Tape No. 82

Side 2 only

OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 1

Twenty-first Meeting, October 9, 1969

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

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

Agenda:

The meeting was called to order by Chairman John Burns at 1:45 p.m. in Room 319 of the Capitol Building, Salem, Oregon.

Chairman Burns welcomed Representative Tom Young of Baker as a new member of the Commission and of Subcommittee No. 1.

The Chairman asked if there were any corrections or additions to the minutes. Since there were none, the minutes were approved as submitted.

Offenses Against Privacy of Communications; Preliminary Draft No. 1, September 1969.

Section 9. Tampering with private communications. Mr. Paillette reported that this section was based on a similar New York statute. It is also a restatement of six Oregon statutes dealing with obtaining information about telegraphic messages or letters intended for another.

Chairman Burns observed that it was a federal offense to tamper with mail but wondered if it were also a federal offense to tamper with telegraphic messages.

Mr. Chandler believed that under FCC regulations, it was an offense to tamper with either telegraph or telephone messages.

Chairman Burns said he had raised the question because he thought subsection (1) of section 9 was broader than present Oregon law pertaining to telegraph messages and mail.

Mr. Paillette advised that ORS 165.520 deals with opening, reading or publishing a letter, and states:

> "Any person who wilfully opens or reads, or causes to be opened and read, any sealed letter not addressed to himself, without being authorized so to do either by the writer of such letter or by the person to whom it is addressed, or who wilfully, without like authority, publishes any letter or portion thereof knowing it to have been so opened, shall be punished [a misdemeanor]. This section does not extend to or include any act made punishable by the laws of the United States."

Although Mr. Paillette could find no reported Oregon cases, he thought there was sound reason for such a provision in this draft.

Mr. Chandler moved for adoption of section 9. Mr. Spaulding seconded the motion and it carried unanimously. At a later point in the meeting, Mr. Chandler reported that he had planned to move to amend subsection (3) of section 9 by reversing the clauses so that the sentence would state: [he] "While an employe or officer of a telephone or telegraph company, knowingly divulges to another person the contents or nature of a telephonic or telegraphic communication." There was no objection so the amendment was incorporated into the section.

Section 10. Civil liability for offenses against privacy of communication. Mr. Paillette explained that this section provides for treble damages and punitive damages in cases of violation of sections 2, 5, 6, 7 or 9 of this Article.

Mr. Spaulding asked if legislation of this type were within the jurisdiction of the subcommittee and Mr. Paillette replied that he thought it was. The section was based on present law, he said, and would do nothing to change that.

Representative Young asked if under present law there were provisions for treble damages as well as punitive damages. In reply, Chairman Burns read from ORS 165.505:

> "Any person violating this section is liable in treble damages to the party injured for all loss and damage sustained by reason of such wrongful act."

He noted that this said nothing about punitive damages. If punitive damages were to be eliminated from this section, he said, that would give the offended person a statutory right to seek double damages and treble damages but he would have to prove wilfulness and maliciousness in order to receive punitive damages. This section would not prevent a person from asking for punitive damages if the circumstances warranted such a request, he thought. He suggested deleting punitive damages from this section, thus leaving it to be decided upon the facts in any given case.

Representative Young called attention to the timber trespass statute which provides for double damages if the trespass was inadvertant and for treble damages if the trespass was intentional. He asked if an intentional trespass would preclude punitive damages.

Mr. Spaulding believed that Mr. Young had raised a good question. However, he added, Judge Rossman had said that double damages were not punitive damages in nature, but he had not mentioned treble damages.

Chairman Burns noted that this question had not come up during discussions on the forestry code in connection with the Arson draft. He suggested limiting this section to double damages under the assumption that if there are substantial facts, punitive damages could be alleged under those rules governing such damages. Representative Young agreed that that would clarify the intent of the draft.

Mr. Spaulding wondered if there should not be some indication of whether the conduct was wilful or malicious, but upon further consideration, concluded that this point should be covered in the commentary.

Mr. Chandler recalled that there was no civil liability imposed under the Arson draft. Mr. Paillette explained the reason for this was that it was covered in the Forestry Code and the subcommittee had decided not to make any changes in that Code. He reminded that the Commission had recommended that two statutes on negligent burning be transferred to the Forestry Code. The damage provisions had not been changed, however.

Mr. Chandler said he did not favor having a crime accompanying a civil penalty, thereby invoking a second penalty. He doubted that anyone would be convicted for engaging in such activity inadvertently. He also presumed that it would be difficult to prove a civil liability without a conviction on the criminal charge.

Mr. Spaulding commented that if the facts could be proved, it would be left up to the jury to determine whether there was a violation.

