Tapes #7 and 8

#7==284 to end of Side 1 and all of Side 2
#8==1 to 469 of Side 1

OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 1

June 22, 1968

A G E N D A

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OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 1

Sixth Meeting, June 22, 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
Miss Kathleen Beaufait, Deputy Legislative Counsel
Mr. Dave Neeb, Multnomah County Sheriff's Office

Chairman Burns introduced Mr. Dave Neeb, a third year law student from Wisconsin, who was working under a grant during the summer in the Multnomah County Sheriff's office. He explained that one of the duties the sheriff had assigned to Mr. Neeb was to collect the views of the 36 sheriffs in the state with respect to drafts tentatively approved by the Commission and to prepare a critique summarizing their comments.

A more efficient means of keeping subcommittee minutes and drafts was discussed informally. Chairman Burns asked that a master notebook be prepared and maintained in the office for each subcommittee member containing all these materials for use at meetings. The drafts mailed to the members will continue to be numbered consecutively and the minutes will be designated on the cover by a letter as an aid in distinguishing minutes from drafts. Minutes of meetings of Subcommittee No. 1 should be lettered as follows:

A - Minutes of meeting of February 24, 1968
B - Minutes of meeting of March 23, 1968
C - Minutes of meeting of April 6, 1968
D - Minutes of meeting of May 17, 1968
E - Minutes of meeting of May 27, 1968

Mr. Spaulding arrived at this point and the meeting was formally convened by Chairman Burns at 10:15 a.m. in Room 309 Capitol Building, Salem.

At the Chairman's request, Mr. Paillette reviewed the material considered at the meeting of May 27, 1968, and outlined the discussion leading to the preparation of Preliminary Draft No. 3 on criminal mischief which incorporated criminal mischief caused by means of an explosive. [Note: See Minutes, Subcommittee No. 1, May 27, 1968, p. 6.]

Criminal Mischief; Preliminary Draft No. 3; June 1968

Mr. Paillette indicated he had reached the conclusion that provisions relating to the use of explosives could properly be included in both the criminal mischief sections and in the arson draft

because the type of intent involved and the type of damage involved were not necessarily the same. He pointed out that both the New York and Michigan codes contained provisions in their arson statutes prohibiting "intentional or reckless damage to a building by causing an explosion" as opposed to the language in the draft, "by means of an explosive." Since the New York and Michigan provisions related specifically to damage to buildings, he did not believe that type of provision, if included in the Oregon arson draft, would be duplicitous of the provision in the criminal mischief proposal prohibiting criminal mischief by means of an explosive. Chairman Burns asked if that type of approach would cause a problem under State v. Pirkey, 203 Or 697 (1955). Mr. Paillette replied that he did not think there would be a constitutional problem because different elements would be involved in each of the crimes.

Mr. Paillette read section 1, criminal mischief in the third degree, and explained the section embodied criminal tampering and carried over the idea approved by the subcommittee at the last meeting of incorporating criminal tampering into a criminal mischief statute. He called attention to minor grammatical changes incorporated in the section to make it consistent with the structure of the following sections.

Section 2, criminal mischief in the second degree, he said, encompassed the provisions of what was called "first degree" under P.D. #2a. In attempting to distinguish between conduct which was the result of an intent to cause substantial inconvenience and conduct which resulted in intentional damage, as discussed at the previous meeting, if the person violated section 1 and there was damage in excess of $100, it would be criminal mischief in the second degree, even though he had no intent to damage the property. If the damage was less than $100, it would be criminal mischief in the third degree. Mr. Paillette said he had arbitrarily picked $100 because that figure was likely to be the point of departure in the theft articles between what was now called petty and grand larceny. Subsection (2) (a) would make the crime second degree if the actor intentionally damaged property of another, and in this event value would not be an element.

Mr. Paillette explained the proposed section 3 would provide that damage to property in excess of $1,000 and damage by means of an explosive in any amount would result in a first degree charge. Representative Elder asked if "explosive" should be defined. Chairman Burns read the second paragraph on page 9 of the minutes of the meeting of May 27, 1968, recapitulating the committee's previous discussion of this subject. Miss Beaufait noted that, in addition to ORS 164.260, "explosives" was defined in two places in the Oregon code -- one in the sections having to do with commercial fishing and the other relating to tort liability dealing with the responsibility of persons conducting blasting operations. In reply to a question by Chairman Burns, Miss Beaufait said that "explosives" could be defined

in the general articles if the committee so desired, assuming the same definition could be applied to the burglary statutes. Mr. Spaulding expressed the view that the court would say "explosive" was an ordinary word and would not require a special definition.

