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OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 1

Twenty-third Meeting, November 6, 1969

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

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

Others Present: Mr. Bruce Rothman, Representative, Bar Committee on Criminal Law and Procedure

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The meeting was called to order by Chairman John Burns at 1:30 p.m. in Room 315 of the Capitol Building, Salem, Oregon.

BUSINESS AND COMMERCIAL FRAUDS

Section . Promoting an endless chain scheme. Chairman Burns recalled that this question was first discussed in the meeting of July 7 (see minutes, p. 20) and the draft on this section was discussed in the meeting of October 9 (see minutes, pp 4 & 5). Decision was withheld in the latter meeting pending review by Multnomah County District Attorney George Van Hoomissen, who had made the original inquiry into this type of legislation. Mr. Paillette reported that he had written to Mr. Van Hoomissen on October 17 enclosing a copy of the draft and advising him that although no action had been taken by the subcommittee, they were somewhat less than enthusiastic about the proposal. Mr. Van Hoomissen's reply, dated October 20, stated:

"This is a serious problem and one which deserves the attention of the Criminal Law Revision Committee. The California statute appears reasonable and would be acceptable to me. Insofar as a penalty clause is concerned, I feel the optional felony/misdemeanor penalty which gives the Court sufficient discretion at the time of sentencing to impose a sentence, has some relationship to the particular scheme.

"While it is true that we have been quite successful in stopping pyramid sales through civil injunction, nevertheless some operators have ignored the agreements filed in court and it has become necessary to relitigate those cases."

Mr. Paillette said that this section is based on the California statute. He noted that Mr. Van Hoomissen had enclosed a copy of FACTS, a publication of the Portland Better Business Bureau dated October 15, 1969, which states:

"In an action filed October 14, Frank Healy, State Corporation Commissioner, Lee Johnson, Attorney General and George Van Hoomissen, Multnomah County District Attorney, charged that the sale of positions as representatives, managers and franchisees being made by the Consumer Business Service of San Jose, California, constitutes the offering of illegal unregistered securities. The plan is also held to be a lottery under the Oregon Law.

"At almost the same time a consumer protection complaint was filed against the firm and several of its officers and representatives by Washington's Attorney General, Slade Gorton. Gorton said the firm induces prospects to purchase sales franchises by representing that substantial profits may be made by selling additional franchises through an arrangement he described as 'similar to the antiquated chain letter scheme.'

"According to the Washington complaint, members of the service receive a directory of retailers purportedly offering merchandise at discount prices to members only.

"In August Deputy District Attorney Dave Shannon brought a halt to one of the company's recruitment meetings here when he served them with notification of a temporary restraining order that had been issued by Circuit Court Judge James M. Burns. A few days later the Consumer Business System entered into a stipulation with the District Attorney, in which they agreed to halt the offering of bonuses to franchisees who recruited other franchisees. As a result, the earlier suit was dismissed, but continuing investigation of this company and its sales program has resulted in the current action."

In reviewing previous discussion on this proposal, Chairman Burns noted that Mr. Chandler had been in favor of such a provision, while Mr. Spaulding and Rep. Young had expressed concern with attaching criminal sanctions to this type of conduct without requiring some element of fraud.

Mr. Chandler remarked that although there may not be an obvious statement of intent to defraud, the mere fact that someone engages in this sort of scheme is fraudulent type business. This section says that an endless chain scheme is a fraud which, he stated, is exactly what it is.

Chairman Burns' opinion was that while there are some chain schemes that are honestly operated, it is the sort of thing that lends itself to abuse. Therefore, this section would declare that as a matter of public policy, this activity is against the law in the State of Oregon, in that the bad outweighs the good. He did not think there was any rationale for requiring an element of fraud because if fraud were an element, this activity could be prosecuted under another statute. Mr. Paillette agreed that in that case, one could prosecute under Theft by Deception.

Mr. Chandler presumed that this type of activity would constitute deception because the results that were promised simply were not available. In theory, he said, they might be, but in actual practice, they were not.

Mr. Paillette called attention to another aspect of the endless chain scheme. In many cases, the sales involve a substantial amount of money. For example, in the letter which originally brought this problem to the attention of the subcommittee, the complainant had invested $6250.

In response to a question from Rep. Young, Mr. Paillette said that so far as he knew, the California statute had not been challenged on grounds of constitutionality. The only information he had on results of this legislation was from the Attorney General's office which indicated that it had been quite effective in protecting the state from endless chain schemes.

