Tapes #8 and 9

#8 - 469 to end of Side 1 and all of Side 2
#9 - 1 to 490 of Side 1

OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 1

July 13, 1968

A G E N D A

ARSON AND RECKLESS BURNING (Article 16)
Preliminary Draft No. 1; July 1968

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OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 1

Seventh Meeting, July 13, 1968

Minutes

Members present: Senator John D. Burns, Chairman
Mr. Robert Chandler

Absent: Representative Edward W. Elder
Mr. Bruce Spaulding

Also present: Mr. Donald L. Paillette, Project Director
Miss Kathleen Beaufait, Deputy Legislative Counsel
Justice Gordon Sloan, Chairman, Oregon State Bar Committee on Criminal Law and Procedure
Mr. Dave Neeb, Multnomah County Sheriff's Office

The meeting was called to order by Chairman John D. Burns at 10:00 a.m. in Room 309 Capitol Building, Salem.

At the Chairman's request Mr. Paillette reviewed the previous meeting of the subcommittee and outlined the drafts approved by Subcommittee No. 1 which would be submitted to the full Commission on July 19: Unauthorized Use of a Vehicle (P.D. #2); Theft of Services (P.D. #3); Burglary and Criminal Trespass (P.D. #2); Criminal Mischief (P.D. #3); and Robbery (P.D. #2).

Mr. Chandler asked if the Commission planned to consider the problem of multiple offenses charged against a defendant for related crimes. Chairman Burns replied that issue was an extension of the question of jeopardy to the defendant, and Mr. Paillette advised that the problem would be considered when the procedural revision was undertaken.

Arson and Reckless Burning; Preliminary Draft No. 1; July 1968

Section 1. Definitions. Mr. Paillette read section 1 together with his commentary thereto. Justice Sloan objected to the language in subsection (1), "vehicle, boat, aircraft, or other structure," and noted that a vehicle, boat or aircraft was not a structure. He questioned whether "other" would require that the vehicle be adapted for overnight accommodation to fall within the definition. Mr. Paillette pointed out that the definition was identical to that contained in the burglary and criminal trespass draft and its purpose was to include the types of structures that would be likely to have people in them. He suggested that the committee go through the rest of the draft before taking action on section 1 so they would have a better idea of what the definitions were intended to cover. Subsection (1), he said, could be clarified to take care of Justice Sloan's objection.

At a later point in the meeting Miss Beaufait asked why the definition of "forest land" contained the phrase "enough flammable forest growth," etc. and suggested a period be placed after "clearing." Whether or not the growth constituted a fire hazard, she said, would go to the question of recklessness and intention. Justice Sloan agreed that the language after "clearing" was superfluous, and Mr. Chandler commented that, with the proposed amendment, the prosecutor would need to prove only that a fire started on the type of land described.

Mr. Paillette explained that the definition of "forest land" was the same as that appearing in ORS 477.001 and was incorporated in ORS 477.715, wilfully and maliciously setting fire to forest land, and ORS 477.720, accidentally setting fire to forest land, but ORS 477.805 said that "'Forest land', notwithstanding the definition in ORS 477.001, means any land producing forest products" and "forest products" was defined in that section as including "all products derived through the cutting, severing or otherwise removing of forest trees and windfalls."

After further discussion, the committee agreed to place a period after "clearing" in section 1 (3).

Section 2. Reckless burning; Section 3. Arson in the second degree; Section 4. Arson in the first degree. Mr. Paillette read section 2 and called attention to his commentary on page 5 of the draft which pointed out that the proposal anticipated that definitions of words of culpability would be adopted similar to those appearing in the Model Penal Code. Reckless burning, he said, was not as serious as arson because the crime would contain no intent to damage property whereas arson carried an intent to damage property of another.

Justice Sloan objected to the use of "intentionally" in section 2. He was of the opinion that if "recklessly" was used, it would include "intentionally" and urged that "intentionally" be stricken from the draft. Mr. Paillette pointed out that the Model Penal Code drew a definite distinction between recklessness and negligence. He also noted that the draft was not intended to say that the actor intentionally damaged property; it said that he intentionally started the fire. The word "intentionally" was not intended to be a word of culpability but was referring to starting or causing a fire. He called attention to section 220.1 (2) of the Model Penal Code which used "purposely" instead of "intentionally" but the intent element was the same. He suggested that the committee read the following sections to see how they fit together before discussing this question further.

