

OREGON CRIMINAL LAW REVISION COMMISSION

Twenty-second Meeting, October 12, 1970

Minutes

Members Present: Senator John D. Burns, Vice Chairman, presiding
Judge James M. Burns
Representative Wallace P. Carson, Jr.
Mr. Robert W. Chandler
Mr. Donald E. Clark
Senator Kenneth A. Jernstedt
Attorney General Lee Johnson
Mr. Frank D. Knight
Mr. Bruce Spaulding
Representative Thomas F. Young

Excused: Senator Anthony Yturri, Chairman
Representative David G. Frost
Representative Harl H. Haas

Staff Present: Mr. Donald L. Paillette, Project Director
Professor George M. Platt, Reporter

Witness: Mr. John F. Steelhammer, Salem attorney,
representing the Oregon Amusement Association

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In the absence of Senator Anthony Yturri, Chairman, who was ill, Senator John D. Burns, Vice Chairman, presided and called the meeting to order at 9:30 a.m. in Room 315 State Capitol.

Approval of Minutes of Commission Meeting of May 14 and 15, 1970

Mr. Clark moved that the Minutes of the Commission meeting of May 14 and 15, 1970, be approved as submitted. Mr. Chandler seconded and the motion carried unanimously.

Proposed Oregon Criminal Code

Distribution and cost of code. Mr. Paillette advised that 4,900 copies of the proposed code had been printed, 3,100 of which went to the Oregon State Bar for distribution to its members. The Bar had agreed to pay for 2,900 copies and 200 more were supplied without charge to distribute to district attorneys and judges. The Commission staff made wide distribution of the code throughout the state including 75 copies to the sheriffs' association, 75 to the Oregon State Police, 75 to the Police Standards and Training Board plus copies to the State Library, Corrections Division, police departments throughout the state, law school libraries, legislators and legislative candidates, news media, state agencies and a number had been sent out of state to interested individuals and agencies engaged in revision projects.

Mr. Clark suggested that a copy of the code be sent to the Director of Law Enforcement Programs at Southern Oregon College and at Portland State University. The Chairman so ordered.

Mr. Paillette reported that the cost of printing 4,900 copies of the code was \$10,417, roughly \$2 per copy, and the Oregon State Bar would reimburse the Commission for \$1,750 of this amount.

Public hearings on code. Senator Burns suggested that the Commission discuss the question of holding hearings on the proposed code in various parts of the state prior to the legislative session in January and asked Mr. Paillette for his views on this subject. Mr. Paillette recommended that an effort be made to disseminate information throughout the state but not necessarily in the form of a town meeting type of hearing where citizens would be invited to criticize and question the provisions of the code. He was of the opinion that meetings should be structured in the form of an informative presentation by members of the staff and/or Commission for the purpose of explaining the code, particularly to members of the Bar and law enforcement agencies. The general public, he said, would not be too well versed on the code except for specific provisions which had been reported through the news media.

Mr. Chandler said he envisioned a hearing situation where testimony would be taken before the code was printed with the thought in mind that changes would be made if they appeared reasonable as a result of the testimony received. He added that the number of witnesses requesting an audience would probably be very small.

Mr. Paillette outlined that although the bill to be submitted to the legislature had been typed, the sections were not yet numbered and the staff was prepared to make any corrections or amendments approved prior to the time it was submitted for printing in bill form.

Representative Carson was of the opinion that it was inadvisable to deprive the public of the right to be heard on the code and urged that they be given the opportunity to express their views.

Mr. Clark agreed that the Commission was obligated to go into various areas of the state and at least be available to answer legitimate questions concerning the document. He added that the legislature would be more receptive to the code if the members were assured that it had been discussed throughout the state.

Mr. Johnson remarked that the value of holding public hearings was highly questionable. He said there would be many who would come to the meetings to express their views on emotional issues such as gun control and there was nothing to be gained by listening to that kind of testimony. Chairman Burns replied that when the hearings were announced, it should be made clear that gun control was not included in the code and no questions or statements would be permitted on that subject.

In reply to a question by Judge Burns, Chairman Burns said he envisioned holding three or four meetings in separated parts of the state with three or four members of the Commission present at each meeting.

Mr. Johnson suggested that the better way was for each member of the Commission to accept speaking engagements before various established organizations and civic groups, explain the code in general terms and provide for a question and answer period.

Mr. Paillette advised that over the past three years he had spoken to a great many groups, principally judicial and law enforcement organizations, and that he had a heavy schedule of speaking engagements lined up for November and December of this year.