Mr. Rothman asked what penalty California had imposed. Mr. Paillette replied that it was a misdemeanor and he had anticipated that it would be a misdemeanor under the draft.

Mr. Chandler moved to approve the section. The motion was defeated with Mr. Chandler and Chairman Burns voting "aye" and Rep. Young and Mr. Spaulding voting "no."

OBSTRUCTING GOVERNMENTAL ADMINISTRATION

Section 5. Bribing a witness. Section 6. Bribe receiving by a witness. Mr. Paillette explained that although these two sections had been approved by the subcommittee and referred to the Commission with the recommendation that they be incorporated into the Bribery Article, and although they were subsequently approved by the Commission, he now faced a problem that had been overlooked in that process. He explained that when Mr. Wallingford begain incorporating those sections into the Bribery Article, he realized that there was a problem with the definitions. It was noted that both sections include definitions that appear in the Obstructing Article but not in the Bribery Article.

Mr. Wallingford pointed out that the problem was further complicated by the fact that "official proceeding", although used in both sections, was not defined in the Obstructing Article. The reason for this was that it had been defined in the Bribery Article and therefore was included by reference in the Obstructing Article. However, he said, Subcommittee No. 2 deleted that definition from Bribery because they found it unnecessary to that Article. It is necessary, he said, to the interpretation of sections 5 and 6.

The second problem, he said, was that "testimony", as used in sections 5 and 6, is not defined in the Bribery Article at present. This situation developed because the subcommittee found the definition of testimony to be unacceptable and is waiting for a new draft of this definition.

The third problem, Mr. Wallingford noted, was that since some of the Bribery statutes had been revised, these two sections on bribing a witness and bribe receiving by a witness did not conform to the rest of the Bribery Article. Therefore, he reported, he had redrafted the two sections to conform.

Chairman Burns observed that whether the two sections on bribing a witness were in Obstructing or in Bribery, they should conform to the Bribery statutes, just as Robbery and Burglary conform with respect to the aggravating elements in each.

Mr. Chandler said it seemed to him that the procedure would be to recommend to the full Commission that they amend the Bribery Article to include the two definitions necessary to these sections.

Mr. Paillette explained that another alternative would be to place the two sections back in the Obstructing Article. He had originally felt that the subcommittee was right in its recommendation, he said, but it now appeared that there would be less difficulty in the long run, not only with the organization of the code, but in the interpretation and application of the statute, if these sections were located in the Obstructing Article.

Chairman Burns expressed concern with the placement of bribery type sections in Articles other than the Bribery Article. It was explained that some of these sections were more applicable to other Articles than they were to Bribery. Mr. Paillette assured him that in the final draft, all these Articles would be incorporated under the tentative heading, "Offenses Against Public Administration" and that one would follow the other. Thus, under the new code, there should be no difficulty with respect to proximity of the definitions.

Mr. Chandler moved to recommend to the Commission that sections 5 and 6 be reinstated in the Article on Obstructing Governmental Administration, without specifying which sections 5 and 6 this motion would refer to. The motion carried unanimously.

He next considered the difference between the sections as originally drafted and those which had been redrafted. He understood that the main difference in section 5 was that the original version required an agreement or understanding while the new draft required only an intent. Mr. Wallingford agreed that was correct. He also explained that section 6 was changed so that solicitation would require only an intent whereas acceptance would require an agreement or understanding. He reported that the revision in section 6 to include intent was in accordance with the wishes of Subcommittee No. 2. In their discussion of the Bribery Article, they determined that solicitation should require only an intent rather than an agreement or acceptance because in many cases, the solicitation might be refused.

Mr. Chandler moved to substitute the redrafted sections 5 and 6 for the original sections in Preliminary Draft No. 1 of this Article and the motion carried unanimously.

Section 7. Tampering with a witness. Mr. Chandler requested and was granted a short discussion on the principle involved in this section. If a charge of bribe receiving can be brought against a person for absenting himself from any official proceeding to which he has been legally summoned, it should also be unlawful for his lawyer to advise him to leave town to avoid service, he said. He maintained that the purpose of a court proceeding is to arrive at the truth in the matter and resolve the question. Therefore, to allow and even encourage attorneys to advise clients to avoid service only confuses the issue and prolongs the arrival at that truth. He stated that he intended to discuss the matter further when the subcommittee considers Preliminary Draft No. 2.

