

Tape #69

Both sides

OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 1

March 4, 1969

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GENERAL PRINCIPLES OF CRIMINAL LIABILITY -- CULPABILITY (Article 2) Preliminary Draft No. 2; February 1969	1

OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 1

Fourteenth Meeting, March 4, 1969

Minutes

Members Present: Senator John D. Burns, Chairman
Mr. Robert Chandler
Mr. Bruce Spaulding

Delayed: Representative Douglas W. Graham

Also Present: Mr. Donald L. Paillette, Project Director

The meeting was called to order by Chairman John D. Burns at 2:45 p.m. in Room 3 of the State Library Building, Salem.

Chairman Burns asked if there were any corrections to the minutes of February 11 and since there were none, the minutes were approved.

Chairman Burns moved directly to the subject of the meeting -- General Principles of Criminal Liability -- Culpability. He reported that he had written a letter to Professor Arthor stating that the subcommittee was moving ahead because of the pressure by the Legislature and they would be very happy to look at his survey in conjunction with the final drafts, but in the meantime, they would use Mr. Paillette.

In regard to Culpability, Chairman Burns said it was clear to him, after sitting with the subcommittee considering assault, how very important the work on definitions and culpability is.

Mr. Paillette suggested that the subcommittee might like to compare their earlier draft to this one. He said one of the problems in the last meeting seemed to be the problem of what constituted a "material element" of the crime. The way it was originally drafted, it said in effect, that conduct result and attendant circumstances were material elements. He said he had tried to write that out of the draft and in effect not define material elements.

Mr. Chandler asked if by material elements, he was referring to the conduct and the result and Mr. Paillette said that was right.

He added that the draft did not define "material element of the crime." Some other states do define that term in their codes. The MPC defines element and material element, the difference being that an element of the crime would be something such as venue, but it would not be a material element. He said he was not so sure that there was a need to define these terms.

Mr. Chandler asked, "By not defining them, what do we do?"

Mr. Spaulding replied that we know what they mean anyway. He said it was impossible to define every word and in the event of an issue, it would be up to the court to define a term.

Mr. Paillette explained that in a criminal case now, the court will instruct the jury on the material elements of the crime and that the burden is on the state to prove each material element beyond a reasonable doubt. The court tells the jury what the material elements consist of.

Chairman Burns said that as he understood it, the culpability section is going to come right behind the general definitions that were discussed at the last subcommittee meeting. Mr. Paillette said that it would come right behind the Article that contains the general definitions. He said there would be preliminary provisions including the general definitions which is the first Article. The second Article is Culpability.

Chairman Burns observed that rather than defining terms like intentionally, etc., in the definitional section, they will be defined in this section but that they will be so close that they will be able to be read in conjunction.

(1) Act: Mr. Burns asked Mr. Paillette why he now inserts the word "Act" into the culpability definitions. Mr. Paillette said he had originally thought that "Act" need not be defined but had since changed his mind. He thinks the definition becomes important in setting up minimum requirements for culpability; that it belongs in this section because this is where it is more likely to be used.

Mr. Chandler requested clarification on the difference between general definitions and culpability definitions. Mr. Paillette replied that some of the definitions set out in this Article are essential to the understanding of culpability, while the general definitions are intended to apply throughout the entire code. He added that all these definitions relate to somebody doing something that involves a bodily movement. They all relate to the culpability requirement.

Chairman Burns suggested that they discuss "Act" as a bodily movement and asked if that were not a little bit restrictive. Mr. Spaulding thought that it was.

(2) Voluntary Act: Mr. Paillette went on to explain that "Voluntary Act" in conjunction with "Act" is a conscious thing the actor is doing and that

he intends to do.

Chairman Burns reported that Michigan says act means a bodily movement and includes possession of property. He then asked why not include possession of property.

Mr. Paillette replied that he had placed it under subsection (2).

Mr. Spaulding stated that what we are saying is that an act means something more than bodily movement when you say that it includes possession of property.

Mr. Graham said he didn't see where possession would have much to do with it.

Chairman Burns established that Mr. Graham came in while they were discussing Section 2 on page 4 and while Mr. Paillette was indicating that his reason for putting act in the culpability section was because of the minimal requirements of culpability in terms of a voluntary act.

Mr. Paillette reminded the subcommittee that we are defining this term mainly for the use of this Article, that it becomes important when we look at what our minimal requirements of culpability are. We are saying that you need to have a bodily movement, but with respect to a voluntary act, it could be a passive sort of thing, for example, the possession of stolen property, or of narcotics, if you became aware of the fact that you had possession and if you were aware of the fact long enough to be able to do something about it.