Mr. Paillette explained that section 2 talked about wilful conduct and intentional damage and placed within the basic framework of arson the intentional starting of a forest fire. The draft, he said, attempted to draw a distinction between the type of arson that was likely to or did result in injury to a person or damage to the

kind of property the burning of which had traditionally been looked upon as arson as opposed to reckless burning where no intent to damage property was involved. Under the common law arson was the burning of a dwelling and it wasn't until the states adopted statutory arson that arson was applied to other types of property, he said. The Model Penal Code, New York and Michigan revisions, among others, had tried to look upon the most serious type of arson as that which would result in injury to someone or result in the burning of a dwelling house and had not tried to make the burning of every type of property arson. This was the reason, he related, for the extensive provisions under criminal mischief where even though the act might amount to what might be considered arson, it was not called "arson" because of the type of property involved or because it didn't result in risk or injury to a person or the burning of a dwelling house.

Mr. Chandler said he could foresee trouble with special interest groups appearing before the legislature who would say that the arson statute did not apply to their particular situation because they were not familiar with the criminal mischief statutes.

Chairman Burns asked if the draft ran into constitutional problems between a set of facts which might be applicable either to the criminal mischief sections or to the arson sections. This point was discussed and Mr. Chandler pointed out that the question would rest upon the penalties attached to, for example, the section on arson in the second degree and the section on criminal mischief in the second degree.

Chairman Burns asked why, since the rationale behind the draft was to protect human life and safety, section 4, arson in the first degree, was applicable to bodily injury only when insurance was involved. Mr. Paillette replied that section 3 concerned the placing of another in danger of injury whereas the highest degree of the crime, section 4, referred to actual damage or injury, plus the clause relating to insurance.

Mr. Chandler asked if it was correct that if he started a fire and someone was killed in the fire, he would be charged with arson in the second degree if he had not started the fire for the purpose of collecting the insurance of the deceased and received an affirmative reply. Chairman Burns added that such an act might fall within the proscription of subsection (1) of section 4 if a building had been burned in addition to the burning of the person.

Chairman Burns asked Miss Beaufait to comment generally on the draft. She advised that she was concerned, as a social judgment, with subsection (2) of section 4 where one could start a fire and intentionally cause injury to a person and the only reason it became an aggravated offense was because insurance was involved. She also

indicated that she had become confused between sections 2 and 3 in trying to determine whether recklessly or intentionally mocified the fire or modified the damage or injury and in trying to determine which fact situation would fit into which section.

Mr. Chandler commented that the draft eliminated crimes now covered under ORS 164.080, fires affecting land of another, because of the use of "intentionally."

Chairman Burns observed that the arson sections would probably be one of the most fiercely lobbied portions of the criminal code because so many groups would be interested; i.e., the forestry associations, cattlemen, State Forester, A.O.I., insurance industry and the field burners, to mention a few. He thought the Commission might be in a better position with these organizations if the draft stayed closer to Oregon's present form of arson rather than following the Model Penal Code or some of the other revisions where the drafters were in a different position so far as fire problems were concerned on prairie and range lands, wheat lands, etc. He suggested that he, as a defense attorney, might be able to induce a judge to throw out an indictment for burning a wheat field that was framed under the criminal mischief statute because the crime was not included under the arson sections. Mr. Chandler suggested that some of the recent revisions made by southern states might be worth looking at and mentioned specifically Florida, Georgia, Mississippi and Alabama.

Justice Sloan asked Miss Beaufait if it would be possible to include in the criminal mischief statutes an exception clause to say that any offense included in the arson sections was not applicable under the criminal mischief sections. Miss Beaufait replied that it would be possible to draft such an exception. Mr. Chandler pointed out that soon there would be a series of exceptions inserted by the legislature under pressure from lobbying groups if such a course were adopted.