ESCAPE AND RELATED OFFENSES

Section 1. Escape and related offenses; definitions. Mr. Wallingford pointed out that he had changed the definition of "detention facility." He explained that the one objective in drafting definitions is to eliminate some of the verbiage in the sections that follow. With respect to "custody" in subsection (3), he noted that use of the words, "actual" and "constructive", although not found in present statutes, is recognized in case law. Subsection (1), he said, refers to the definition of "public servant."

Mr. Spaulding suggested that the subcommittee read the definition of "public servant" to get the meaning of the definition as it applies to this Article. At Mr. Spaulding's suggestion, Mr. Wallingford read the definition of "public servant" from the Article on Bribery and Corrupt Influence, P.D. No. 3:

" 'Public servant' includes:

"(a) A public officer or employe of the state or of any political subdivision thereof or of any governmental instrumentality within the state;

"(b) A person serving as an advisor, consultant or assistant at the request or direction of the state, any political subdivision thereof or of any governmental instrumentality within the state;

"(c) A person elected or appointed to become a public servant although not yet occupying the position; and

"(d) Jurors."

Chairman Burns said he thought the definition was too broad but suggested that Mr. Wallingford read the rest of the definitions, explaining any changes that he may have made,and that the subcommitte reserve making any motion on this section until after discussion of the remainder of the draft.

Mr. Spaulding voiced objection to the definition of "custody" on the basis that it excludes a detention facility, juvenile training school and state hospital. He said this definition would lead to misunderstanding because it is not consistent with the general use of the word.

Mr. Rothman asked about the explanation in the commentary on p. 3 that "custody" is inapplicable to a person released on bail or who is on parole or probation. Mr. Wallingford explained that there are two degrees of bail jumping which would be treated as a separate offense.

Mr. Chandler stated that he would give consideration to offering an amendment to subsection (3) later on but urged the subcommittee to move on to section 2.

Section 2. Escape in the third degree. Section 3. Escape in the second degree. Section 4. Escape in the first degree. Mr. Wallingford explained that the only person who could be charged with escape in the third degree would be one who had been arrested for a misdemeanor but not yet incarcerated, i.e., not yet delivered or committed to a detention facility.

Chairman Burns wondered if this would include a misdemeanant who had been given a summons in lieu of arrest but failed to appear in municipal court on the specified date. Mr. Wallingford answered that that was not his intent because he did not consider that to be a situation where actual restraint was imposed upon the person. However, he noted, section 10 of this draft covers that problem. He reported that section 3 contained the aggravating factors that enhance the degree of the offense. In reply to a question from Chairman Burns, he said he had no intent to include bail situations in any of the escape sections since there will be bail jumping statutes to cover that offense.

Chairman Burns then asked for an example of who might be arrested under subsection (2) of section 3. Suppose a person, having been arrested for, charged with or convicted of a felony escapes from custody but is not on bail or released on recognizance for which there are separate statutes and he is not in a detention facility. What kind of situation would this cover, he asked.

Mr. Rothman replied that this section might cover making a citizen's arrest in which case, it would involve some very serious problems. One could assume that the citizen might think he was acting in his capacity as a public servant. In the case of a citizen's arrest, there is always the prospect of resistance and the ensuing danger of the use of physical force, he said. There is also the possibility that some form of restraint would be used in effecting the arrest. This situation brings up the question of some very serious crimes and penalties, he warned.

Mr. Wallingford noted that this discussion brings up a collateral point because section 10 of the Justification Article proposes a criminal offense for resisting arrest, whether the arrest is lawful or not. That would also apply to a citizen's arrest. Therefore even if it were determined later on that the arrest was unlawful, a person could be charged with the crime if he forcibly resisted the arrest.

Chairman Burns recalled the case in which Brudos allegedly arrested his victim. What if the girl in this case was in the position of wanting to resist the arrest, but afraid of the legal consequences.

Mr. Wallingford also pointed out that in the Justification Article, Mr. Paillette has proposed a section on the "no sock" principle. This section would prohibit someone resisting a peace officer although it would not apply to anyone making a citizen's arrest.

Mr. Paillette asked Mr. Rothman how he was applying the citizen's arrest to the definition of public servant. Mr. Rothman replied that under the broad definition of public servant, a citizen might believe he was acting in a governmental capacity. He also pointed out that an employe of the state is considered a public servant under this definition. Chairman Burns noted that if this definition were restricted along the lines of the present law, that problem would not arise.

