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OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 1

May 27, 1968

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OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 1

Fifth Meeting, May 27, 1968

Minutes

Members present: Senator John D. Burns, Chairman
Representative Edward W. Elder
Mr. Bruce Spaulding

Absent: Mr. Robert Chandler

Also present: Mr. Donald L. Paillette, Project Director
Justice Gordon Sloan, Chairman, Oregon State Bar Committee on Criminal Law and Procedure

The meeting was called to order by Chairman John D. Burns at 9:30 a.m. in Room 309 Capitol Building, Salem.

Minutes of Meeting of May 17, 1968

Inasmuch as members had not had an opportunity to read the minutes of the meeting of May 17, 1968, action thereon was deferred until a subsequent meeting.

Theft of Services; Preliminary Drafts Nos. 2, 2a and 2b

Mr. Paillette explained that three alternative drafts had been prepared on theft of services in accordance with the wishes of the subcommittee expressed at its last meeting. Preliminary Draft No. 2 incorporated the amendments adopted by the subcommittee at that time and he outlined the revisions therein.

Chairman Burns pointed out that "entertainment," after "elsewhere," on line 5 of the draft had been omitted. Mr. Paillette replied that the omission was an inadvertent typing error and should have been included. He called attention to a change he had made in subsection (3) where, because it was more explicit, "customarily" had been used in place of "ordinarily." The subcommittee agreed that this was an acceptable revision.

Mr. Paillette advised that Preliminary Draft No. 2a was the same as P.D. #2 with the exception of subsection (3) which incorporated the language of ORS 165.230, defrauding an innkeeper, and would expand the prima facie provisions considerably beyond the provisions of P.D. #2.

Preliminary Draft No. 2b, Mr. Paillette explained, was derived from the New York Revised Penal Code which enumerated more definitively the particular types of situations covered and was set forth to meet some of the objections expressed at the previous meeting that P.D. #1 was too general.

Preliminary Draft No. 2.

Subsection (1). Representative Elder expressed concern over inclusion of "professional services" in subsection (1) and Mr. Spaulding commented that he could not imagine the offense of a person refusing to pay for a professional service being serious enough to warrant a jail sentence. Chairman Burns noted that all the recently revised codes included "professional services" within their theft of services definitions and since they probably had a good reason for doing so, he was prepared to accept the language. He also noted that Connecticut used "service" rather than "services" in their definition section and asked if this revision would improve the language. The committee agreed that the draft should be consistent in the use of either the singular or plural. Mr. Paillette indicated that the Model Penal Code said "Services includes service . . . " and after further discussion, the committee agreed, for the sake of consistency, to revise "services" to "service" after "professional."

Justice Sloan outlined a hypothetical situation where an individual might use a false Medicare card or hospital insurance card to obtain hospital care. Chairman Burns asked if such a situation would be covered by the section on false pretenses and Mr. Paillette said it would not since the actor would obtain no property thereby.

After further discussion, the committee agreed, in view of the decision reached by many competent authorities, to include "professional service" in subsection (1) even though it was an expansion of present law.

Chairman Burns asked if "the supplying of" should be inserted before "entertainment." Mr. Paillette pointed out that the MPC used the term "admission to exhibitions." Representative Elder asked if "entertainment" would cover a situation where a gate crasher unlawfully entered an area before the entertainment had begun and the committee agreed that "entertainment" together with the phrase "includes, but is not limited to," would not leave a loophole for this type of act. After further discussion, the committee unanimously agreed to insert "entertainment," after "communications service,".

Subsection (1) was approved as amended.

Subsection (2). Chairman Burns said a question was raised at the last meeting as to whether the committee preferred the language as set forth in P.D. #2 to the shorter language which appeared in the Michigan code:

> A person commits theft if "having control over the disposition of services of others to which he is not entitled, he knowingly diverts those services to his own benefit or to the benefit of another not entitled thereto."

Mr. Paillette explained that he had used the longer version, derived from the New York code, because it covered the question of diverting equipment or other property of, for example, a manufacturing plant to the actor's own benefit.