Representative Young expressed agreement with Mr. Johnson. In eastern Oregon, he said, the meetings would probably be attended only

by those who were interested in gun control or in sex crimes. There would be some advantage in Mr. Paillette appearing before an eastern Oregon Bar association or the Farm Bureau, Representative Young said, but it would be of little value in his opinion for Commission members to tour the state to hold open forum type meetings.

Chairman Burns indicated that his experience in speaking to various groups had shown that an explanation of the Commission's stand on controversial issues, such as sexual offenses, tended to ameliorate at least some of the criticism. He believed too that if the public were given an opportunity to be heard prior to the legislative session, they would be in a less tenable position to complain to the legislature.

Senator Jernstedt agreed with Representative Young and Mr. Johnson that a public hearing as such would accomplish very little. He suggested that the staff act as a control center to set up speaking engagements for Commission members.

Representative Carson observed that the matter under discussion boiled down to a question of whether the public was to be given a chance to be heard, with the minutes of that testimony to be turned over to the Judiciary Committees of the legislature, or whether the Commission and staff were going to go on a circuit of the state to explain the code. Obviously, he said, there was not sufficient time to take testimony, reconsider the draft and make changes before it was printed in bill form. He expressed doubt that Commission members were competent to handle a question and answer period on all the ramifications of the proposed code and said that probably Mr. Paillette was the only person qualified to undertake such a technical assignment.

Mr. Johnson commented that public hearings would undoubtedly be attended by a very small segment of the population. The legislature, he said, would be obliged to hold hearings on the code whether or not the Commission did so and he was of the opinion that public hearings prior to the legislative session would be a waste of time.

Mr. Clark moved that the Commission and staff hold public hearings of one day duration in Bend, Pendleton, Medford, Eugene, Coos Bay and Portland between now and January. The motion failed. Voting for the motion: Carson, Chandler, Clark, Chairman Burns. Voting no: Judge Burns, Jernstedt, Johnson, Spaulding, Young.

Mr. Paillette asked if the Commission wished him to set up speaking engagements for the members and the concensus was that he should handle as many of the engagements as possible himself but if he encountered conflicting dates, he should ask a member of the Commission to fulfill one of the engagements and should also feel free to ask any

member to accompany him to any meeting if he wished to do so. Mr. Johnson added that organizations should be made aware that the Commission was still open to consideration of proposals which any group wanted to submit.

Mr. Johnson suggested that an explanation of the proposed code be presented to the members of the legislature either during the orientation session or at some other appropriate time, and other members concurred that this would be of value. Chairman Burns asked Representative Carson to make the necessary arrangements to implement Mr. Johnson's suggestion with the Joint Committee on Legislative Administration which was meeting on the following day. Representative Carson agreed to do so.

Chairman Burns recommended that an effort be made to speak to all county Bar associations throughout the state. Judge Burns said he and Chairman Burns had discussed the possibility of conducting explanatory sessions with the Multnomah County District Attorneys Association and also with the Multnomah County legislative delegation following the November election. He suggested that this would be a useful procedure for other Commission members to follow in their own localities.

Representative Carson asked if there was a possibility that a series of explanatory articles might be published in the newspapers throughout the state using basically the summaries of each article which the staff had prepared. Mr. Chandler said this was a possibility but his guess would be that only one-third of the newspapers in the state would use the material.

Article 30. Gambling Offenses

Chairman Burns introduced Mr. John F. Steelhammer representing the Oregon Amusement Association who expressed an objection to section 263, subsection (11), of the proposed criminal code. This provision would in effect overrule McKee v. Foster, 219 Or 322, 347 P2d 585 (1959), and ban "free-play" pinball machines.

Mr. Steelhammer reviewed the history of legislative attempts to ban free-play pinball machines and pointed out that the state tax on pinball devices last year amounted to approximately \$155,000 plus city taxes, including some \$38,000 for licenses in the city of Portland. He advised that passage of this portion of the code would wipe out this source of revenue to the state and the cities and would also destroy an industry with sizeable payrolls throughout the state.

Chairman Burns pointed out that free-play pinball machines were banned by ordinance in the city of Portland and Mr. Steelhammer explained that the figures he had cited for Portland applied to all coin-in-the-slot-operated amusement devices.

Mr. Steelhammer pointed out that ORS 320.010 was in direct conflict with the proposed gambling article because it imposed a privilege tax on amusement devices including free-play machines. Mr. Paillette concurred that the statute probably should be amended to delete "or replay" in subsection (2) (a).

Chairman Burns asked Mr. Steelhammer if he had any statistics on the amount of money police agencies had spent on undercover investigations attempting to track down the people who paid off on free-play pinball machines and received a negative reply.