Mr. Chandler complained that eliminating subsection (2) of section 3 would also eliminate the citizen's arrest because without the threat of criminal action against an escape, it would be very difficult to effect such an arrest. Chairman Burns replied that this action would not eliminate the citizen's arrest. Mr. Chandler pointed out that it would make escaping from one no longer a crime so what would be the sense in providing for a citizen's arrest under those conditions.

Chairman Burns stated that most of the citizen's arrests he was aware of were in the presence of an officer who then took the person into custody. He thought probably 95% of these arrests were effected in this way. He mentioned a recent case where a citizen tried to arrest some people in a park at night but where the people resisted the arrest. He

said he would have resisted also under those circumstances, because he would not have known who the man was nor what his motives were. He urged that there be some protection afforded to the person who has a legitimate reason for resisting an arrest.

Mr. Spaulding was of the opinion that if a citizen wanted to make an arrest, he should be prepared with power to enforce it, which in most cases, would mean that a police officer was at the scene.

Mr. Wallingford asked if the issue was not really the lawfulness of the arrest. This section simply indicates that a person who is unlawfully arrested should not be charged with escape for resisting that arrest, he said.

Mr. Rothman wondered if self-help was not something that should be discouraged. We are no longer living in a time where a man has to defend himself with his good right arm and his gun, he remarked. He asked if it was not the purpose of this subcommittee to encourage utilization of the services of the police officer in any effort to establish order.

Mr. Chandler challenged this theory on the basis that the situation in Baker, Deschutes, Grant, Harney and Malheur Counties is entirely different from that in the Portland-Multnomah County area. These are counties which cover large areas of the state, but which have small budgets and relatively few people so that trained help is not as available as it is in the metropolitan areas of the state. There are times, he said, when 150 miles away from the courthouse where the sheriff and his deputies are located, someone suddenly needs the trained help of these officers, which is unavailable to them. In two-thirds of the land area of this state, he reminded, a citizen is largely on his own. As an example, he cited a recent case in which some men from Idaho flew in to a ranch near Rome, Oregon. They butchered a cow, loaded it on the plane, and escaped before anyone could catch them. Fortunately someone saw them and obtained a description of the plane so they may be arrested and returned eventually, he said. But if anyone were going to stop them at the time, it would have had to be with a citizen's arrest.

Chairman Burns commented that had the landowner pulled a gun and told these men that they were under arrest, their attempted escape would presumably have been at their own risk. However, if the landowner had merely told them they were under arrest, but the men, seeing that he had no means of enforcing his order, left anyway, the owner could not under present law go to the district attorney and file a complaint charging them with escape as he could under the proposed section. He urged the

subcommittee to balance the equity in the situation. Does the good to be achieved by permitting the crime of escape outweigh the harm that can result from some of the demented souls who prowl the lovers lanes in the metropolitan areas and who would take advantage of such a provision, knowing the scared kids would be afraid that if they did resist, they would be charged with a crime. Further, he warned, there is a good deal of prowling of this type going on all the time and therefore, a real danger to the kids who park in these areas.

Mr. Spaulding elaborated on the question brought up by Chairman Burns by posing the hypothetical situation where a mentally unstable person thought he had a right to make an arrest when in fact he did not. If the person escaped from him, he could then go to the district attorney with a good case for prosecuting the escapee in court, even though the arrest was unlawful. In this case, the district attorney would have no basis for refusing to issue a complaint for an escape which would mean the case was built on nothing at all.

Mr. Wallingford answered Chairman Burns' earlier question about what type of situation would be covered under subsection (2) of section 3. He explained that it referred to a person who had been arrested, taken into custody and charged with a felony. He added that section 4 lists two more aggravating factors with respect to escaping from a detention facility. One of those factors, he said, is when the escapee, aided by two or more persons, uses or threatens use of physical force; the other factor is when he uses or threatens to use a dangerous or deadly weapon.

Mr. Chandler asked the reason for the limitation of two or more persons actually present. Mr. Spaulding explained that the presence of two or more persons aiding the escapee puts the officer trying to prevent the escape in much the same kind of fear that he would experience in the presence of a weapon.

Mr. Chandler said it seemed to him that if a person were aided by a particularly large and powerful man who used or threatened to use physical force in the escape, it could be as intimidating as if there were two people helping him. Chairman Burns pointed out that that situation would be covered in subsection (1) of section 3 by the language, "uses or threatens to use physical force...."

Mr. Wallingford explained that subsection (1) of section 4 was directed toward the mass escape attempts from detention facilities rather than the individual escaping from a police officer. The language is from Michigan, he reported, and their rationale was that the mass escape attempt evidenced a greater degree of planning and premeditation and was, therefore, more of a threat to the overall detention facility than the case of an escape by an individual.

