted in the alternative as set forth above. Mr. Knight seconded and the motion carried unanimously.

Intoxication. Mr. Tanzer observed that it would be advisable to include the intoxication section within the responsibility article. Professor Platt noted that the MPC included intoxication under General Principles of Liability. Senator Yturri pointed out that questions relative to intoxication would arise when the Commission discussed responsibility and said it seemed logical to keep the subjects together, and other committee members agreed. Professor Platt said he would present the intoxication section to the committee for scrutiny before it was passed on to the full Commission.

Chairman Harlan called the committee's attention to two articles germane to this subject. One was in the September 1968 issue of the ABA Journal on page 877 and discussed chronic alcoholism and criminal responsibility. The other was an article written by Dr. Karl Menninger on crime and punishment which appeared in the September 7, 1968, issue of the Saturday Review. He suggested these articles be reproduced and distributed to members of the Commission.

Responsibility; Preliminary Draft No. 1; July 1968

Section 1. Mental disease or defect excluding responsibility. Mr. Knight said he was not sure he liked the proposed California rule with respect to the insanity defense but would prefer it to the Oregon proposal because he was of the opinion that the jury would be better able to understand the rule which stated:

"A person is not criminally responsible for conduct if at the time of such conduct, as a result of mental illness, disease or defect, he lacked substantial capacity to know or understand what he was doing, or to know or understand that his conduct was wrongful, or to control his actions."

Professor Platt noted that the California rule included the term "mental illness" which was not used in any of the other rules and would have the effect of expanding psychiatric testimony.

Professor Arthur mentioned that New York, Michigan, Illinois and New York had not stayed completely with the M'Naghten rule. The Oregon Commission, he said, had a duty to adopt a rule that would look toward the future and allow the use of scientific discoveries as they occurred.

Judge Burns observed that the outcome of every case depended largely on the appearance of the defendant and the psychiatric testimony plus the eloquence of the attorneys. The jury, he said, were laymen and they rendered a verdict based on common, everyday, community standards.

He related some of the material he had been reading and said he vacillated between adopting the ALI formulation and staying with the M'Naghten rule. He indicated he would be willing to send either rule to the Commission.

Professor Platt suggested the action of the subcommittee be to present a rule different from M'Naghten to the Commission, whether or not the subcommittee was wholeheartedly in favor of it. This, he said, would give the Commission a better basis for a complete discussion.

Mr. Paillette remarked that the Commission should not ignore what had taken place in Oregon in the past. The Interim Committee on Criminal Law endorsed the ALI formulation and the legislature passed it in 1961. He too recommended that the subcommittee give serious consideration to having the issue discussed by the full Commission before a final decision was made.

Judge Burns moved that the subcommittee pass along to the Commission section 1 of Preliminary Draft No. 1 as drafted by Professor Platt without an endorsement by any member of the subcommittee. Mr. Knight seconded and the motion carried unanimously.

Chairman Harlan commented that the subcommittee would be expected to make firm recommendations to the Commission in other areas but for this particular subject the best course appeared to be to leave the final decision to the full Commission. He also noted that the Commission should be given the benefit of hearing the viewpoint of psychiatrists when the responsibility article was presented to them.

Professor Arthur called attention to 14 Wayne Law Review No. 3. About half the issue, he said, was devoted to a symposium on the proposed Michigan Revised Criminal Code and he recommended that the Commission obtain copies.

Next Meeting

In reply to a question by Chairman Harlan concerning the date for the subcommittee's next meeting, Professor Platt advised that school would begin on September 30 and he would therefore need about a month to prepare the material for the next meeting.

Professor Arthur said he could have a draft on culpability ready in about three weeks or a month for the committee's consideration.

It was decided to leave the meeting date open at this time.

The meeting adjourned at 4:15 p.m.

Respectfully submitted,

Mildred E. Carpenter, Clerk
Criminal Law Revision Commission