Tape #80

Side 1 only

OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 1

Eighteenth Meeting, August 15, 1969

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

Members Absent: Rep. Douglas Graham

Staff Present: Mr. Donald L. Paillette, Project Director
Mr. Roger D. Wallingford, Research Counsel

Others Present: Miss Kathleen Beaufait, Legislative Counsel

Agenda:

Chairman Burns called the meeting to order at 1:15 p.m. in Room 315 of the Capitol Building, Salem, Oregon.

Business and Commercial Frauds; P.D. No. 1; May 1969

Chairman Burns asked for a motion to approve the minutes of the last meeting with those minutes to reflect the fact that Mr. Chandler's motion appearing on page 3 relating to sections 6 and 7 of the Business and Commercials Frauds draft implied adoption of the amendment on page 1 suggested by Mr. Wallingford. Mr. Spaulding so moved and Mr. Chandler seconded the motion, which was then passed without opposition.

Chairman Burns called attention to the fact that section 8 of the Business and Commercial Frauds draft had not been formally approved in the previous meeting and therefore would have to be acted upon. He noted that there had been questions raised about the extent of the problem in this area and whether the statute was applicable and enforceable. He called for more discussion on the subject in view of his disapproval of some of the sections which had already been approved.

Mr. Paillette reported that none of the subcommittee members were particularly enthusiastic about this section but that they felt they should let the Commission consider it. The problem as he saw it was in trying to determine its scope and coverage and whether or not it was explicit enough, or perhaps too broad, particularly when looking at the definition of a "sports participant" which includes a person associated with a player or a team member.

Mr. Chandler's feeling was that it was a worthwhile section because it leaves the state's interest out of everything except giving or receiving a bribe.

Chairman Burns asked if it were the subcommittee's intention to pass this tampering statute to repeal the horse and dog racing statutes.

Mr. Paillette said it was his understanding that was the intent.

Chairman Burns reminded the members that the primary purpose of the Commission is to render the statutes more precise and to avoid overlap as much as possible. If there is to be a statute on tampering in which a person could be charged with stimulating a race horse, this would be a duplication of ORS 462.420, he said, and it seemed to him that there was the possibility of a constitutional objection.

Mr. Paillette's objection to section 8 was that it led into some fringe areas that were very hard to define.

Chairman Burns interpreted this section to mean that a doctor who gave a player a shot to kill pain in order to make that athlete perform better could be prosecuted. It was, however, pointed out that that would not be criminal unless it were "contrary to the rules and usage governing the contest."

Mr. Wallingford agreed with Mr. Paillette's point of view by saying he was not particularly enthusiastic with the section. One of the problems he encountered was with the word "tampering" itself.

Chairman Burns observed that "tampering" was a broad expression which lends itself to so many different interpretations that it compounds rather than clarifies. He advised that the decision of whether or not to retain this section should be made in the subcommittee rather than impede the progress of the Commission by passing it on for their decision.

Mr. Spaulding voiced his disapproval of the section.

Mr. Chandler moved to approve section 8. The motion failed with Mr. Chandler voting "aye" and Mr. Spaulding and Chairman Burns voting "no."

Justification; P.D. No. 1; August 1969

Mr. Paillette explained that this draft involves an area which is not new to criminal law but in which there is very little statutory law. This is the last of the major preliminary sections of the proposed code, he said. It will establish policy which will apply throughout the code.

It will also be a defense to most crimes with some exceptions, e.g., duress. The entire draft follows the approach of New York and Michigan plus the rationale of the MPC. It was his feeling that the Michigan and New York codes were better because they were more explicit and had better statutory form than the MPC.