Chairman Burns pointed out that if the subcommittee approved the draft as submitted, they would be adopting a new policy and departing from the present code because historically the malicious destruction statute was framed in terms of the degree of wantonness or maliciousness with which the act was committed rather than in terms of the dollar amount of the damage. He asked what would happen if a person recklessly drove a car into a fence and the person whose fence was damaged asked the district attorney to issue a complaint against the driver for damaging his fence which had originally cost $600 to construct. He said the person should be prosecuted for reckless driving and not be prosecuted under the criminal mischief statute. Mr. Paillette replied that he was anticipating that terms such as "reckless," "negligent" and similar terms denoting conduct of a reckless nature would be defined for the purpose of the entire code. He read the definition of "recklessly" in Model Penal Code section 2.02, subsection (2) (c), and noted that by this definition the MPC was attempting to stay away from confusing language such as wantonness, maliciousness, gross negligence and other ambiguous terms.

Chairman Burns asked Mr. Paillette if he was supplanting "wanton" and "malicious" as used in ORS 164.900 with "recklessly" and received an affirmative reply. Mr. Paillette stated that to a certain extent intentional damage also supplanted the malicious destruction statute. He read a portion of the commentary to New York section 145.00:

> "The culpability concept prescribed in subdivision two -- 'recklessly' -- . . . must be shown that the defendant was aware of and consciously disregarded a substantial risk that property damage in excess of $250. would occur. Thus, where defendant is pitching a baseball to a catcher whom he knows is inexperienced and who is standing in front of a large plate glass window, it can be concluded that such defendant is acting 'recklessly.'
>
> "As originally enacted, 145.00 equated reckless conduct with intentional conduct. This introduced an imbalance which the 1967 amendment to this section cured by limiting criminal liability for reckless conduct to cases where the property damage exceeds $250."

Mr. Paillette expressed the view that the New York approach was preferable to Michigan section 2707 because it contained a distinction between intentional and reckless conduct, and the members agreed.

Chairman Burns asked if there was an ambiguity between section 2, subsection (2) (a), and section 3, subsection (1). He noted that

there was a dollar limit placed on the latter subsection but none on the former and asked if this would be unconstitutional because a person could be charged with first degree under section 3 (1) or, for the same crime, could be charged with second degree under section 2 (2) (a). Mr. Paillette replied that the crime prohibited under section 3 had one more element and that element was the value of the damage. Chairman Burns said he would prefer not to change the draft but he wanted to be sure that no constitutional problems could occur under the proposed language.

Mr. Paillette stated he was thinking in terms of additional elements when he prepared the draft. For example, a petty larceny statute could say that a man would commit petty larceny if he stole property, and an element would be added by providing that he would commit grand larceny by stealing property of a value greater than X number of dollars. He suggested that the draft could be amended, to avoid any problem of interpretation, in section 2, subsection (2) (a), to say "property of another in an amount not exceeding $1,000" but he did not agree that the amendment was essential. He contended that value was not an element in second degree criminal mischief any more than value was an element in a charge for petty larceny. He called attention to section 155.25 of the New York code which said: "A person is guilty of petit larceny when he steals property." In a prosecution for grand larceny, the district attorney would be entitled under that statute to a conviction of petty larceny if he proved everything but value, he said.

Mr. Spaulding asked why it was necessary to include "having no right to do so nor reasonable ground to believe that he has such right" in all three sections of the draft. Mr. Paillette explained that he had intended the phrase to be an element in each of the three sections, but the element was not the same in all three. The "right" referred to in section 1 was the right to tamper or interfere with the property, whereas sections 2 and 3 spoke in terms of the "right" to damage the property. The committee discussed various ways of revising the language to avoid the redundancy but finally decided that to change the draft would alter its meaning.

Representative Elder moved that Preliminary Draft No. 3, Criminal Mischief, be approved as submitted with the proviso that the question raised by Chairman Burns with respect to the constitutionality of section 2, subsection (2) (a), would be researched and if there was reason to believe that a problem existed, the draft would again be called to the attention of the committee. The motion carried unanimously.

A recess was taken at this point.

Robbery; Preliminary Draft No. 1; June 1968

Mr. Paillette pointed out that the robbery draft did not contain a definitions section. The Michigan code, he noted, included a definition of terms; New York did not. He suggested that the committee might want to incorporate by reference the definitions in the theft articles, particularly the property definition, and they might also want to define "in the course of committing a theft" as Michigan did.