Chairman Burns wondered if an acquittal on the criminal charge would eliminate the possibility of a civil liability case. Mr. Spaulding did not think so because in the criminal case, the state would have to prove guilt beyond a reasonable doubt but in the civil case, that would not be required of the plaintiff. He said he supported Mr. Chandler's general philosophy.

Mr. Chandler moved to delete section 10. The motion carried unanimously. Mr. Paillette noted that the commentary would be changed to indicate the intent of the subcommittee, since this deletion would change existing law.

Business and Commercial Frauds; Proposed Amendment to Preliminary Draft No. 1, May 1969.

Section . Promoting an endless chain scheme. Mr. Paillette reminded the subcommittee of earlier discussion about a letter on the subject that Senator Burns had received from Multnomah County District Attorney, George Van Hoomissen last April. He explained the problem and outlined the way the scheme works. He reported that he had written to the California Attorney General's office and had recently received a reply indicating that section 327 of the California Penal Code, enacted in 1968, had been quite effective in protecting the state against endless chain schemes. He advised that he had drawn this draft based on that section of the California code, but with a few structural changes to conform to Oregon drafting techniques.

Chairman Burns said that he had no experience with this type of scheme. Mr. Chandler, however, related numerous instances where these schemes were successful in bilking money from unsuspecting and oftentimes elderly people.

Mr. Spaulding questioned whether there was actually anything fraudulent in this type of scheme. Mr. Chandler considered it fraudulent to the extent that the profits to be realized were overstated. Mr. Spaulding contended that even in that case, the potential was there, but Mr. Chandler argued that as a practical matter, it was not. He realized, he said, that there was a problem in attempting legislation to protect people from their own ignorance and greed. He sympathized with them, however, because it seemed to him they were often the ones who could least afford to be victimized.

Representative Young expressed concern that this section was written without requiring any element of fraud. He could conceive of numerous ways to make money, he said, but if fraud were involved, that would change the situation considerably.

Mr. Chandler supported the proposed statute. Since the California Attorney General had indicated in his letter than enactment of their statute had been successful in combatting the problem, he felt a similar statute would be of some deterrent value to Oregon.

Chairman Burns compared this section to the Portland Municipal Ordinance which bans pinball machines, whether they are for fun or for profit. This statute, if approved, would prohibit endless chain schemes, whether they were fraudulently or honestly contrived and operated.

Mr. Paillette advised that this statute would not prohibit legitimate businesses from distributing their products because this proposal requires a payment for the opportunity to participate in the scheme, and the chance to receive compensation for recruiting another participant. If these elements were absent, there would be no violation, he said. Chairman Burns suggested giving more thought to this section by postponing a decision until the next meeting.

Progress Report and Review of Plans

In an effort to bring the subcommittee up to date on the progress thus far and apprise them of future plans, Chairman Burns reviewed some previously considered drafts and asked Mr. Paillette about his plans for future drafts.

Mr. Paillette reported that when this subcommittee had finished work on Obstructing Governmental Administration, its next assignment would be Escape and Related Offenses, which was somewhat related. He indicated that the drafts on Obcenities and Narcotics might also be assigned to this subcommittee. A draft on Firearms and Weapons would go to subcommittee No. 3, he said, since they had worked on Inchoate Crimes which was a related area in so far as possession of instruments of crime was concerned. Also to be considered, he added, were drafts on Public Indecency, Gambling and Treason and Anarchy. The latter could be a separate statute, he pointed out, or could be included in another article such as Riot and Related Offenses if it were determined there was a need for such a statute. During the seminar on criminal code revision at Ann Arbor, Michigan in June, the consensus was that most states did not feel such a state law was necessary.

Obstructing Governmental Administration

Obstructing governmental administration; definitions. Chairman Burns inquired about the Article numbers in subsection (1) and what they referred to. Mr. Paillette replied that they were tentative numbers assigned to the Articles on Bribery and Perjury and should be renumbered 20 and 21 rather than 19 and 20. It was agreed to delete the section numbers after each Article number in subsection (1) since they were unnecessary at this point.

Mr. Paillette then read the definitions from those two Articles of "public servant", "benefit" and "pecuniary benefit." Mr. Chandler objected to the system of cross referencing with respect to the definitions. He thought it would be preferable to restate the definition, if necessary, in order to avoid this problem. Chairman Burns noted that there had been a policy decision on that question previously. It had been determined that the definitions should, wherever possible, be near the pertinent section and that it would not be practical to restate them in more than one section.