Section 1. Justification; a defense. Mr. Paillette noted that this section made a basic statement that "in any prosecution for an offense, justification, as defined in sections 2 to 18, is a defense. The only notable thing about it, he pointed out, was that he had stated it in terms of defense rather than an affirmative defense. In the area of justification, he said, most Oregon cases are on self defense and homicide. In trying to interpret the present rule in Oregon, he cited State v. Ruff which provided the best statement he could find on the burden of proof in a self defense prosecution:

> "While it is not necessary that the defendant establish that the death was accidental or the defendant acted in self defense to have a jury return a verdict of not guilty, as it is only necessary that the jury entertain a reasonable doubt in these respects, nevertheless, it is for the jury to determine whether or not there is a reasonable doubt."

State v. Anderson states that:

> "A defendant is entitled to an instruction on self defense if the issue is raised by the evidence in the case."

Chairman Burns wanted the record to show that although the language is in terms of "any prosecution for an offense", it should be made clear that "offense" includes violations as well as felonies and misdemeanors.

Mr. Paillette agreed that was what was meant. Although it certainly would apply to crimes, he did not want to limit it to crimes only. Some of the same principles of justification could be raised in cases involving a violation where no imprisonment was involved, he added.

Chairman Burns asked if the word "offense" was used in terms of grading.

Mr. Paillette replied that the word "offense" was used and that it was defined by saying that offenses are misdemeanors, violations and felonies; that a crime is a felony or a misdemeanor.

Chairman Burns expressed concern about consistency. He noted that some "affirmative defenses" have been established. He wondered if any other "defenses" have been established and if so, where has the line been drawn.

Mr. Paillette replied that the terminology "defense" has been used previously. In the Theft Draft, for example, the defense of "claim of right" was used. It was said either something was a defense, or it was a defense for the defendant to prove by the preponderance of the evidence, which in that case would be termed an "affirmative defense." Insanity was another example, he added, where it specifically states that the burden is on the defendant. The burden is also on the defendant in Renunciation, he reported, while there are some affirmative defenses in P.D. No. 2 on Sex Offenses. The difference in these cases, he explained, is that the burden of persuasion is on the defendant whereas here it is not. However, he felt that in accord with existing law, the subcommittee would not want to change that.

A motion was made to approve section 1. The motion carried unanimously.

Section 2. Justification; generally. Mr. Paillette reported that this section was essentially the same as the Michigan proposal except for the last phrase in subsection (1) which says "or is performed by a public servant in the reasonable exercise of his official powers, duties or functions." That language, he said, came from the amended 1968 version of the New York Revised Penal Law. The New York commentary pointed out that the original provision had been criticized as not being sufficiently comprehensive because there could be conduct which would be proper but which was not specifically authorized or required by law, e.g., there might not be any statute or regulation explicitly authorizing officers of a particular police department to buy narcotics for purposes of a criminal prosecution and, hence, such activity might subject the officer to a technical charge of unlawful possession of narcotics. While such a charge was unlikely, Mr. Paillette felt that it was desirable to include the New York language.

Subsection (2) defines what is meant by "laws" and "judicial decrees." There are a number of statutes in this area, he reported, but with the exception of the ORS chapter 163 series, they would not be repealed. He indicated that this section would enhance the existing statutes defining the duties of public servants and private persons.

Mr. Chandler moved to approve section 2 and the motion carried unanimously. A subsequent motion (see section 3) amended section 2.

Section 3. Justification; choice of evils. Mr. Paillette discussed the "choice of evils" concept where a person could do something he would not normally be allowed to do if it were a question of the lesser of two evils, e.g., the blasting of a building to prevent a major fire; the breaking into a house to make an emergency phone call. These are cases where a person actually commits a crime in order to prevent something much worse, he explained.

Chairman Burns questioned Mr. Paillette about his use of the phrase "or with some other provision of law." He wanted to know why the phrase was used in the first part of this section while section 2 uses the phrase "unless inconsistent with other provisions of this Article."

Mr. Paillette explained that it was an unintentional omission on his part since Michigan section 601 on which he based section 2, includes the same phrase as that in section 3.

Chairman Burns moved to amend section 2 by inserting language to make it consistent with that in section 3. The motion passed unanimously.