Mr. Chandler asked what charge would be brought against three men who were trying to escape at the same time even though they were not really aiding each other but just trying to effect their own escape. Mr. Spaulding replied that if each was aided by the other two, their conduct would fall under section 4. Mr. Rothman thought their acts would have to be in concert to fall under this section because of the meaning of the words, "aided by."

Chairman Burns observed that acting in concert implies that there are three principals involved. He asked if a person waiting in a car for an escapee to make his break would be aiding.

Mr. Paillette answered that the same consideration would apply to this section as was applied to the Robbery draft. In reference to a person being aided by another person actually present, the commentary indicated that it was concerned with the proximity to the victim. The question would be whether the person who was aiding was close enough to the victim to pose a threat. In fact, he said, the commentary cited a hypothetical situation which indicated that a person waiting in a get-away car would not be considered as actually present for purposes of enhancing the degree of robbery, since he did not pose an additional threat to the victim.

Mr. Rothman asked if the two or more persons referred to would have to be in custody themselves. Mr. Spaulding replied that he did not think so. In reply to a second question by Mr. Rothman, Mr. Spaulding agreed that aiding or abetting is a separate crime, but pointed out that this section is not directed toward the person who aids or abets, but toward the escapee who is the beneficiary of that aid. Mr. Paillette explained that the Article on Parties to Crime with respect to accomplices would cover the situation where a person aids or abets. He could be charged along with the escaper, not because he was in custody, but because he aided, he said.

Chairman Burns noted that robbery in the second degree uses the language, "aided by another person actually present." Therefore, he said, if being aided by another is to be the highest degree of escape, it occurred to him that one person with a gun was as bad as two. He moved to amend subsection (1) of section 4 by deleting "two or more persons' so that it would read: "Aided by another person...." The motion carried unanimously.

Mr. Paillette pointed out that with respect to accomplices, ORS 163.324 is the present "escape from official detention" statute and requires that one of the means of committing that crime is by knowingly causing or facilitating an escape. Therefore, a person would not have to be in custody to violate the present escape statute.

Mr. Wallingford reported that Oregon presently has a statute on defenses to the crime of escape. In comparison, he said, Michigan does not provide defenses for escape. However, their section covering escape in the third degree states: "This section shall not apply to a person escaping or attempting to escape from restraint pursuant to an illegal arrest." This means, he said, that a person illegally arrested for a misdemeanor could not be charged with escape from custody. He stressed, however, that Michigan did not apply that exemption to escape in the first degree. It is basically the same as Oregon's present defense statute, he advised, except that ORS 162.326 provides that an irregularity in effecting confinement in a detention facility or lack of jurisdiction of the detaining authority is not a defense to a prosecution if the escape is from a detention facility.

Mr. Wallingford reported that there is currently a division of opinion among the states on whether that defense should be provided for a person who escapes from detention after having been unlawfully committed. He explained that escaping from an illegal arrest under section 2 also involves the question of resisting an arrest. Under the new proposals a person could be charged with resisting arrest even though the underlying charge was unlawful. The question to consider then, is whether a person can resist an unlawful arrest if he can do so without the use of force. The same rationale for the proposal on resisting arrest would apply to this section on escape, he said. It is the protection of the party being arrested from what the police officer might feel to be his duty which, in the case of a fleeing misdemeanant, might include shooting him.

Mr. Paillette advised that the underlying consideration for the "no sock" rule under the Article on Justification, which applies equally to the section on resisting arrest, was to prevent fighting in the streets against constituted authority, while stressing that this is not the place to decide -- certainly not by force -- whether or not the arrest is lawful. There is some disagreement among authorities, he reported, and good argument can be made for both sides of the controversy. For example, the

New York provision on the "no sock" rule, which was the basis for our Justification Article, was severely criticized as putting the private citizen on the horns of a dilemma and introducing the possibility for abuse by police. On the one hand, officers would be able to arrest unlawfully, while the citizen would have no redress at the time; he would have to submit or face the charge of resisting arrest; there would be no justification to the charge of assault on the peace officer or to the charge of resisting arrest. On the other hand, there is the argument that providing for a defense in the event of an unlawful arrest, along with the justification in resisting that arrest by force, only breeds violence in the streets.