Chairman Burns and Justice Sloan questioned the meaning of "other substantial benefit" as used in the draft. Mr. Paillette responded that New York had used the phrase to specify that the section was not intended to make criminal the use of equipment on a casual basis. Justice Sloan commented that it was probably aimed at a racketeering type of operation where the foreman said to the men working under him, "You come to the plant tonight and do this if you want to keep your job," and the foreman would derive a financial benefit from such labor. Until such time as the foreman's actions reached the status of producing a commercial benefit, such acts should not be covered by the criminal law, he said. Chairman Burns agreed that the section was aimed at the big scale type of operation. He urged that the committee avoid ambiguities of language and accordingly moved that "or other substantial" be stricken from subsection (2) (b). The motion carried unanimously.

Chairman Burns then noted that the Connecticut code said "benefit for himself or a third person not entitled thereto" and asked if "not entitled thereto" should be inserted in the draft. The committee agreed to this insertion.

Mr. Spaulding raised the problem of more explicitly defining the third person referred to in the fifth line of the draft. Mr. Paillette read section 223.7 (2) of the Model Penal Code and the committee agreed that it contained better language than the draft and eliminated the question raised by Mr. Spaulding. The following was suggested:

> "(b) Having control over the disposition of labor or of business, commercial or industrial equipment or facilities of another, to which he is not entitled, he diverts such services, equipment or facilities to his own benefit or to the benefit of another not entitled thereto."

Mr. Paillette objected to the above language because it dropped the statement of fraudulent intent. He noted that the Model Penal Code said "he knowingly diverts such services" but pointed out that the actor could knowingly divert the services to his own benefit without having a fraudulent intent. Justice Sloan pointed out the distinction between having control over labor of another person as opposed to having control over labor in the employ of another. He suggested using the phrase "labor of another" to eliminate the distinction. Mr. Spaulding said he could not see how it improved the section to require that the defendant had to be working for someone for wages and maintained that the section should be aimed at misuse of

labor of another. Mr. Paillette commented that there were certain types of acts in this category which should not be criminal and which should be left to the discretion of employers to deal with as they saw fit. There was a lengthy discussion on this subsection after which Mr. Spaulding suggested:

> "(b) Having control over the disposition of labor or of business, commercial or industrial equipment or facilities of another, he uses or diverts to the use of himself or a third person such labor, equipment or facilities with intent to derive a commercial benefit for himself or a third person not entitled thereto."

Mr. Spaulding moved adoption of the above language and the motion carried unanimously.

Subsection (3). Chairman Burns advised that the question before the committee was whether to adopt the broad general language of Preliminary Draft No. 2 or go to a section such as the New York code in Preliminary Draft No. 2b which employed great specificity.

Representative Elder was in favor of either adopting ORS 165.230 or the language of the New York code.

To refresh the committee's memory on their previous discussion of this subject, Chairman Burns read pages 6 and 7 of the minutes of Subcommittee No. 1, May 17, 1967, dealing with subsection (3).

In reply to a question by Chairman Burns, Mr. Paillette explained that subsection (3) of P.D. #2 would not be as broad as ORS 165.230 and pointed out that P.D. #2 contained the approach adopted not only by the drafters of the Model Penal Code but also by revisors in other states. He said there was good reason to include protection for the proprietor against an individual who absconded without paying for the services he had obtained, but he expressed doubt that these acts constituted enough of a social problem to warrant so extensive a listing of deeds that amounted to prima facie evidence of a criminal intent as was contained in either the New York code or in ORS 165.230. If a person refused to pay for his meal because he received bad food, he said, it should not raise a prima facie case that he entered the restaurant with intent to defraud the proprietor.

Representative Elder suggested the committee discuss the problem with innkeepers to see if they encountered this situation frequently, and Chairman Burns commented that this would be done after the Commission had tentatively approved the draft but the subcommittee should make a preliminary decision.