Representative Young questioned the definition of "peace officer." In response, Chairman Burns read from page 16 of the minutes of September 9, 1969:

> "Mr. Spaulding found that ORS 133.170 defines peace officer as a sheriff, constable, marshall, policeman of a town or member of the Oregon State Police. It was then concluded that this would include all sheriff's deputies as well as any auxiliary policemen such as those hired by businesses."

Chairman Burns noted that subsection (2) does not give the same definition of "peace officer." He suggested that it be redrafted to conform as closely as possible to ORS 133.170. The subcommittee approved the change.

In reply to a question by Chairman Burns, Mr. Paillette stated that the definition of "fireman" had been taken from the Michigan code. Representative Young believed there was a good definition of "fireman" in the state Civil Service statutes. Mr. Paillette indicated he would check into that while redrafting the definition of "peace officer."

Chairman Burns pointed out that Michigan had defined "testimony" to include, "oral or written statements, documents or any other material that may be offered by a witness in an official proceeding", while this draft mentions, "any other evidence" rather than, "any other material." He wondered why that change was made. Mr. Chandler thought the reason was that if the judge denied the material as evidence, it could still be offered as testimony. Mr. Spaulding suggested defining evidence by saying that evidence includes testimony, but Mr. Chandler pointed out that the crime was offering false testimony.

Mr. Paillette suggested that the definitions should be viewed in light of their use in the complete draft before making definite decisions about them. After brief discussion of the definitions of "physical evidence" and "public record", the subcommittee moved on to section 2.

Section 2. Obstructing governmental administration. Mr. Paillette reported that Michigan, New York and the MPC codes had all been utilized in drafting this section.

Representative Young asked if, for instance, he were to bring an injunction to prevent the Highway Department from further construction, he would be guilty of intentionally obstructing a governmental function. It was pointed out that the injunction would be the enforcement of another statute and would not be illegal in this case since he would not be obstructing justice, but promoting it on the strength of a complaint.

Chairman Burns referred to the Article on Culpability in regard to Representative Young's concern and concluded that none of the elements of culpability would be present in the case of an injunction.

Mr. Spaulding thought that Representative Young's question implied that perhaps he really did not think he had a good injunction case, but wanted to test it to find out for sure.

Chairman Burns recalled that acts must be accompanied by an element of culpability to be criminal. Thus, even in the case of a frivolous injunction suit, there might not be any criminal intent. Mr. Paillette added that this section uses the word, "intentionally" so he could see no problem under that definition. He explained that the section is intended to prohibit unlawful obstruction with an intent to interfere with governmental administration. He read from page 7 of the commentary:

> "The section is therefore limited to obstructive threats or violent or physical interference."

Mr. Chandler then moved to adopt the section and the motion carried unanimously.

Section 3. Refusing to assist a peace officer. Mr. Paillette advised that there were similar provisions under present law. However, he noted the proposal would repeal those provisions dealing with the refusal to assist a peace officer. Interference with a sheriff conveying a defendant to prison or interference with process serving would both be covered since such conduct would constitute a crime, i.e., obstruction of governmental administration.

Mr. Spaulding questioned the language, "unreasonably refuses or fails." He wondered if it should not be "unreasonably refuses or unreasonably fails." Mr. Chandler remarked that he thought the modifier would fit both verbs and Mr. Paillette agreed that that was the intent of the draft.

Chairman Burns emphasized that in the Justification draft, the discussion was in terms of refusing to help a police officer. Even if the officer were making an illegal arrest, a person was still obligated to assist him. If it later developed that the police officer was without authority, the person who assisted him was protected. He wondered if there was a conflict by use of the term, "authorized arrest" in this section. A person could conceivably refuse to help an officer and argue that he refused because the arrest was unauthorized.

Mr. Spaulding observed that in this case, a person would be refusing at his own risk. He would not be guilty unless he refused to help an officer make an authorized arrest and the state would have to prove that it was in fact an authorized arrest, he thought, since that was one of the elements of this crime.

Chairman Burns wondered if changing the language, "an authorized arrest" to "making an arrest" would promote greater cooperation between the citizen and the officer. Mr. Spaulding was opposed to making a person guilty of a crime if the arrest was not authorized. He was of the opinion that it was enough that a person who refused to help an officer would do so at his own peril.

Mr. Chandler moved to approve section 3. Mr. Spaulding seconded the motion which then passed unanimously.

Section 4. Refusing to assist in firefighting operations. Mr. Spaulding compared subsection (2) which says, "intentionally disobeys" with subsection (1) which says, "unreasonably refuses." He suggested adding the words "and unreasonably" after "intentionally" in subsection (2). Representative Young concurred with Mr. Spaulding's suggestion. He so moved the amendment which carried unanimously. Mr. Spaulding then moved to approve section 4 as amended. That motion also passed without opposition.