Mr. Spaulding questioned the phrase "injury which is about to occur." He wondered if it would not be advisable to insert the concept of "which would appear to a reasonable person to be about to occur" so that the state would not have to prove that an event was in fact going to occur. He could see where someone might argue that the state would have to prove that the event was about to occur which would be difficult for the state to prove.

Mr. Paillette agreed that it might be advisable to include something to that effect.

After some discussion about how to insert this concept into an already long sentence, it was determined that since there was no objection to the substance of this section, Mr. Paillette should rewrite the section, including this concept and breaking it into paragraphs for clarity.

Mr. Spaulding called for discussion of subsection (3) of section 3 in regard to the judge rather than the jury ruling on a matter of fact.

Chairman Burns noted that this was a departure from present law.

Mr. Spaulding agreed. He wondered, if the court were to rule that the claimed facts and circumstances would not, if established, constitute a justification, whether the jury would have any say in the matter. He questioned the constitutionality of such a provision.

Mr. Paillette did not think it would be different from an offer of proof.

Mr. Spaulding pointed out that in that case, all the judge did was rule on the competency of the evidence.

Mr. Paillette noted that under this section, the judge would be saying that "even if what you say is true, as a matter of law, it would not constitute justification."

Mr. Spaulding commented that under this section the judge would be able to rule on what is right and wrong in the case of evidence.

Mr. Paillette explained that the reason this was included was that the Michigan commentary on this subject had indicated it was used to prevent misuse of the concept by having it brought up in cases where there was not really a "choice of evils" but where the defendant might argue that there was.

Miss Beaufait suggested that subsection (2) be amended by inserting "shall" instead of "may" in the second line. This was made into a motion which carried unanimously.

Chairman Burns asked if Mr. Spaulding were still concerned with subsection (3) to which Mr. Spaulding replied that he was.

Mr. Paillette felt the question was whether the subcommittee thought the "choice of evils" concept was clear enough and whether it would be subject to abuse.

Chairman Burns voiced his concern with letting a judge rule on facts as a matter of law because it seemed to him that it weakened the case for justification.

Mr. Spaulding called attention to the phrase in subsection (3) "Whenever evidence relating to the defense of justification under this section is offered by the defendant." He asked if this meant the defendant must be the one to submit the evidence.

Chairman Burns thought perhaps it should say "be offered on behalf of the defendant."

Mr. Spaulding pointed out that if it were evidence, it could be offered by anybody.

A motion was made to insert "is raised" before "by the defendant" deleting "offered." The motion passed unanimously.

Mr. Chandler moved to approve section 3 in substance and with the above advisory comments in regard to rewriting the section. The motion carried unanimously.

Section 4. Justification; use of physical force generally. Mr. Paillette read subsection (1). He explained that there was little to say about present Oregon law relating to any part of section 4. He could find no cases setting forth any rules with respect to reasonable force, he added. This proposal would follow the trend in other states, he said, in trying to set out guidelines for the use of reasonable force.

Chairman Burns wondered if anyone in the subcommittee saw a problem with the word "entrusted." The members agreed that they thought the meaning of the word was clear.

Mr. Paillette pointed out that "deadly physical force" has been defined and approved by the Commission as meaning "physical force that under the circumstances in which it is used is readily capable of causing death or serious physical injury."

Mr. Spaulding observed that although the term "deadly physical force" is somewhat modified by "reasonably believes it necessary" in this subsection, it implies that anything short of killing is acceptable.

Chairman Burns suggested that instead of saying "but not deadly physical force" it could say "may take such action upon such minor or incompetent person as a reasonably prudent person would believe to be necessary to maintain discipline."

Mr. Paillette reminded the subcommittee that the concept of "deadly physical force" is used throughout this Article. He suggested that all sections be considered to see how it had been used before making any effort to delete it.

Mr.Chandler did not see how anyone could ever say "deadly physical force" was reasonably necessary.