Mr. Spaulding noted that a person would still have the right of protection for unlawful arrest but it would have to be enforced by the court. Mr. Chandler remarked that he did not think everyone should have the right to determine at the time of arrest whether or not the arrest was lawful. Mr. Spaulding agreed and added that it sometimes takes a highly sophisticated legal argument to establish whether an arrest is lawful. He argued, however, that many people would try this approach if given the chance.

Mr. Paillette said he did not advocate providing a defense for resisting arrest by a person who is being unlawfully arrested by a police officer. As to whether the same considerations should apply to a "peaceable" escape, he said, he was not sure. When a person attempts an escape, even without the use of force or violence, he invites the attempted prevention by the peace officer of that escape, which leads to further complications.

Rep. Young expressed his concern with setting out the defense for escape from unlawful arrest. Mr. Wallingford explained that under ORS 162.326, a person is not allowed that defense once he has been confined. In response to a question by Chairman Burns on why that provision was left out of this draft, Mr. Wallingford replied that it was a policy question because it was connected with other provisions that we are dealing with that still have not been decided upon.

Mr. Paillette agreed with Mr. Wallingford. He explained that ORS 162.326 provides:

"(1) Irregularity in effecting detention, or lack of jurisdiction of the committing or detaining authority, is not a defense to a prosecution under ORS 162.324 if the escape is from:

"(a) Detention in a facility for the custody of persons under charge or conviction of crime; or

"(b) Other detention pursuant to judicial commitment.

"(2) In any other case irregularity in effecting detention, or lack of jurisdiction of the committing or detaining authority is a defense if:

"(a) The escape involved no substantial harm or risk of harm to the person or property of anyone other than the individual detained; or

"(b) The detaining authority did not act in good faith under color of the law."

Mr. Rothman related that there is presently a new tort claims act that would provide a civil remedy to an individual unlawfully arrested, convicted or detained although it is somewhat restricted to certain areas. If the subcommittee considers allowing no defense for resisting an unlawful arrest, he said, it seemed grossly unfair to him that a person could then be charged with escaping from that custody. If that were going to be the case, he said, he would urge the subcommittee to give some consideration to the immunity statutes and to the tort claims statutes for civil redress.

Rep. Young said it was his understanding that this section indicates there is a defense to escape when the arrest is unlawful and when the escape is made without the use of force; but if a person uses force, he could be charged with escaping in the second degree as well as resisting arrest, even though the arrest was unlawful.

Mr. Chandler said it seemed to him that there was a necessity for retaining the integrity of the arrest whether it is lawful or unlawful. In order to maintain that integrity, he stated, penalties must be provided for escape from arrest in cases where force is used.

Chairman Burns requested the subcommittee's opinion on whether to include a defense section similar to that found in present Oregon law.

Representative Young replied that if the subcommittee is to allow a defense to resisting arrest, it is difficult to see why it does not also allow the defense to escape under similar circumstances.

Mr. Paillette explained that the statute on resisting arrest requires the use of force as an element of the crime and since the defense to escape would apply only to escape in the third degree, and since it does not condone the use of force or violence, he did not think it would be inconsistent. If the defendant uses force, he will be covered under one of the other sections. If it is simply a matter of escape in the third degree, this provides some protection for the individual against an unlawful arrest if he can escape from it without the use of force or violence.

Rep. Young noted that escape in the third degree applies only to misdemeanors. How about the unfortunate person charged with a felony, he asked, who walks away peaceably.

Mr. Paillette said he thought Rep. Young had raised a good point. Escape in the third degree, he said, could be restructured to cover that situation and second degree offenses could be limited to the person who has been convicted of a felony. He thought that was the approach Michigan had attempted because of the language in their section on second degree, "having been convicted of a felony...." Their third degree of escape would include arrests for a felony where there had not yet been a conviction. Because they have excluded the arrest for felony under their second degree, they have implied that this covers both felonies and misdemeanors if the arrest is illegal.

Chairman Burns asked if Mr. Paillette favored adding a section 5 which would state that these sections (2, 3, and 4) shall not apply to a person escaping or attempting to escape from custody pursuant to an unlawful arrest. Mr. Paillette replied that he did not think it would be wise to go that far because that would exclude anyone who used force or a deadly weapon.

Chairman Burns then asked if it would be practical to include a subsection in section 2 similar to subsection (2) of section 4607 of the Michigan Code. Mr. Paillette remarked that if the subcommittee decides to provide a defense, it should be limited to section 2 and if felonies are to be included in that defense, it would be best to delete in subsection (2) of section 3, the language, "arrested for, charged with."