Mr. Steelhammer stated that the proposed criminal code contained many revisions which were advantageous to the people of the State of Oregon and he urged that passage of the code not be jeopardized by inclusion of the provision to ban free-play pinball machines.

Mr. Chandler commented that Mr. Steelhammer's presentation was based on the grounds that the industry was hiring people and paying taxes but this, he said, was not sufficient reason to change the direction the Commission had taken which had been adopted because the use of the machines was not always limited to free play. In practice, he said, tavern owners and others were paying off on free plays.

Mr. Steelhammer contended that pinball machine owners were reputable businessmen and Mr. Spaulding said he too was convinced that the type of people operating pinball machines today were of a much higher type than they were when he was a district attorney some 30 years ago and was frequently offered bribes. One of the pinball machine owners, he said, had pointed out to him that a major difficulty which would be encountered if this section became law was that free-play pinball machines would be confiscated, making it difficult for the owners to do business.

Mr. Clark pointed out that the machines could be altered so as not to provide a free play. He advised that the machines were constructed and operated as gambling devices and said that a "free-play" machine in Multnomah County in a good spot could gross \$3,000 a month.

Chairman Burns asked Mr. Steelhammer to submit any further comments or statistics he had to Mr. Paillette who would distribute them to Commission members for further study.

Article 15. Burglary and Criminal Trespass

Proposed amendment to section 135. Mr. Johnson explained that the criminal trespass provisions had been drafted and approved by the Commission more than two years ago. Since that time, he said, a new

form of anti-social behavior had developed and caused some problems where persons had conducted "sit-ins" or had refused to leave a building at the regular closing hour. The amendments he was proposing to section 135 were designed to get at this problem by redefining "remain unlawfully" in a more specific manner and by adding definitions of the terms "open to the public" and "person in lawful charge." A trespass where a person was told to leave a building and refused to do so was not specifically considered when the criminal trespass provisions were drafted. Mr. Johnson said he would like to see the proposed amendments approved prior to the time the code was submitted to the legislature.

Mr. Chandler stated he was unprepared to vote on or debate the amendments at this time and suggested that they be treated as other revisions to the code; i.e., referred first to a subcommittee and then brought back to the full Commission with a complete explanation for final approval and adoption.

Professor Platt commented that he thought the approach Mr. Chandler suggested was the proper action to take with respect to the amendment. One of the basic failures of the trespass law, he said, was caused by the tendency of local law enforcement agencies to charge offenders under municipal ordinances which in most cases were broader than the state law. He was of the opinion that neither the Commission nor the legislature should allow options of that kind since this was an area where the public interest was state-wide. He urged that the subcommittee draft a statute which was clear enough and strong enough to avoid a situation where offenders would be required to go through the municipal courts for violation of the criminal trespass laws. The municipal courts, he said, were the worst possible place to litigate a constitutional issue.

Mr. Chandler moved, seconded by Judge Burns, that the proposed amendment to section 135 be referred to Subcommittee No. 1 which originally prepared the burglary and criminal trespass article. The motion carried unanimously on a voice vote.

Representative Carson asked what the Commission's policy was going to be with respect to amendments to the printed final draft of the proposed code. Inasmuch as the Commission had decided not to hold public hearings, he asked what course individuals or groups would be required to follow when they had an amendment they wished the Commission to consider. Mr. Paillette replied that up to this time when he was contacted regarding a revision or proposal, he had told the concerned party that he would call the proposition to the attention of the Commission and he had done so. In his opinion, he said, it was not necessary to make changes in the draft before its

submission to the legislature regardless of the nature of the change but it was both advisable and necessary to be prepared to anticipate some of the suggestions which might be coming in and have amendments prepared and ready for submission to the legislature. An orderly and legitimate method of handling revisions would be to have amendments ready for submission to the Judiciary Committee so the members of that committee could be told that the Commission was prepared to take a specific position. He indicated that he would make every effort to get all suggested amendments before the Commission between now and the time the legislature met in January.

Representative Carson asked whether the Commission would be called upon to offer a collective judgment on amendments made during the course of the legislative session. Mr. Paillette replied that he did not foresee that a legislative committee would ask the Commission's advice on any particular amendment but the Commission should nevertheless be prepared to take an intelligent position on suggested changes. Chairman Burns agreed it was unlikely that the Commission would be called upon to render assistance to the Judiciary Committees on the substantive code. The Commission, he said, would probably be meeting in November and again in December and could consider any suggested amendments at those two meetings. Thereafter proposed revisions would be submitted to the legislature.