Mr. Paillette pointed out that P.D. #2 was not as severe as the New York draft because it required that the actor had to abscond before there was a prima facie case whereas the New York proposal

required merely a failure or refusal to pay for services. Mr. Spaulding noted that such cases usually involved small sums of money and the innkeeper should not be placed in a position where he could have someone arrested for refusing to pay $50 for a room that was worth $10. Representative Elder suggested it might be better to use a word other than "abscond" and Justice Sloan explained that a person could not be held for absconding if he questioned the rate at which he was charged for a room or a meal.

Chairman Burns noted that subsection (3) of P.D. #2 was essentially the same as subsection (3) (d) of P.D. #2 taken from ORS 165.230. Representative Elder contended that the Commission could avoid future difficulty with hotel and motel owners by using a term in subsection (3) other than "absconding." Chairman Burns asked Mr. Paillette to check case law to see if "absconding" as used in ORS 165.230 had been defined by Supreme Court decision.

Chairman Burns moved to adopt subsection (3) of P.D. #2 without amendment and the motion carried. Voting for the motion: Senator Burns and Mr. Spaulding. Voting no: Representative Elder.

Criminal Tampering; Preliminary Draft No. 2. Criminal Mischief; Preliminary Draft No. 2a

Mr. Paillette explained that the draft on criminal tampering, Preliminary Draft No. 2, conformed to the amendments adopted at the last subcommittee meeting. Preliminary Draft No. 2a, he explained, was the result of the committee's request that a section on criminal tampering be drafted in conjunction with the criminal mischief proposal. Criminal mischief in the second degree, Mr. Paillette outlined, was identical to P.D. #2 where it was called "criminal tampering," and criminal mischief in the first degree dealt with the person who caused damage or intended to cause damage to the property of another as opposed to the intent to cause substantial inconvenience as outlined in the first section. In other words, second degree mischief was embraced in first degree mischief if there was actual damage to property.

Chairman Burns asked Mr. Paillette if he had considered inclusion of still another degree of criminal mischief which would cover malicious and wanton destruction of personal property similar to ORS 164.900. Mr. Paillette replied he was of the opinion that criminal mischief in the first degree would encompass ORS 164.900. ORS 161.010 (6), he said, defined "wantonly" and the definition was close to subsection (2) of criminal mischief in the first degree. After further discussion, Chairman Burns expressed approval of the joinder of the two sections in P.D. #2a.

Criminal Mischief; Preliminary Draft No. 2a. Chairman Burns asked if the two proposed sections were intended to take the place of ORS 164.810 through 164.900. Mr. Paillette replied that most of the ORS sections cited would be encompassed in P.D. #2a but further study would need to be conducted to make certain that all the elements of those sections were covered. He called attention to ORS 164.830 concerning the use of explosives and said that particular crime would need to be covered separately at another place in the code. ORS 164.850, he said, would be covered under the criminal trespass draft.

Chairman Burns suggested inclusion of "defaces" in the draft and noted that most of the present ORS statutes dealing with this subject used "destroys" or "injures." Mr. Paillette commented that the majority of the revised codes used "damages" rather than "destroys" and expressed the view that "damages" was preferable to "destroys" with which the committee agreed.

Chairman Burns suggested the draft be amended in both sections to say "without having any right to do so or* instead of "nor" and the committee concurred in this revision.

Mr. Spaulding pointed out that it would be a second degree crime if a person tampered with property and caused inconvenience but no damage whereas it would be first degree under subsection (1) if he tampered with property and damage resulted unintentionally and also first degree under subsection (2) if the damage was caused intentionally. He suggested that unintentional damage should not be as serious an offense as damage caused intentionally. After further discussion, Chairman Burns suggested that criminal mischief in the second degree be revised to third degree; subsection (1), first degree, be revised to second degree; and subsection (2), first degree, requiring intent to damage property, become first degree.

Mr. Paillette proposed that if the committee wanted to adopt a draft with three degrees, they might consider the New York and Michigan codes which carried three degrees of the crime with the first degree being reserved for criminal mischief caused by means of an explosive. Chairman Burns asked Mr. Paillette if damage by explosives could not be included elsewhere in the code as he had suggested earlier and was told that one logical place for the crime would be under the arson statutes.