Mr. Spaulding said that the problem he saw with this term was that it referred to treatment of children. It seemed to him to be out of place to say a person could use "physical force" but not "deadly physical force."

Mr. Paillette commented that by the definition of "deadly physical force", this section would prohibit a person from using any force likely to cause serious physical injury to another.

Mr. Spaulding concluded that this also was very bad. There might be something short of that which would still be too much, he thought.

Chairman Burns wondered if a baby sitter would be justified in impairing the physical condition of the child she was caring for, so long as it did not involve a substantial risk of death.

Mr. Paillette remarked that under present law, a sitter could not discipline the child without subjecting himself to liability. However, he possibly could kill him, claiming it was excusable homicide. He explained that the law does not specifically say a person can use deadly physical force but it mentions "by accident or misfortune", which means that a person, although he may not have intended to cause death, because he used excessive physical force actually did cause the death. He repeated that it was a rather strange situation in Oregon where, at present, there are no statutes in the criminal code with respect to use of reasonable force in these areas, but there is the statute on excusable homicide.

Mr. Spaulding asked why the section could not say "may use reasonable physical force" and strike out "but not deadly physical force."

Mr. Paillette defended the term by saying the idea he wanted to convey was that a person could not use deadly physical force. He did not think that term needed to be deleted in order to add "reasonable."

Chairman Burns suggested the language "may use such reasonable physical force...that he believes to be necessary to maintain discipline...."

Mr. Paillette remarked that this would be giving a broader hand than there is now because by implication, reasonable physical force might include deadly physical force. He argued that even though you are saying a person can use physical force or even if it is to be qualified by saying reasonable physical force, it still should be made very clear that this does not include deadly physical force.

Mr. Spaulding's interpretation of this section was that he could do anything short of using deadly physical force. He observed that it could not possibly be reasonable to use anything even near deadly physical force.

Mr. Chandler moved to insert the word "reasonable" and to eliminate "deadly physical force", specifically noting in the commentary that it was with the intent that "deadly physical force" would not be permitted. The motion carried unanimously.

Mr. Spaulding moved that subsection (1) be further amended to read "may use reasonable physical force upon such minor or incompetent person when and to the extent a reasonably prudent person would believe it necessary...." This motion also carried unanimously.

Following discussion of section 5 and the term "reasonably believes" in which Mr. Paillette said it seemed to him that if you say "he reasonably believes", you are imposing an objective standard on him, the subcommittee agreed to rescind this action thus replacing the original language "which he reasonably believes" and deleting "a reasonably prudent man" with the record reflecting that no substantive change is meant but that the subcommittee assumes that these terms mean the same thing.

Mr. Spaulding wondered if the section could not be further shortened by inserting "teacher" after "guardian" in the first line of subsection (1) and thus eliminating the phrase "or a teacher or other person entrusted with the care and supervision of a minor for a special purpose." He thought the second phrase was unnecessary because his interpretation of the phrase "may use reasonable physical force" meant that a person could use such force as was reasonable under the circumstances and part of the circumstances is that he is a teacher and not a parent. He therefore moved to further amend subsection (1) as he had just suggested.

Mr. Paillette explained the rationale behind the language by saying that a "parent, guardian or other person entrusted with the care and supervision of a minor" is in itself a special class of persons who have broad supervisory powers over a minor or an incompetent, whereas the other phrase "or a teacher or other person entrusted with the care and supervision of a minor for a special purpose" refers to a group without such broad powers. This section maintains that they both can use the same kind of force to maintain discipline. It was not intended to limit the kind of force they could use, but to make it clear that they are being granted the same authority as are the people who would be thought of as having broad disciplinary powers.

Mr. Spaulding said it seemed to him that Mr. Paillette had taken care of the difference in the two groups of people, if there was a difference, by the idea of what is reasonable under the circumstances.

With no further discussion, Mr. Spaulding's motion carried unanimously.