Disposition of Material in Subcommittee Books

Mr. Paillette asked Commission members whether they wished to retain the drafts and materials they had used during subcommittee meetings. The members agreed that the material should be assembled and bound and those who desired to do so could take their books with them after the next meeting.

Criminal Procedure Revision

Mr. Paillette called attention to the material placed in the members' notebooks relating to the procedural revision:

- (1) Outline of existing statutes relating to criminal procedure
- (2) Tentative outline of Proposed Oregon Criminal Procedure Code
- (3) Articles from The Criminal Law Reporter reviewing U. S. Supreme Court's criminal law cases announced during the 1969-70 term
- (4) Article from The Criminal Law Reporter on ABA Prosecutions and Defense Functions Standards

- (5) Outline and summary of ABA Standards Relating to Pleas of Guilty
- (6) Article from The Criminal Law Reporter on ABA Criminal Appeals Standards
- (7) Article from The Criminal Law Reporter on ABA Standards Relating to Probation
- (8) Minimum standards adopted by ABA on Standards on Joinder and Severance, Sentencing, Pretrial release and Trial by Jury
- (9) Report on ALI Model Code of Pre-Arrestment Procedure
- (10) Bibliography of materials available to Commission

Mr. Paillette was asked to furnish members with additional copies of this material for each of their offices.

Tentative Outline of Proposed Oregon Criminal Procedure Code.
Mr. Paillette explained that the outline he had prepared was intended to give the Commission a starting point for discussing the make-up of the procedure code.

Chairman Burns pointed out that the life of the Commission would expire on June 30, 1971, and the 1971 legislature would be requested to enact a two year extension. He asked if any of the members felt that procedure should be postponed until after the legislature had acted on the extension.

Mr. Chandler replied that the Commission could make substantial progress on the procedure code in the next eight months and he saw no reason to do nothing for that period of time while awaiting the legislature's action.

Judge Burns expressed agreement with Mr. Chandler and pointed out that the procedure code would involve philosophical differences among Commission members to a greater extent than did the substantive revision and it would therefore be advisable to start work on the revision as soon as possible.

Mr. Knight concurred that the procedure code would affect district attorneys and law enforcement agencies to a much greater extent than the substantive code. He was of the opinion that the Commission should be very cautious about codifying recent Supreme Court decisions concerning due process in the procedure code. If

these decisions were codified, he said, it would close the door to making any changes from present holdings should the Court take a different position in the future.

Mr. Paillette recommended that the make-up of the subcommittees not be altered inasmuch as the present structure had worked well in drafting the substantive code, but there was the question to be decided of assigning specific areas of the procedure code to each of the subcommittees.

The members agreed that the present structure of the subcommittees should be continued. Chairman Burns asked if there was any feeling that the subcommittee format should be altered in any way; for example, by placing greater reliance on testimony from interested individuals or groups. Mr. Chandler commented that while not many witnesses had testified at subcommittee meetings in the past, no one had been denied the right to appear.

Judge Burns remarked that because the material to be considered was so interrelated, it was important in making subcommittee assignments to assign related areas to a single subcommittee. Mr. Johnson pointed out that if the code were divided by Parts as set forth in the tentative outline, Judge Burns' suggestion would be carried out.

Mr. Chandler moved that the following subcommittee assignments be made:

- Subcommittee No. 1: Parts IV and V
- Subcommittee No. 2: Part III
- Subcommittee No. 3: Parts I and II

Mr. Johnson moved to amend the motion to let the Chairman of the Commission make the subcommittee assignments. Judge Burns concurred that the Chairman should make the assignments after consultation with the Project Director and the members agreed. Mr. Chandler withdrew his motion.

Chairman Burns stated that if the subcommittee chairmen were particularly interested in working on specific areas of the procedure code, they should communicate their wishes to Mr. Paillette who would in turn relay them to the Chairman.

Bills to be Submitted to Legislature

Proposed Criminal Code. Mr. Paillette indicated there were some technical decisions to be made concerning introduction of the bills to be proposed by the Commission to the legislature, one of which was the sponsorship of the proposed criminal code. He asked whether the Commission wished to have the code introduced by an individual member or members of the House or Senate at the request of the Criminal Law Revision Commission or by one of the Judiciary Committees at the

request of the Commission. Because the bill would have to go through the Joint Committee on Rules and Resolutions to be checked for proper form and style, Mr. Paillette suggested that it might be better to have it introduced by a member so it would receive a top priority with that agency. Chairman Burns stated that it would be accorded the same priority if an individual legislator requested the Joint Committee on Rules and Resolutions to go over the bill and it could then be introduced by a Judiciary Committee at the request of the Commission.