Chairman Burns indicated that the committee's concern at this point was that damage to another's property without intent to damage it was a lesser crime than damage caused by virtue of intent and the two should not be in the same classification. Mr. Spaulding suggested the two crimes were different subjects and the more serious could not be considered criminal mischief. Mr. Paillette remarked that part of the committee's problem was caused by the fact that crimes had not yet been graded by the Commission. He urged, in line with the observations

of Mr. Sol Rubin when he appeared before the Commission, that the number of grades and degrees of a crime be limited as much as possible, particularly until such time as the grading provisions were determined for the entire code.

After further discussion, Chairman Burns asked Mr. Paillette to give more study to the problems the committee had discussed with respect to the proposed criminal mischief statute and to either prepare a revised draft encompassing the crime by use of explosives in the criminal mischief sections or to cover that subject in the arson draft.

Burglary and Criminal Trespass; Preliminary Draft No. 1

Burglary and criminal trespass; definitions

Subsection (1). The committee approved subsection (1) defining "building."

Subsection (2). With respect to subsection (2) Justice Sloan pointed out that the draft said "'Premises' includes" while subsection (3) said "'Dwelling' means." He asked if there was a difference in meaning between these two terms. The committee noted that the New York and Michigan codes used the two terms interchangeably and decided to make no revision in subsection (2). Mr. Paillette pointed out that "premises" was defined to include real property because these definitions were designed to apply to the trespass statutes. Subsection (2) was approved without amendment.

Subsection (3). In reply to a question concerning the phrase "other than the actor" in subsection (3), Mr. Paillette explained that if a person entered his own home with intent to commit statutory rape upon the baby sitter, without the phrase "other than the actor" in the statute he could technically be charged with burglary. The phrase had been inserted in the draft to preclude such a possibility. Mr. Spaulding commented that a dwelling could be an apartment house which was usually occupied by persons other than the actor. After further discussion, the committee agreed to delete "other than the actor" from subsection (3).

Chairman Burns said he failed to see why the definition of "dwelling" should contain the words "at night" when burglary in the first degree covered the situation where the burglary took place at night. He thought the phrase in the definition section was redundant. Mr. Paillette replied that burglary in the daytime would fall under the category of burglary in the second degree as would burglary not in a dwelling. He explained that he had attempted to retain the traditional concept that burglary in the nighttime was more serious because of the terror it inflicted upon the occupants. Further discussion of this subject was deferred until the committee reached the proposed section on burglary in the first degree.

Subsection (4). Mr. Paillette read subsection (4) together with his comment on page 2 of P.D. #1 which explained why "night" had been defined to include the period thirty minutes after sunset and thirty minutes before sunrise. The committee approved subsection (4) as drafted.

Subsection (5). Mr. Paillette next read subsection (5) together with his commentary on pages 2 and 3 of P.D. #1 and explained, in reply to a question by Mr. Spaulding, that the subsection encompassed a new concept in Oregon law in that a person would commit burglary if he entered or remained unlawfully in a building. Mr. Paillette commented that when a person was prosecuted for burglary under present Oregon law, the best evidence the prosecution had as to his intent when he entered was what he did after he got into the building, so in that respect the draft would not change present law as much as it appeared on the surface. The individual who would be prosecuted under the proposed statute would be one who actually committed a burglary after remaining unlawfully in the building.

Chairman Burns pointed out that the major change from present law was that at the present time, in order to be guilty, the person would have to commit or attempt to commit a crime whereas the proposed statute contained no such qualifying language. Mr. Paillette replied that the same intent was required by the draft and in that respect it was not a departure from Oregon law.

There was a lengthy discussion of subsection (5) and how it fit into the burglary sections of the draft after which the committee decided it had no objection to retaining the definition as drafted.

Burglary in the second degree. Mr. Paillette read the draft on burglary in the second degree together with his commentary on page 8 of P.D. #1.