A brief recess was taken at this point and when the meeting resumed, Mr. Paillette asked the committee to turn to page 16 of the draft for the purpose of going over some of the background information to clarify policy questions that had been written into the draft. He called particular attention to the Model Penal Code approach to first degree arson as compared to first degree arson under the New York code (page 28 of the draft). From the standpoint of proving first degree arson, he said, New York required considerably more proof than the MPC approach which was more akin to the Oregon proposal and included the kind of property most likely to be inhabited rather than requiring actual proof that there was a person in the building at the time of the fire. In preparing the draft, Mr. Paillette said he had attempted to grade the degrees of arson partly on the kind of property involved and partly on the danger to other people. He noted the difficulty inherent in considering the arson draft when the committee could not know how each crime would be classified as to punishment in comparison with the classifications yet to be made in the criminal mischief draft.

Mr. Paillette noted that section 220.1 (1) (b) of the Model Penal Code made the burning of property arson in the second degree for the purpose of collecting insurance but provided that it was an affirmative defense if no one was recklessly endangered or if another building or occupied structure was not recklessly endangered. Rather than framing the draft in terms of a defense, the proposal stated it in terms of an element of the crime. The term "any property" would cover not only a building or dwelling but the burning of any type of property, he said.

Since arson in the first degree would be the most serious type of offense, Mr. Paillette pointed out that the draft required actual injury or damage, and recklessly endangering a person or building of another would fall under arson in the second degree. He explained that he had not tried to marry the draft to the common law but did take into consideration what seemed to be legitimate differences and distinctions between the kinds of property involved. First degree arson under the New York and Michigan revisions was such a departure from what Oregon had traditionally thought of as first degree arson, i.e., the dwelling house of another, that to require the prosecution to prove there was someone in the building at the time of the fire and that the defendant either knew or should have known he was there, was requiring too much proof, he said. On the other hand, he felt that the reckless endangering of a person, in the absence of actual damage or injury, should not be first degree arson. He explained that he had tried to incorporate and embody what seemed to him good provisions in the present law which should be retained and at the same time to up-date the code and draw reasonable distinctions between not only the culpability element but also the nature of the property.

In connection with protection of the forest lands, Mr. Paillette said he was of the opinion that the prohibition against burning forest lands would be a better provision than the two-pronged approach in the present law where the actor could either be prosecuted for third degree arson for setting fire to forest lands or he could be prosecuted for the same offense under ORS chapter 477. He suggested that the committee conduct a general discussion concerning the type of approach they would recommend.

Chairman Burns said it was interesting to note that Michigan restricted their arson statutes to the burning of buildings. Mr. Paillette explained that the Michigan commentary, as well as the New York commentary, generally stated that their concern was with prohibiting certain types of conduct. If they felt the proscription was going to be amply provided for under a section of the code, such as criminal mischief, they weren't concerned with the label so long as the conduct was prohibited. He read the following note on burning of personal property from the commentary to the Michigan code, page 215:

"Personal property is not covered in Chapter 28, unless it is a vehicle or watercraft used for overnight lodging or

for the conduct of business. Burning of other personal property is one form of criminal mischief now covered in Chapter 27."

Chairman Burns remarked that if the committee, as a policy matter, decided to restrict the arson statutes to burning of buildings as Michigan did, and made a specific reference to damage by burning of other property being covered in the criminal mischief section, it would render the statute less susceptible of ambiguity than if burning of certain property was covered under the arson sections and burning of other types of property was in the criminal mischief sections.

Mr. Paillette remarked that he thought setting a forest fire should be a serious crime in this state but he had not considered that the same degree of criminality should apply to the burning of a large wheat field.

In response to a question by Mr. Chandler, Mr. Paillette said that if a man burned his own property and no other property was damaged and nobody was hurt, the crime could be prosecuted as fraud or theft by deception if he attempted to collect insurance for his loss. If someone burned his own property with the motive to collect insurance and caused no bodily injury, he could be prosecuted under subsection (2) of section 3. In that situation if the element of burning his own property coupled with a reckless endangering of other property, even without actual damage, were present, he could be prosecuted under section 2.

Chairman Burns noted that the effect was that first degree arson had been broadened considerably over the present statute because the draft was not restricted to the burning of buildings but added the elements of bodily injury and insurance.