Chairman Burns stated the amendment: Section 2 would be broken into two subsections. The first would consist of what is now section 2; the second would state: "This section shall not apply to a person escaping or attempting to escape from custody pursuant to an illegal arrest."

Mr. Paillette suggested that the amendment be framed in terms of a defense to make it consistent with the rest of the code. Chairman Burns agreed. He resumed with his explanation noting that the proposed amendment would delete from subsection (2) of section 3, "arrested for, charged with or". Mr. Chandler moved to approve the proposed amendment. The motion carried unanimously.

Section 5. Facilitating escape. Mr. Wallingford explained that one of the reasons for this statute is that under this Article, while it is not a crime for a person to escape from a juvenile training school nor a state hospital, it is a crime to aid those persons to escape. In response to a qu tion from Mr. Chandler on the reasons for not classifying this type of escape a crime, Mr. Wallingford said that the primary purpose of these facilities is rehabilitation.

Chairman Burns observed that the juvenile code is quite explicit in stating that a person under jurisdiction of the juvenile court is not considered a criminal. He said it would seem to him to be inconsistent to commit a person under the juvenile code and then make him liable to a felony for escape. He maintained that escape from a juvenile training school was a problem for the juvenile court and rightfully should be segregated from other crimes until such time as the person is remanded to circuit court.

Mr. Chandler asked what would happen if a person in the juvenile training school assaulted someone but the judge refused to remand him to the circuit court. Mr. Spaulding answered that the responsibility would rest on the judge in that case.

Mr. Chandler remarked that at times, juveniles are quite rough on teachers and custodians. Since the state hires people to keep track of them and to keep them in order, he said, it did not seem to him that they should have a blanket exemption from the escape statutes.

Chairman Burns replied that in fact they had no such release from escape. He referred to p. 1 of the draft and pointed out that the definition of "juvenile training school" refers to ORS Chapter 420 which relates to giving any peace officer authority to apprehend or take into custody a juvenile who is absent without authorization. It was also pointed out that the facility usually has some administrative sanctions with respect to misbehavior.

Mr. Chandler stated that apparently they were not effective sanctions because, with some regularity, administrators were attacked during escape attempts.

Mr. Paillette reminded him that just because a person is an inmate of one of the juvenile training schools, he does not have immunity to commit other crimes in the course of an escape. That would be an entirely different matter and would have to be considered by the authorities in determining whether or not to prosecute for the other crimes. However, in the event of an escape without commiting some other crime, it would probably be an exercise in futility to charge a juvenile with the crime of escape.

Mr. Chandler related that he had heard complaints by administrators of many cases where a person who is actually a trouble-maker escapes, and yet when he is brought back, the administrators do not have an effective way to deal with him.

Chairman Burns asked if the subcommittee knew how the administrators handled these people prior to 1967. Until then, he explained, these administrators had been effective in perpetuating a statute which said that if a juvenile was incorrigible and beyond the control of the juvenile institution, he could be released. He remembered a case where a boy was released from MacLaren as an incorrigible. He promptly went to Portland, climbed up a drain pipe into a woman's bedroom and stabbed her 27 times. Chairman Burns reported that he had been somewhat instrumental in getting that statute repealed on grounds that if the juvenile was incorrigible, he belonged in a training school rather than on the street.

Mr. Chandler pointed out that keeping the incorrigible juvenile in that institution makes it difficult to handle the others who are not yet incorrigible. The question, he said, is whether to release these juveniles or transfer them elsewhere, OCI, for instance.

Chairman Burns said he thought the present system of corrections was evolving to a point where the security risks and the tougher cases were going to be at MacLaren and those who may be hurt by association with them will be in youth care centers. He said he personally felt that it was more of a problem for juvenile corrections than for the criminal code.

Mr. Paillette explained that section 5 continues present Oregon law. The subcommittee agreed it was acceptable. Mr. Chandler moved to approve section 5 and the motion carried unanimously.

It was later pointed out by Mr. Rothman that a strict interpretation of section 5 would indicate that a juvenile within the facility could be charged with this crime and he doubted if that was the intent. Mr. Wallingford advised that his intent in drafting this section was to exclude patients or inmates. Chairman Burns then requested Mr. Wallingford to redraft an alternate section to eliminate the problem posed by Mr. Rothman.

Section 6. Promoting contraband in the second degree. Section 7. Promoting contraband in the first degree. Mr. Chandler objected to the word, "promoting" because he did not think it adequately described the conduct referred to in these sections.