Sections 5. Bribing a witness. Section 6. Bribe receiving by a witness. Mr. Paillette explained that these sections involved the same type of acts or omissions as the sections on bribe giving and bribe receiving in the Bribery Article.

Mr. Spaulding asked whether the benefit a person might receive should be limited to a pecuniary benefit. He felt, and Chairman Burns agreed, that it should not be, since there could be some benefits greater than pecuniary benefits.

Mr. Paillette noted that both bribe giving and bribe receiving required pecuniary benefits. He advised that "pecuniary benefit", as defined in the Bribery Article, means, "a benefit in the form of money, property, commercial interests or economic gain but does not include a political campaign contribution reported in accordance with ORS Chapter 260."

At Mr. Chandler's suggestion that the problem would be simplified by including "witness" in the Bribery Article, Mr. Paillette advised that he and Mr. Wallingford had discussed including sections 5 and 6 in the Bribery Article. They felt there was some question on whether they logically belonged in this draft.

Chairman Burns expressed the same concern. He urged that either this section be included in the Bribery Article or Bribery should be included in this Article on Obstructing Governmental Administration. His preference, however, with regard to form, was that both sections 5 and 6 would fit better under Bribery.

Mr. Chandler agreed that these two sections were more applicable to Bribery than the whole Bribery draft was to this Article.

Mr. Paillette informed the subcommittee that the Bribery Article was on the agenda for consideration at the Commission meeting the following day. Therefore, these sections could be referred to the Commission if the subcommittee favored that approach.

Chairman Burns said he would consider a motion to adopt that approach but he first wanted to examine more closely whether the definition of "pecuniary benefit" in the Bribery statute would apply to these sections. He cited a hypothetical case where a lawyer advised his client to move out of town to avoid being called as a witness. He wondered whether that lawyer would be violating this section.

Mr. Paillette replied that the definition of "pecuniary benefit" would apply to these sections because it is incorporated by reference. His opinion was that in the case cited by Chairman Burns, there would be no violation because there would be no pecuniary benefit being conferred upon him and there was no bribery involved. Chairman Burns agreed that answered his question.

Mr. Spaulding moved to approve section 5 and the motion carried unanimously. Representative Young moved to approve section 6. That motion also carried unanimously. Chairman Burns then moved to recommend to the Commission that sections 5 and 6 be taken out of this draft and incorporated into the Bribery Article. The motion passed unanimously.

Section 7. Tampering with a witness. Mr. Chandler compared this section to sections 5 and 6 because of the element of avoiding legal process. This action would be precedent to absenting oneself from any legal proceeding under subsection (2), he said, but with the added requirement that he had already been legally summoned. He concluded that tampering with a witness was not much different from bribing a witness.

Mr. Paillette pointed out that in this case, there would be no element of actual bribery; it would be more of an inducement or persuasion. He noted that under subsection (2), the language is, "any official proceeding to which he has been legally summoned." He also called attention to the commentary set out on page 34:

> "It would not be a violation of this section to persuade a witness to lawfully refuse to testify on grounds of personal privilege or to induce a witness to avoid process by leaving the jurisdiction of the court. The latter conduct, if engaged in by an attorney, may raise certain ethical questions but should not be subject to criminal liability since neither the means used nor the end sought is independently unlawful."

Mr. Chandler disagreed with that opinion. The assumption, he said, is that since no money is involved, it is a lesser degree of the crime. Because of those circumstances, he said, a person is not considered as culpable as if he had accepted money, but he did not think it was a valid distinction.

Chairman Burns advised that knowingly inducing a witness to offer false testimony is suborning perjury. Since that would be covered under the Perjury Article, he could see no reason for including it here, he said. He did not approve of having the same crime covered under two sections.

Mr. Paillette explained that perjury was only related to the individual who gives a false statement; there is no subornation section in the Perjury Article, he said.

Chairman Burns contended that there should be a subornation section in Perjury and was of the opinion that that was what this section actually stated.

Mr. Paillette disagreed. Although this section relates to an interference with the administration of the court, he thought it fit here as well as in Perjury, since Perjury is related to the false statement of the actor himself.

Mr. Spaulding asked if there were a present statute on subornation. Chairman Burns reported that subsection (2) of the Perjury statute provides that, "any person who procures another to commit the crime of perjury is guilty of subornation of perjury", which, he continued, seems to be in the logical place. If, however, a person were induced to suborn perjury but did not actually testify, he would be guilty of attempted subornation of perjury under the Attempt statute.