Chairman Burns suggested that "knowingly" be inserted after "he" on the second line of the draft. Mr. Spaulding commented that the inclusion of "knowingly" would bar prosecution of someone who drunkenly entered the wrong house and if that person also had the intent to commit a crime when he entered, "knowingly" would add nothing to the section.

Mr. Paillette called attention to the fact that the section would overlap existing ORS sections 164.220 through 164.250.

Chairman Burns expressed concern that the definition of "building" might not include the curtilage and asked how a person would be charged if he stole chickens from a chicken house. Mr. Paillette replied that he would be charged with burglary in the second degree and Mr. Spaulding pointed out that the definition of "building" said "in addition to its ordinary meaning" which would include buildings within the curtilage of the dwelling house.

Burglary in the first degree. Mr. Paillette read the draft on burglary in the first degree together with the commentary thereto on page 9 of P.D. #1.

Subsection (1). Mr. Spaulding asked if it would be advisable to further describe explosives in subsection (1) (a). Mr. Paillette replied that the subsection was aimed particularly at safecrackers and pointed out that ORS 164.260 said "nitroglycerine, dynamite, gunpowder or other high explosive." He expressed the view that the use of "explosive" without a qualifying adjective would not narrow the statute.

Mr. Spaulding questioned the use of "recklessly" in subsection (1) (b). He outlined a hypothetical situation where someone who was an invitee did not leave the premises when he should have and recklessly hurt someone. He would then be subject to a charge of burglary in the first degree. Mr. Paillette explained that the language of the draft was derived from the Model Penal Code. Chairman Burns suggested using "purposely, knowingly or recklessly" and Mr. Spaulding expressed approval of "purposely or knowingly." Chairman Burns pointed out that to be prosecuted under this section, the person would have had to remain unlawfully but that act, in and of itself, would not constitute a burglary unless he also attempted to commit or did commit a crime. He expressed approval of the section.

Mr. Paillette called attention to the New York approach which said "causes physical injury to any person who is not a participant in the crime." The new York provision was discussed in considerable detail after which Chairman Burns moved to amend the draft by deleting subsection (b) and inserting:

> "(b) Inflicts or attempts to inflict physical injury to any person; or
>
> "(c) Uses or threatens the immediate use of a dangerous instrument; or"

Representative Elder moved to amend Senator Burns' motion by restoring after "person" in subsection (b) the last phrase of the New York statute, section 140.25 (b), "who is not a participant in the crime." He said his reason for making the motion was that he was not sympathetic to a person who participated in the crime. Chairman Burns explained that he had recommended deletion of the phrase in order to make certain that both burglars who were engaging in dangerous conduct would come within the purview of the statute. Representative Elder withdrew his motion to amend and moved to adopt subsection (b) of P.D. #1 without amendment and to add subsection (c) as set forth in Chairman Burns' motion. Chairman Burns withdrew his motion at this point.

Mr. Spaulding, in a spirit of compromise, suggested the committee use "causes" instead of "inflicts" in subsection (b) which would leave open the question of whether the injury was caused by recklessness.

After further discussion, he moved that subsection (b) of the draft be deleted and the following inserted:

"(b) Causes or attempts to cause physical injury to any person; or

"(c) Uses or threatens the immediate use of a dangerous instrument; or"

The motion carried unanimously.

Subsection (2). Chairman Burns said he had grave reservations about reducing burglary in a dwelling to second degree if the burglary occurred in the daytime. He was of the opinion that breaking into someone's home, whether day or night, constituted a more serious offense than breaking into a building. Mr. Spaulding expressed the opposing view and said he did not think a burglary during the daytime, particularly if the occupants were away, was as serious or fearsome as a nighttime burglary when the family was sleeping.

After a brief discussion, Representative Elder moved that subsection (2) be adopted as drafted and the motion carried. Voting for the motion: Representative Elder and Mr. Spaulding. Voting no: Chairman Burns.

Possession of burglar's tools. Mr. Paillette read the draft on possession of burglar's tools together with his commentary thereto. He noted that this section, if adopted, would be new to Oregon law but similar provisions were fairly old and well established in the laws of many more metropolitan states.