Chairman Burns said that he would think that maybe it is alright in subsection (2) and to leave it out of subsection (1), (the possession of property). He thought the concept was unrelated to act but insofar as voluntary act was concerned, it may be appropriate to add it so that it could be said that the possession of property is being voluntary.

He suggested that it be structured in subsection (2) and then work out the particulars and not also structure it in subsection (1). He thought that subsection (1) was alright the way it is.

He questioned in subsection (2), "effort or determination" and "for a sufficient period to have been able to terminate it".

After much discussion of the wording in subsection (2) of Section 1, and several suggested changes, Chairman Burns suggested that the subcommittee move on to subsection (3) and come back to this section before the end of the meeting.

(3) Omission: Mr. Paillette pointed out that in the definition of omission, we use "act", and we have already defined the term. We have said what an act is and we are saying that omission is the failure to perform this act.

Mr. Spaulding asked if by using the word act, we are not limiting the meaning of the word omission? There followed discussion of the word omission and the terms of this subsection.

Mr. Chandler then asked, if you could commit a crime by omission -- by being completely passive. Mr. Spaulding and Mr. Paillette cited several kinds of crimes that could be committed by omission -- nonsupport, for instance.

Chairman Burns commented that his original thought was that the language was a little unwieldy and should be shortened. However, he said, if there is a possible distinction (between act and omission) since this is fairly well set out, he didn't have any objection to keeping it the way it is. He thought it was more rigidly structured this way. He also felt that we have to build this upon act and not focus it equally upon act or duty because then we would be in the position of having to define duty also.

Mr. Spaulding asked if it would sound better to say, "Omission means a failure to perform an act, the performance of which is required by law?"

Chairman Burns and Mr. Chandler agreed that it would sound better and still say the same thing.

(4) Conduct: Mr. Paillette explained that these definitions become extremely important when we get to the later sections.

Representative Graham asked for clarification of "accompanying mental state". Mr. Paillette replied that the draft defines culpable mental state. Mr. Spaulding explained that the accompanying mental state of the person has to be considered to establish culpability and Mr. Graham was satisfied with the explanation. It was agreed that subsection (4) is alright as drafted.

(5) To act: Mr. Spaulding didn't like the definition because it said to act includes not to act.

Chairman Burns reminded the committee that we have said an act is this, omission is this, conduct is this, and now we are saying "to act" means this. He wondered if this were not just a little bit inconsistent. Does it do violence to our scheme to omit this, he wondered.

Chairman Burns referred to what Michigan has said -- that by including the definition of omission, they are making it clear that omissions are included, a matter also stressed in the definition of conduct and in the definition of to act. Whether it is necessary to stress that or not, he didn't know, he said. He could see no compelling reason to take it out.

Mr. Chandler said that if it is read in connection with subsection (2) and subsection (3) it doesn't seem to be absolutely necessary.

Mr. Spaulding reported that in some cases where a person fails to perform a duty, the result is that a person dies. He referred to a parent's failure to properly care for a child.

Chairman Burns determined that the committee agreed to accept subsection (5) as it is.

(5) Culpable mental state: Chairman Burns explained that the term means any one of the terms included in this subsection, not necessarily all of them. He referred to the December 12 meeting and mentioned that P.D. #1 did not define culpable mental state.

The subcommittee discussed the structure of the paragraph and whether there was a need for addition of an action word such as "acts intentionally, or did something intentionally".

Mr. Paillette argued that that is not what he was trying to say. He said that he is not referring to "acting"; he is talking about a state of mind and he thought it would confuse it to place act in there again.

Mr. Chandler agreed that this does not do any damage to the definition.

(7) Intentionally: Mr. Paillette pointed out that the definitions in subsections (7), (8), (9), and (10) (intentionally, knowingly, recklessly, with criminal negligence) make more sense as we read them in context with the rest of the Article and it is a little hard to discuss them abstractly, but these are the same in substance as definitions in P. D. #1 and the rationale is the same.

Section 2:

Mr. Paillette explained that he had set out the minimum requirements of culpability in this section.

Mr. Spaulding questioned subsection (2) and asked Mr. Paillette if what he meant to say was that a person acts with a culpable mental state with respect to each element of the crime to which his culpable mental state is material? There are elements of many crimes, he said, where it doesn't matter what connection his mental state is to some of the elements. There is no crime that doesn't include a mental state, he continued.