Mr. Paillette read the two sections of the robbery draft and portions of his commentary. He pointed out that the primary difference between the proposed statutes and the present Oregon statutes was that the draft shifted the focus of attention from the taking of property to the risk of injury and violence to the victim. The language in the first section "in the course of committing a theft" would mean, he said, that there would not necessarily have to be an actual taking of the property for robbery to occur. If the type of force outlined in the proposed statute were employed, even though the actor might be prevented from actually obtaining property, he could still be charged with robbery. Impliedly, the statute would say that what the law was concerned with was the use of force upon the victim.

Another departure from present law, Mr. Paillette explained, was that the use or threat of force would not need to be directed at the owner of the property; it could be directed toward a member of the owner's family or one of his employes and still fall within the purview of the robbery statute.

Mr. Paillette called attention to the aggravating factors set forth under robbery in the first degree and expressed the view that there was good reason to distinguish between a "deadly weapon" and a "dangerous weapon." If the purpose of the law was to try to suppress violence and the use of violent means to steal property, he said, there was a good policy reason to prevent being armed with a deadly weapon. He observed that if there were two or more robbers, the type of injury which could be inflicted on the victim, even though the robbers were not armed, was serious enough to make the crime punishable to a greater extent than when only one was present.

Chairman Burns commented that in the current Oregon law assault and robbery went hand-in-hand. The proposed draft would separate robbery from assault, he said, and asked Mr. Paillette for the rationale behind this approach. Mr. Paillette was of the opinion that the two crimes were not being separated and, in fact, the draft would move more in the direction of saying that robbery was an assault. Present statutes, he said, proscribed assault with intent to rob where no property was taken. He called attention to the Oregon cases cited on page 3 of P.D. #1 showing that as far as the Oregon court was concerned, assault was fundamental to robbery, and that concept was being retained in the proposed draft.

Chairman Burns pointed out that the draft would do away with the distinction between principles and accessories and asked what would happen if the subcommittee which prepared the general provisions for the criminal code defined an attempt to commit a crime as the unsuccessful completion of the act. Mr. Paillette replied that such a definition would constitute an ambiguity which would have to be reconciled.

Mr. Paillette advised that the revised criminal code would eventually contain an article on assault setting forth other types of assault which a prosecutor could fall back on if he felt he was lacking sufficient proof on the property taking aspect of the crime of robbery. Representative Elder expressed approval of the proposed draft and commented that the act of robbery was serious the minute the robbery began and whether or not the robber obtained property was not too important.

Mr. Paillette pointed out that the proposed draft followed the direction of the MPC and the revisions of New York, Michigan and Connecticut. He read the following excerpt from the commentary to the MPC, T.D. #11, referring to the phrase "in the course of committing theft" as employed in section 222.1:

> "The thief's willingness to use force against those who would restrain him in flight strongly suggests he would have employed it to effect the theft had there been need for it. No rule-of-thumb is proposed to delimit the time and space of 'flight' . . . The concept of 'fresh pursuit' will be helpful in suggesting realistic boundaries between the occasion of the theft and a later distinct occasion when the escaped thief is apprehended."

With respect to attempted robbery and assault with intent to rob, the same commentary to the MPC said:

> "Since common law larceny and robbery required asportation, the severe penalties for robbery were avoided if the crime was interrupted before the accused laid hold of the goods, or if it developed that the victim had no property to hand over. Legislation developed the offense of assault with intent to rob . . . The proposed text makes it immaterial whether property is or is not obtained."

Mr. Spaulding said it seemed to him there was a distinction between succeeding and not succeeding in obtaining property by force, and the committee could take care of the concept embodied in the draft by making the penalties for assault with intent to rob something very near the penalty for robbery. Chairman Burns commented that under present law the penalties were identical.

Chairman Burns requested an explanation of subsection (4) under robbery in the first degree and was told by Mr. Paillette that the section was attempting to prevent the use of force or a show of force in the course of committing a theft and the crime would be more serious if any factor increased the danger to the victim. Under subsection (4) the accomplice would constitute additional force because the fact that the robber had someone present to help him was as great a threat to the victim as if the robber were armed with a club. Chairman Burns commented that if two unarmed men robbed a cashier, they would be charged with first degree robbery the same as though they had been armed. He remarked that in "purse snatching" cases there were customarily two persons involved. Under this draft they could be charged with robbery in the first degree and he expressed approval of this possibility.