He asked if the committee had any thoughts with respect to changing the title of reckless burning to third degree arson. Mr. Paillette expressed the view that the stigma of arson should not attach to the act of reckless burning. Mr. Chandler said the only thing that concerned him about section 2 was the use of the word "intentionally." Mr. Paillette explained that the interpretation the committee was putting on "intentional" was not what he had intended and if the word was going to cause confusion, he suggested it be eliminated. Mr. Chandler noted that if "intentionally" were deleted from section 2, the proposed statute would be broadened to cover the 70% of the state covered by grass, forest, sagebrush, etc.

Chairman Burns asked if "reckless" had been defined in any of the codes and was told by Mr. Paillette that the definition of "reckless" in the New York code was quite comparable to the definition of that term in the Model Penal Code.

Miss Beaufait asked what crime would be committed if someone was caused bodily injury by fire without actually damaging property and was told by Mr. Paillette that under the Model Penal Code if the person died, it would be manslaughter and some form of assault if he did not.

Chairman Burns said that under the present statute if a person were caught in the act of setting fire to a hotel, he would be guilty of first degree arson even though there was no damage to the building. Under the proposed draft he would be guilty of attempted arson. Mr. Paillette said he would not agree that he would be guilty of first degree arson under the present statute in that situation because the cases required a charring of the property for the crime to reach the stature of arson and called attention to the comment on page 8 of the draft where State v. Elwell, 105 Or 282, 209 P. 66 (1922), required a "charring" as an essential element of the crime. He was of the opinion that "damage" was not a departure from present law because the word would require a charring.

Mr. Chandler suggested that "intentionally" be removed from section 2 and Justice Sloan suggested that "recklessly" be removed from the first sentence and substituted for "intentionally." Mr. Paillette explained that the section was talking about culpability. He reiterated that he was attempting to draw a distinction between an attempt to damage the property and a reckless damage to the property. He pointed out that if Justice Sloan's suggestion were adopted, the section would not then cover the situation where the actor intentionally started the fire but didn't intend to damage someone else's property and as a result of starting the fire, he did recklessly damage the property. He noted that the section pertained to a reckless kind of culpability and was talking about a material element of an offense under the Model Penal Code definition of "recklessly" and the material element in this section was damage. Chairman Burns asked if the same argument would be applicable if "intentionally" were stricken and Mr. Paillette said it would because "intentionally" as it modified "starting a fire" was not intended to denote culpability, whereas "recklessly" was so intended. The section was not talking about recklessly starting a fire, he said.

Tape 2 of this meeting begins here:

Mr. Paillette indicated he would agree that deleting "intentionally" would broaden the coverage and would be an improvement but he urged that "recklessly" not be inserted in its place because that was a word of culpability and the material element that "recklessly" defined and modified was "damages," not the starting of the fire. He said that a situation where someone carelessly flicked a lighted cigarette and started a fire would be amply covered by the criminal mischief statute and would not fall under arson.

Chairman Burns expressed approval of the fact that under the draft if a person set fire to and burned his own stubblefield and the fire escaped to a neighbor's land, he could be prosecuted under

subsection (2) of section 2. Mr. Paillette pointed out that "recklessly" did not imply mere negligence.

Justice Sloan said that, other than permitting a fire to escape and get out of control, he did not see how anyone could "recklessly damage." Chairman Burns said it could be done by throwing a lighted cigarette into a field and Miss Beaufait pointed out that one could recklessly damage by failing to take proper steps to call the fire department when it became apparent that a fire was out of control.

Justice Sloan suggested that section 2 read:

> "A person commits the crime of reckless burning if he recklessly damages property of another by fire or explosion."

Mr. Paillette expressed approval of this proposal because it left "recklessly" in juxtaposition with "damages."

Mr. Chandler noted that some guilt should obtain to a man who saw that a fire was escaping but did nothing to contain it. Justice Sloan commented that in such a case the "recklessly damages" would be meaningless.

Mr. Chandler called attention to ORS 164.070 (3):

> "Accidently (sic) setting any fire on one's own land or the land of another and allowing it to escape from control without extinguishing it, or using every possible effort so to do."