Chairman Burns asked if existing law had any reference to what we are doing?

Mr. Paillette said none, except for some of the definitions themselves.

Mr. Spaulding questioned whether "maliciously" should not be included in the definition of culpable mental state. Mr. Paillette replied that this is one of the terms we expressly intend to eliminate from the code.

There followed discussion of murder and the degrees of murder in connection with the kind of culpability required for the crime.

Chairman Burns remarked that historically, society has now come to the place where we consider murder by degrees.

Mr. Chandler disagreed with this statement. He said the law considers murder by degree; he is not so sure society does. He said he thought that to the average juror, it was sort of horrifying to him in some respects to call a thing murder and then say this is less murderous than another kind of murder. It is easier to say this is murder and this is manslaughter and this is something else.

Note: Representative Graham had to leave at this point to make a phone call.

With regard to inserting a definition of "maliciously", Mr. Paillette said he thought this was like swimming upstream since all the codes were now pointing to simplification of culpability elements and getting rid of terms like wantonly and maliciously and sticking with four basic terms - "intentionally," "knowingly," "recklessly" and "criminal negligence."

Chairman Burns recalled that the subcommittee had agreed on a basic policy of doing away with maliciously, but he didn't think about it with regard to murder at that time.

Mr. Paillette pointed out that they could examine the question more closely with respect to murder when the criminal homicide draft was considered.

Chairman Burns directed the subcommittee to look at subsections (7), (8), (9) and (10).

Note: Representative Graham came back at this point.

Subsection (7) was discussed with regard to the word "intent." Mr. Paillette supported his draft by saying that when we are talking about the intent to do something, the intent has to be related to a specific conduct as defined by a statute and that a person has to intentionally do something that is prohibited by statute.

Chairman Burns supported Mr. Paillette by saying that the form he employed is consistent with the MPC, the New York and the Michigan codes.

Mr. Chandler reminded the Chairman that he had to leave soon and Chairman Burns asked him if they had his vote to make the changes in (2) and (3) that they had already discussed and to leave the rest of (4), (5) and (6) the same. He also asked him his opinion of the definitions in (7), (8), (9) and (10). Mr. Chandler replied that he thought they were pretty clear

definitions. Then Chairman Burns asked him if the committee were so stay pretty much with what Mr. Paillette has done, they would have his vote on any changes they needed to make and Mr. Chandler responded that they did and he left.

Mr. Spaulding moved that the following subsections be amended as follows:

- (2) " 'Voluntary act' means a bodily movement performed consciously and includes the conscious possession or control of property."
- (3) " 'Omission' means a failure to perform an act the performance of which is required by law."

The motion was passed unanimously.

Representative Graham moved that the subcommittee accept subsections (1) through (6) as amended and the motion also passed unanimously.

Mr. Spaulding then moved to amend subsection (8) as follows:

- (8) " 'Knowingly' or 'with knowledge', when used with respect to conduct or to a circumstance described by a statute defining a crime, means a person acts with an awareness that his conduct is of a nature so described or that a circumstance so described exists."

Mr. Spaulding moved that (7), (8), (9) and (10) be amended to incorporate the change in language and punctuation (form) as previously recited in subsection (7). This motion was passed unanimously.

Representative Graham moved that the subcommittee accept subsections (7) through (10) as amended. The motion passed unanimously.

Section 2:

Mr. Paillette pointed out that subsection (2) is a restatement of subsection (2) of Section 3 of P. D. #1 and it is possibly the biggest change he made in this particular section.

Chairman Burns and Mr. Spaulding brought attention to the word "physically" as used in the context of physically capable of performing, in subsection (1). It was subsequently agreed to strike the word "physically". A motion was duly made and passed unanimously.

Chairman Burns asked Mr. Paillette if he envisioned any problem by having voluntary describe act and not omission? Mr. Paillette indicated that he did not.

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Mr. Spaulding questioned subsection (3) which stated that a culpable mental state is not required for an offense that is a violation and the subsection was discussed in relation to the definition of "violation" in the draft section on "Classes of Crimes."

After a lengthy discussion on this section, Chairman Burns said there was some legitimate objection and Mr. Paillette was requested to draft an alternative to subsection (2).

The meeting was adjourned at 5:50 p.m.

Respectfully submitted,

Connie Wood
Criminal Law Revision Commission