Mr. Paillette contended that this section covers not only false testimony but the withholding of testimony, which would not be considered subornation of perjury.

Chairman Burns emphasized that if part of this section is subornation of perjury, it should be put with the perjury statute.

Mr. Spaulding pointed out that "testimony" has been defined as including "physical evidence"; thus withholding physical evidence would be a violation of this section.

Chairman Burns maintained that he was not concerned with the word, "withholding" but with the words, "offer false testimony." He supposed, he said, that could be construed to mean offering false physical evidence.

Mr. Paillette could see no advantage in drafting a separate section to apply only to subornation of perjury. In response to a question raised by Chairman Burns, he said he did not think there was a Pirkey problem even if there were two separate statutes. That problem would only arise when one crime could be treated as either a felony or a misdemeanor, he explained, and when there were not appropriate guidelines in the statute to distinguish between the two.

Mr. Chandler was concerned with the problem of advising another to avoid service of process. He thought this should be a lesser crime than bribing a witness or receiving a bribe, but nevertheless, he felt it should be a crime.

Mr. Spaulding opposed this view. There is no duty on a person until the process has been served, he reminded, and he warned that you could not limit people's freedom of movement in that way.

Mr. Paillette pointed to a distinction between the intent in sections 5 and 6 and that in section 7. Under sections 5 and 6, he said, there needs to be an agreement or understanding between the parties; in section 7, there is no element of agreement or understanding.

Mr. Chandler asked if the term "induce" did not imply an agreement. The other members were of the opinion that that would not constitute an agreement. Mr. Chandler maintained that the purpose of the court proceeding was to try to arrive at the truth. He thought it was bad policy for anyone to attempt to keep some portion of the truth out of the court process whether by actually bribing someone to leave town by offering

money, or by suggesting that he leave town to avoid process. The net effect is that the testimony, which is of some value to one side or the other, belongs in the proceeding. He concluded that a citizen had an affirmative duty to make himself available if he has reason to know that he may be asked to appear as a witness in any court proceeding.

Chairman Burns and Representative Young, however, concurred with the view expressed earlier by Mr. Spaulding. Mr. Chandler then moved to approve section 7 as drafted. The motion carried unanimously.

Section 8. Tampering with physical evidence. Chairman Burns wondered if there was duplicity in relation to the definition in section 7 of "testimony", which includes evidence and documents and mentions offering false testimony (evidence), compared to subsection (2) of this section, which refers to producing or offering any false physical evidence. Mr. Paillette explained that there was a separate definition of "physical evidence."

Mr. Chandler, Representative Young and Chairman Burns each said he had misgivings about the definition of "testimony" which means,"any oral or written statements, documents or any other evidence that may be offered by a witness or party in an official proceeding." Chairman Burns observed that this section states that a person tampers with a witness if he offers false testimony, which means false evidence. Representative Young's interpretation of the definition of "testimony" was that it included physical evidence. Chairman Burns suggested that the definition of "testimony" be reworded to clarify the meaning.

Mr. Paillette asked if changing the definition of "testimony" would remove bribing or tampering with a witness to withhold physical evidence from coverage by the draft.

Mr. Spaulding wondered if there were any reason for handling "testimony" any differently than "evidence", since evidence means any written or oral statements or physical objects. It was his suggestion that the definition of "testimony" in subsection (4) of section 1 would mean, "oral or written statements that may be offered by a witness in an official proceeding", that "or party" be deleted after the word, "witness", and "documents or any other evidence" be included in the definition of "physical evidence" in subsection (5) of that section.

Chairman Burns instructed that the record show that to be the guideline from which Mr. Paillette is to draw new definitions. He indicated that with the change in the definition of "testimony", he had no further objection to section 8.

After further discussion on the differences between sections 7 and 8, Mr. Paillette read from the commentary:

> "There could conceivably be some close issues on whether a person has the right to destroy evidence prior to seizure or subpoena. If a legal right or authority to destroy such evidence exists, an actor would not be criminally liable unless he was motivated by the specific intent to suppress the evidence."

Mr. Chandler agreed that a person could have a legal right to destroy evidence, but he contended that if that person has reason to believe it is about to become an issue in a case or that it might become an issue, it should be criminal to destroy that evidence. He asked for and received clarification of the term, "with the intent that it be used." The subcommittee agreed that the meaning was with the intent that it be used in its changed form.

Mr. Chandler then moved to approve section 8 as drafted and the motion carried unanimously.

The meeting adjourned at 4:45 p.m.

Respectfully submitted,

Connie Wood, Secretary
Criminal Law Revision Commission