After further discussion, it was decided that the bill would be introduced on the Senate side by all carry-over legislative members of the Commission at the request of the Criminal Law Revision Commission.

Effective date. Judge Burns asked if it would be advisable to make a recommendation as to the effective date of the substantive code.

Mr. Johnson moved that the effective date be designated as July 1, 1972.

Mr. Chandler moved to amend the motion to make the effective date January 1, 1972. Mr. Clark seconded Mr. Chandler's motion to amend and after a brief discussion it carried. Voting for the motion: Chandler, Clark, Jernstedt, Knight, Spaulding, Young, Chairman Burns. Voting no: Judge Burns, Johnson.

Mr. Paillette asked if the Commission wished the date of January 1, 1972, inserted in the final section of the bill and received an affirmative reply. The Chairman so ordered.

Bill to extend life of Commission. Mr. Paillette advised that a budget request for the Commission for the 1971-73 biennium had been submitted even though the Commission would not be a viable agency for that period without an extension by the legislature. The appropriation bill, he said, would come out of the Committee on Ways and Means. He had prepared an amendment to ORS chapter 573, Oregon Laws 1967, to extend the Commission through June 30, 1973, and suggested that this bill also be introduced by the Committee on Ways and Means along with the appropriation bill. The Commission agreed and it was so ordered.

Additional Commission member. Mr. Johnson moved that ORS chapter 573 be further amended to change the statutory membership of the Commission by adding a member of the Court of Appeals to be appointed by the Chief Judge of the Court of Appeals. Mr. Chandler seconded.

Judge Burns said he had no objection to adding a member of the Court of Appeals but asked if anyone foresaw any problem arising by

virtue of the fact that the Commission would then contain an even number of members. Chairman Burns said he could foresee a problem in this area and also pointed out that passage of the motion would alter the subcommittee structure.

Mr. Chandler commented that it was a rare occasion when every member was in attendance at a meeting which alleviated the problem of a tie vote. He added that the Commission had sometimes had tie votes in the past.

Chairman Burns said he had serious reservations about approving this motion without more extensive discussion and with four members being absent, one of whom was the Chairman. Judge Burns suggested that the vote be postponed until the Chairman was present and Mr. Spaulding proposed that the vote be taken subject to the approval of the absent members. Chairman Burns so ordered and the motion carried unanimously. Voting for the motion: Judge Burns, Chandler, Clark, Jernstedt, Johnson, Knight, Spaulding, Young, Chairman Burns.

Senator Burns gave notice that he would move to reconsider the matter when the Chairman and other absent members of the Commission were in attendance.

ORS 164.070, Crimes relating to fires on land, and ORS 164.080, Fires affecting land of another. Mr. Paillette recalled that when the article relating to arson was under consideration, the feeling of the Commission was that ORS 164.070 and 164.080 should not be retained in the criminal code, one reason being that the statutes contained several culpability elements, all of which carried the same penalty, and they were therefore not consistent with the rest of the code. The discussion at that time was that the Commission would recommend that the two sections be taken out of the criminal code and transferred to ORS chapter 477. He asked if the Commission wanted the two sections recodified in ORS chapter 477 by inclusion in the bill to be submitted to the legislature or whether they should be omitted entirely in which event they would be repealed.

Mr. Clark moved, seconded by Mr. Chandler, that ORS 164.070 and 164.080 be included in the final bill to be submitted to the legislature and that they be recodified as presently written in ORS chapter 477. The motion carried unanimously.

Firearms proposal. Mr. Paillette explained that the Commission's proposal on firearms had recently been drafted in bill form. He said he had received numerous requests for copies of the bill but thus far had distributed only copies of Preliminary Draft No. 3 with an explanatory note. He asked for direction from the Commission as to whether copies of the proposal should be distributed by the Commission staff or whether it should be handled as any other bill and distributed out of the bill room after it had been introduced and printed by the legislature.

The Commission decided that the firearms bill would be introduced by the House Committee on Judiciary and would be distributed out of the bill room to those requesting copies. In the interim copies of Preliminary Draft No. 3 with explanatory material should be given to those requesting copies.

Staff Reductions

Chairman Burns advised that the Commission staff had been reduced to three. Mr. Wallingford, he said, had gone into private practice in Portland and two clerks, rather than three, were presently employed. It was contemplated that the staff would remain at this level, he said, at least through the 1971 legislative session.

The meeting was adjourned at 12:15 p.m.

Respectfully submitted,

Mildred E. Carpenter, Clerk
Criminal Law Revision Commission