Chairman Burns then asked if a man driving a "get-away car" would be considered "actually present" under the proposed statute. Mr. Spaulding replied that he did not believe the man in the car would be considered "actually present" because the two men would not be together to increase fear in the victim and the second man would not be on hand to constitute an additional show of force. Mr. Paillette agreed with Mr. Spaulding's interpretation and commented that it might be possible to make the language clearer in this respect. Mr. Spaulding remarked that subsection (4) obviously meant as much as the committee thought it should mean; the only possible argument was whether it might include more than they had intended, and he did not believe it was necessary to clarify it further.

Chairman Burns cited a hypothetical case where he went into a store, no one was in sight, and he stole a pair of overalls. After he left the store, the owner chased him, caught him and he beat up on the owner in order to escape. The initial act would be theft, Mr. Paillette said, but after the thief had injured the owner, the act became robbery. Miss Beaufait said that if in the course of the chase, he had dropped the overalls, the charge for beating the owner would be using force to escape detention rather than robbery because he would not be resisting in order to retain the property.

There was a discussion concerning the type of charge that could be made against the defendant under the circumstances outlined above. The question was raised as to whether theft would be a lesser included offense under the Chairman's hypothetical situation if the prosecutor were unable to prove robbery. Mr. Paillette urged that the committee not become distracted by what was intended to be accomplished in this draft and what would be accomplished in the attempt statutes when they were drawn. The attempt statutes, he said, would be general provisions relating to incomplete crimes whereas the robbery draft was intended to refer to a crime which could be completed even though no property was taken. One way of completing the crime of robbery was to employ an element of force or threat of force. Chairman Burns asked

Mr. Paillette if he thought the statute should be broadened to include the exercise of force to facilitate an escape and was told that crime entailed a different concept and he would oppose such a revision.

Mr. Spaulding raised an objection to the phrase "retention thereof" in subsection (1) of robbery in the second degree. He contended that the way the sentence was worded sounded as though the robber was trying to overcome resistance to his retention of the property and the storekeeper was trying to overcome his resistance. Senator Burns moved that subsection (1) be amended to read:

> "(1) Preventing or overcoming resistance to his taking of the property or to his retention thereof immediately after the taking; or"

The motion carried unanimously.

Mr. Neeb questioned the meaning of the phrase in the first section of the draft, "uses or threatens the immediate use of physical force," as opposed to the extortion draft which used the phrase "in the future." Mr. Paillette explained that the committee had purposely used this language in the two statutes to differentiate between a threat to pull the trigger of a gun immediately and a threat to carry out violence at a future time in order to draw a clear distinction between robbery and extortion.

Mr. Spaulding indicated that if it was the committee's intention to charge a man with robbery even if he didn't actually obtain property, the phrase "in the course of committing a theft" should read "in the course of committing or attempting to commit a theft." The committee discussed various methods of solving this problem, one being to define "in the course of committing a theft" as had been done in the Michigan draft which said that the phrase "embraces acts which occur in an attempt to commit or the commission of theft, or in flight after the attempt or commission." Chairman Burns thought the last phrase of the Michigan definition was too broad and suggested the insertion of "immediate" before "flight." The committee also discussed the feasibility of incorporating the theft definition section in the robbery draft and Miss Beaufait pointed out this would be an editorial problem to be resolved when the drafts were finally coordinated.

Mr. Spaulding commented that there was some benefit in being able to read one statute in its entirety rather than having to refer to other sections and moved that the first paragraph of robbery in the second degree be amended by inserting "or attempting to commit" after "committing." The motion carried unanimously.

Chairman Burns pointed out that some of the other code revisions contained three degrees of robbery while P.D. #1 contained only two. Mr. Paillette explained that the third degree of the crime in the

New York and Michigan codes was the presence of another person to aid the robber. Chairman Burns noted that armed robbery under the present code was punishable by life imprisonment and asked the committee if they would agree that a robber "aided by another person" should also receive a life sentence. He also asked if this would pose an equal protection problem. The committee agreed that there was no equal protection problem involved, and they had no objection to subsection (4) carrying a first degree penalty.

Mr. Spaulding asked if the language should be clarified in subsection (4) to indicate that the fear of the victim was enhanced by the additional manpower present. He noted that there could be another person on the premises whose presence was unknown to the victim. Mr. Paillette replied that the danger of violence or force to the victim was not lessened by the fact that he was unaware of the second person's presence.