Chairman Burns questioned Mr. Wallingford on the origin of the word, noting that present law speaks in terms of posessing. Mr. Wallingford replied that "promoting" was a New York term. Michigan had used "introducing", he said, while ORS 475.090 uses the term "furnishing."

Mr. Spaulding observed that this section leaves to the person in charge of the facility the determination of what would be considered contraband. Mr. Wallingford explained that this approach is similar to present law in the area of dangerous drugs where the Pharmacy Board determines what is considered a dangerous drug.

Chairman Burns referred to the language in ORS 169.130: "...no person shall give or sell to an inmate of a county jail any article or beverage, without obtaining the permission of the sheriff, jailer or keeper." He thought it would be desirable from the defendant's standpoint to require the promulgation of a rule rather than to rely on permission of the administrators. Mr. Paillette agreed that it might eliminate problems involving an administrator's judgment, which varies a great deal, depending on many circumstances.

Chairman Burns and Mr. Spaulding both agreed with Mr. Chandler that "promoting" was not particularly appropriate in this section. After some discussion about the meaning of other words that might take its place, Rep. Young moved to replace "promoting" with "supplying" in both sections. The motion carried unanimously. Mr. Chandler then moved to approve sections 6 and 7 as amended. That motion also carried unanimously.

NOTE: Although approval of sections 8, 9 and 10 was deferred until the next meeting, along with a reappraisal of the definitions in section 1, section 10 was discussed.

Section 10. Failing to respond to an appearance citation. Mr. Chandler asked what would happen if, on his way home from Salem to Bend, he was stopped by a state police officer for a violation, handed a ticket with bail set at $50 and told to appear in Justice of the Peace Court in Stayton, but decided to drive on to Bend, ignoring the citation. Mr. Wallingford explained that there is a statute to cover that offense which provides that a citation can be issued and served anywhere in the state. If it were a case of a citation by police under a City of Bend ordinance, he said, it would be a different matter. There is presently no way to force a person outside the county to return for an appearance on a city ordinance violation, he reported.

Chairman Burns asked if adoption of section 10 would give cities the power to force violators to post bail or appear in court regardless of whether or not they were still in the county. Mr. Wallingford replied that it would cover a failure to appear on a citation issued anywhere in the state. Chairman Burns commented that it appeared from the language that it would not, since it says, "based upon his alleged commission of a misdemeanor...." Therefore, he thought it would not apply to city ordinances. He wondered if section 10 added anything constructive to present law, since State Police now have power to issue bench warrants. It seemed to him that the only addition this section would make is that a person could be charged with yet another crime.

Mr. Wallingford referred to an Attorney General's Opinion in 1966 which stated that a bench warrant issued by a municipal judge or a justice of the peace, based upon a municipal ordinance cannot be served outside his jurisdiction.

Chairman Burns reminded him that under legislation approved this year, a bench warrant, based upon failure to appear on a misdemeanor, can be served anywhere in the state. Since this section relates to a misdemeanor also, it was his opinion that it was unnecessary.

Mr. Wallingford noted that the intent in section 10 was to reach not only those charged with misdemeanors but also those charged with a violation of any city ordinance. Chairman Burns suggested that "alleged commission of a misdemeanor" be changed to "alleged violation" if that is the intent. He felt that when a person is cited for a violation and ordered to appear for a hearing, he should be reprimanded if he chooses

to ignore the summons. Justice dictates that he be brought to the court and sentenced, he said, which is the function that the bench warrant presently serves. If he can be charged with escape in addition to the original violation, he will be facing two charges. Since it is unlikely that a judge would impose a double sentence, he wondered what purpose would be promoted or served by making this a separate crime.

Mr. Paillette explained that the purpose was to provide the courts with a means to enforce, throughout the state, the appearance of those charged with municipal ordinance violations.

Mr. Wallingford reported that this section was based on New York section 215.58 which was added in 1968. In their supplementary commentary, it states:

> "Prior to the 1968 amendment, this question often arose: what offense was committed by a person who failed to respond to an 'appearance ticket' (a process confusingly referred to as a summons) issued by a police officer or other authorized public servant (not by a court) requiring the recipient's court appearance upon a future date to answer an information which was to be subsequently filed at some time before the return date?"

Mr. Wallingford explained that prior to 1968, New York had found that a person could not be charged in these cases.

The meeting adjourned at 4:30 p.m.

Respectfully submitted,

Connie Wood, Secretary
Criminal Law Revision Commission