Chairman Burns asked if there were any reported cases on the question of constitutionality of the language on the ground that it was too broad. He said he was quite certain that the Oregon court had ruled upon the constitutionality of the Portland city ordinance covering this subject. Mr. Paillette replied that there would be a constitutional problem if mere possession alone were criminal, but the section required possession coupled with intent. The language was prospective and would therefore apply to the actor's intent to use the tools in the future.

Mr. Spaulding asked if the section should contain an exception for the police officer who picked up burglar's tools and by having them in possession would be technically guilty of violating the section because it said "knowing that some person intends to use the tool." To resolve this question Representative Elder moved that "unlawfully" be inserted after "intent to use the tool" on line 3 and also on line 4 of the draft. Mr. Paillette pointed out that the draft used the present tense and if the officer had just made an arrest and had taken the tools, it would seem ridiculous to assume that any

person could then intend to use those tools. Mr. Spaulding agreed and Representative Elder withdrew his motion.

Chairman Burns moved the section on possession of burglar's tools be adopted as drafted and the motion carried unanimously.

Criminal trespass in the second degree; Criminal trespass in the first degree. Mr. Paillette read and explained the two criminal trespass sections and asked the committee to bear in mind that the definitions applying to the burglary sections also applied to criminal trespass.

Representative Elder asked if the draft would establish a prima facie case against a trespasser who went beyond a farmer's "No trespassing" sign. Mr. Paillette replied that the draft would not make such a case prima facie trespass nor would it make it more serious to be what the Model Penal Code called a "defiant trespasser" because of refusal to leave the premises when asked to do so. He noted that the draft did not draw a distinction between the person who went through a fence as opposed to one who did not. He had, he said, avoided that type of language and had drafted the sections to provide that the crime of trespass would be committed by any invasion of the premises whether or not the land was fenced. If the trespass involved fenced lands, he remarked that the district attorney would have a stronger case.

Representative Elder pointed out that farmers were constantly harassed by trespassers while police and district attorneys were unable to give them much assistance in keeping hunters off their lands. He suggested that the proposed statute should draw definite lines concerning posted lands and should deal explicitly with oral communications given by the owner to the trespasser to leave his land.

Chairman Burns asked Mr. Paillette why he had not included a provision similar to section 140.10 of the New York Penal Law to cover "property which is fenced or otherwise enclosed in a manner designed to exclude intruders." Mr. Paillette replied that he was trying to be consistent and provide for only two degrees of each crime and added that he had been more concerned with ease of enforcement than with severity of punishment.

Chairman Burns asked if "knowing" as used in the draft was sufficient or if the sections should also include "or having good reason to know." Mr. Paillette's reponse was that every time the phrase "having good reason to know" was used, the reasonable man test had to be applied. Mr. Spaulding suggested that the "knowing" phrase be omitted entirely and Mr. Paillette commented that such a deletion would make the sections more severe than if the reasonable man test were applied. Chairman Burns observed that public opinion would

probably be overwhelmingly in favor of tighter trespass laws and expressed approval of Mr. Spaulding's suggestion. The revised language, he said, would give the police and district attorneys sufficient guidelines and would avoid problems caused by including language having to do with posted and fenced lands.

Mr. Spaulding moved that the following phrase in the two criminal trespass sections be deleted: ", knowing that he is not licensed or privileged to do so,". The motion carried unanimously.

Next Meeting

Chairman Burns set the next meeting of the subcommittee for Saturday, June 22, and commented that the only proposal covered at today's meeting which would need to be reviewed was whether to include a malicious use of explosives section with the malicious mischief section or to place that subject with the arson statutes. Mr. Paillette outlined the sections yet to be covered by the subcommittee and said the drafts on arson and robbery would be presented at the next meeting.

The meeting was adjourned at 3:15 p.m.

Respectfully submitted,

Mildred E. Carpenter

Mildred E. Carpenter, Clerk
Criminal Law Revision Commission