Mr. Chandler moved to approve subsection (1) and the motion also carried without opposition.

The subcommittee next considered subsection (2). Mr. Spaulding asked why, since the force mentioned for officials was already authorized, it was necessary to say it again.

Mr. Paillette replied that it was simply a matter of conformity.

Mr. Spaulding was of the opinion that there was some merit in showing that authorized officials would also be covered. The subcommittee generally agreed to approve subsection (2).

In discussion of subsection (3), Mr. Paillette reported that he could find no case involving common carriers. New York, Michigan and the MPC all have statutes of this kind, he said. Although it would be new law, Mr. Paillette thought it would be a reasonable provision.

Mr. Spaulding observed that a common carrier had a great deal of responsibility to protect passengers and in order to comply with that duty, such a provision was needed. He cited an Alaska case where some drunks on a train were wandering around when one fell under the train and was killed. It was claimed that the conductor did not carry out his duty by failing to maintain order by the use of physical force if necessary. The defendant's claim against the railroad was made stronger by his contention that there was a statutory right for the conductor to use whatever force was necessary to maintain order.

Chairman Burns felt that the words "he may use deadly physical force only when he reasonably believes it necessary" was surplus language because whether that was included or not, he would be justified in using that force to prevent death or injury.

Mr. Paillette explained that the reason for the language was to indicate that the conductor, although he can use deadly physical force, is not, by implication, given greater discretion to use that force than would be given anyone else under these circumstances.

Mr. Chandler moved to approve subsection (3). The motion carried with Mr. Spaulding and Mr. Chandler voting "aye" and Chairman Burns voting "no."

Mr. Paillette explained that subsection (4) allows reasonable force to prevent an apparent suicide attempt and supports the general policy of the law to prevent and discourage suicide.

Chairman Burns questioned the necessity of subsection (4).

Mr. Spaulding said that although he could see nothing wrong with it, he could not imagine anyone being prosecuted for keeping a person from committing suicide or from hurting himself.

Mr. Chandler moved to approve subsection (4) and the motion carried unanimously.

Chairman Burns saw a problem with subsection (5), he said. He was of the opinion that when this draft goes to the legislature, someone will want to include other practitioners in the healing arts.

Mr. Spaulding saw even more of a problem. The physician has special knowledge, he stated, but the reference to "reasonably believes" includes a person acting under his direction which would normally be a nurse. Thus, there are two people coming under the term "reasonably believes."

Mr. Paillette thought Mr. Spaulding had a good point. He explained that he had meant to say what the physician reasonably believes. It was not his intention to leave this up to some third person.

Mr. Chandler suggested that adding "the physician" in place of "he" would take care of the problem. After some discussion on the subject, he put his suggestion in the form of a motion which was then passed unanimously.

Mr. Spaulding moved to adopt subsection (5) as amended and this motion also passed without opposition.

Mr. Paillette pointed out that subsection (6) referred to the use of "physical force generally" and that it was designed to interrelate with the rest of the Article. Mr. Chandler made the motion to approve subsection (6) which carried unanimously.

Section 5. Justification; use of physical force in defense of a person. Mr. Paillette noted that this section does not change present law; it simply states that a person can use force to defend himself if force is being used against him.

Mr. Chandler moved to approve section 5. The motion carried unanimously.

Section 6. Justification; limitations on use of deadly physical force in defense of a person. Chairman Burns asked about use of the word "complete" in subsection (3).

Mr. Spaulding observed that no one is ever "completely" safe.

Mr. Paillette explained that this section gives a person an "out" to stand his ground.

Mr. Spaulding objected that it was too much of an "out." He suggested deleting the word "complete" in subsection (3).

Chairman Burns determined that this section was going to require a great deal of discussion based on the "retreat" concept so he continued it until the next meeting.

The meeting adjourned at 4:45 p.m.

Respectfully submitted,

Connie Wood, Secretary
Criminal Law Revision Commission