He was of the opinion that the draft should contain language recognizable as this provision. Chairman Burns asked if that ORS section were included, whether Mr. Chandler would still recommend that section 2 (2) be retained and received a negative reply. Mr. Paillette suggested the possibility of a separate section to be called "negligent burning" or something similar and Mr. Chandler expressed agreement with this proposal.

Chairman Burns asked Mr. Paillette to prepare alternative drafts containing (1) Justice Sloan's suggested language and (2) reckless burning as suggested by Mr. Chandler incorporating the language of ORS 164.070 (3) as subsection (2) of section 2 of the draft and deleting "intentionally" in subsection (1). The latter section need not necessarily be an alternative but could be an additional section, he said, and asked Mr. Paillette to base the negligent burning statute on ORS 164.070 and to bear in mind the historical tort problems that had grown out of that section.

Chairman Burns asked Mr. Paillette if there was a specific statute in ORS chapter 477 making it a crime to set fire to forest lands and received an affirmative reply. In answer to a further

question by Chairman Burns, Mr. Paillette stated that statute carried a maximum penalty of two years and it would be repealed if the Commission's arson statute was adopted. Chairman Burns then remarked that the specific question the committee had to decide was whether to make a separate crime of the burning of forest lands. Mr. Chandler said he had been persuaded that the criminal mischief statute would cover the crime and added that lobbying pressure would undoubtedly be applied on the legislature unless specific reference was made in the proposed code to forest lands.

Chairman Burns asked Mr. Chandler if he would agree that there was sufficient social justification for sending a man to the penitentiary for first or second degree arson if he set a forest on fire and there was greater justification for so doing than if he set a wheat field on fire. Mr. Chandler concurred.

Justice Sloan suggested that the "and" in section 4 (2) be changed to "or." Chairman Burns concurred with this suggestion but pointed out that this revision would create an ambiguity as far as the last clause was concerned, "or damage to a building of another," because the crime was arson in the second degree if the act imperiled a person and imperiling and actually harming an individual were two separate things. Mr. Chandler suggested there would be no such problem if a period were placed after "person" in the last line of section 4. Justice Sloan said he would make damage to the building of another second degree arson because he was of the opinion that the most serious crime should be causing harm to a person.

Mr. Paillette explained that if a person burned property with the intent to collect insurance and in so doing injured someone or damaged someone else's building, the charge would be first degree arson. Even though section 3, second degree arson, didn't mention insurance, if he tried to collect insurance, he could still be prosecuted for second degree arson if he didn't actually injure or damage the building, but the element of insurance in the second degree charge would not have to be proved. If he burned up his own property and tried to collect on the insurance, it would be fraud; if he did not, there was no crime. He expressed the view that if a person burned his own property and no one was damaged or endangered in the process, the act should not be arson, and the committee agreed. He opposed the suggested amendment and thought there was more protection for all concerned the way sections 3 and 4 were drafted.

Miss Beaufait asked what crime a man would commit if he burned property and caused bodily injury to another but made no claim to collect insurance and was told by Mr. Paillette that the crime would be arson in the second degree. Miss Beaufait expressed the view that if someone was imperiled, it should be second degree but if that person were burned, even though the insurance element was absent, the crime should fall under first degree and the committee members agreed. Mr. Paillette pointed out that if a person was burned, the offense would fall under one of the assault crimes.

After further discussion, Chairman Burns suggested that an alternative draft be prepared which would put the burning of property, whether his own or another's, to collect insurance for such loss, as subsection (3) of section 3 and that subsection (2) of section 4 be amended to read "Any property, whether his own or another's, and such act recklessly causes bodily injury to another person."

Mr. Paillette suggested another technique to accomplish the same purpose would be to delete in section 4 (2) "to collect insurance for such loss" so that insurance would not be an element of the crime and the insurance claim would come in as a motive during the trial. The insurance industry, he said, would still be protected under the theft and fraud statutes. Chairman Burns concurred with this suggestion and asked Mr. Paillette to prepare an alternative section 4 incorporating the proposal.

The meeting was adjourned at 1:45 p.m.

Respectfully submitted,

Mildred E. Carpenter

Mildred E. Carpenter, Clerk
Criminal Law Revision Commission