Chairman Burns noted that subsection (c) of the draft on burglary in the first degree used "dangerous instrument" while the robbery draft said "dangerous weapon." The committee agreed that the terms should be made uniform and that "weapon" was the better word. Inasmuch as the burglary draft had been approved by the committee, it was decided to make no change at this time but when the draft was later retyped, the amendment would be made.

Chairman Burns asked if the proposed robbery draft would in any way affect any of the court decisions defining the terms used. He made particular reference to the decision which held that when a gun was used, there was a presumption that the gun was loaded. Mr. Spaulding pointed out that the way the draft was written, the fact that a man threatened the use of a dangerous weapon was all that was necessary whether or not it was loaded and even though it was only a cap gun which looked like an actual gun; the fear in the mind of the victim was the governing factor.

Representative Elder moved that the robbery draft as amended be adopted by the subcommittee and the motion carried unanimously.

Robbery; claim of right not a defense. Mr. Paillette read the section prohibiting claim of right as a defense to robbery together with his commentary on page 8 of P.D. #1. He maintained that the criminal law should not encourage anyone to engage in violent activity even though he believed he was acting under a claim of right. Mr. Spaulding expressed the opposing view, commenting that a man had a right to take reasonable force to protect his own property. Mr. Paillette replied that he thought there was a good policy reason for encouraging people to use lawful processes to recover property.

Chairman Burns noted the theft defenses provided that theft was not committed if the person acted under an honest claim of right. He

commented that if the robbery defense were adopted, there would then be a solid policy reason for making the theft defense conform; the rationale was the same. Mr. Paillette outlined that there was an added feature under the robbery section and that was the use or threatened use of violence. Representative Elder observed that if the robbery defense section were not adopted, a person still could not use violent means to reclaim property because he would then be guilty of assault.

Mr. Paillette said he didn't believe that even by omission the statute should imply that it was all right to commit robbery under a claim of right; the proposed section would discourage people from taking the law into their own hands. He read an excerpt from the commentary to the Michigan Revised Criminal Code, p. 259-60:

> " . . . at least two Michigan decisions state that a claim of right to the property taken is a defense against a charge of robbery. This flows logically from the traditional definition of robbery as in effect larceny by assault. A claim of right means that there is no larceny, so that in turn and as a matter of logic there can be no robbery. Only the assault can be punished. Since robbery under section 3307 of the Draft occurs in the course of committing or attempting to commit theft, and since claim of right is a defense to a charge of theft, a claim of right would also be available as a defense under chapter 33 unless a contrary doctrine is indicated.
>
> "However, the chief concern in Chapter 33 is for the protection of the lives and physical or mental well-being of citizens. Therefore, there is little point in retaining the common-law defense, since the danger to the citizen from the use or threat of force is present no matter what the origin of the claim by the defendant to the property may be. There is an added policy in favor of non-retention of the defense, namely that citizens should be encouraged to assert their property rights through orderly processes of law rather than by force. The Draft, therefore, in section 3310, specifically eliminates a claim of right as a defense to robbery in any of its degrees."

Mr. Spaulding said he could not approve of convicting a man of robbery under claim of right circumstances, whether or not he actually owned the property, if he honestly believed he owned the property he was trying to get. He said he would categorize such an offense on the basis of an assault.

It was pointed out that the section pertaining to claim of right would apply only in rare instances since it was very seldom that a defendant could make any substantial claim of ownership.

Mr. Spaulding commented that he would approve of the proposed section if a period were placed after "theft" and the balance of the section deleted. It would then be possible to convict a violator of robbery even though he obtained no property. He later discussed ending the section with " . . . that there was no theft or intended theft." There was considerable discussion on the proposed amendment and Mr. Spaulding explained that he was attempting to allow the use of reasonable self-help in regaining property if the person had a right to that property.

Representative Elder moved that the section entitled "Robbery; claim of right not a defense" be laid on the table and the motion carried. Voting for the motion: Mr. Spaulding and Representative Elder. Voting no: Chairman Burns.

Next Meeting

Mr. Paillette advised that there was now a sufficient backlog of material approved by the subcommittee for presentation to the full Commission and he would attempt to set a date for a Commission meeting in the very near future.

The meeting was adjourned at 2:05 p.m.

Respectfully submitted,

Mildred E. Carpenter

Mildred E. Carpenter, Clerk
Criminal Law Revision Commission