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OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 1

December 18, 1968

A G E N D A

OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 1

Twelfth Meeting, December 18, 1968

Minutes

Members Present: Senator John D. Burns, Chairman
Mr. Robert Chandler
Representative Edward W. Elder
Mr. Bruce Spaulding

Also Present: Professor Courtney Arthur, Reporter, College of Law, Willamette University
Mr. Donald L. Paillette, Project Director
Miss Jeannie Lavorato, Research Counsel

The meeting was called to order by Chairman John D. Burns at 9:45 a.m. in Room 309 Capitol Building, Salem.

Minutes of Meeting of November 15, 1968

There being no objection, Chairman Burns declared that the minutes of the meeting of November 15, 1968, were approved as submitted.

New Subject Matter to be Considered by Subcommittee No. 1

Mr. Paillette reported that in accordance with the decision made at the previous meeting of Subcommittee No. 1, he had discussed with Senator Yturri, Chairman of the Commission, the desirability of this subcommittee undertaking revision of the Preliminary Provisions and General Principles of Liability. Senator Yturri had indicated his approval of this procedure and Professor Arthur had accordingly prepared the draft to be considered at today's meeting.

Mr. Paillette explained that Subcommittee No. 3 had previously approved Professor Arthur's drafts on Classes of Crimes and on Purposes and Principles of Construction, both of which were a portion of the Article on Preliminary Provisions. These drafts had now been transferred to the Subcommittee No. 1 notebooks and were thus available to the committee for reference.

Chairman Burns then welcomed Professor Arthur to the meeting and expressed gratitude on behalf of himself and the other committee members for the work he had accomplished for the Commission.

PRELIMINARY: General Principles of Liability -- Culpability;

Preliminary Draft No. 1; December 1968

Professor Arthur explained that the draft to be considered at today's meeting had to do with the mental elements of crime and the manner in which blameworthiness in crime was to be described. If the draft were adopted, he said, it would not necessarily change the law in Oregon. As drawn, the draft would set up four mental elements and any crime could be coupled with one or more of those mental elements.

Professor Arthur said he would like to make a strong argument for adopting the Model Penal Code approach employed in this draft for the reason that New York had adopted it as had Michigan and Illinois, and California was in the process of doing so. It would be helpful, he said, to have the same general approach as the largest states in the country to insure a reservoir of court decisions to follow as precedent as well as to maintain uniformity.

One thing that did not appear in the draft before the committee, Professor Arthur commented, but which was important to bear in mind was the Model Penal Code definition of "element of an offense" as it appeared in section 1.13 (9). These elements were: (1) conduct; (2) attendant circumstances; or (3) result of conduct.

Professor Arthur remarked that the Model Penal Code, California, New York, Michigan and Illinois codes said that a person was not liable for a crime unless he was blameworthy. Criminal offenses were possible, he said, where no blameworthiness existed but, generally speaking, in instances where society needed a regulation proscribing a certain conduct, if the person were not blameworthy, the penalty should be a modest one. Therefore, the draft was based on the assumption that the penal code was dealing with serious crimes.

The draft, he explained, contained four culpable mental states: intentionally, knowingly, recklessly and criminal negligence. Each of these mental states was in turn applicable to the three material elements of the crime set forth in the Model Penal Code definition of "element of an offense;" i.e., conduct, attendant circumstances or result of conduct.

Mr. Chandler commented that the Commission had tentatively approved a number of proposed statutes and he was not certain that each of those crimes contained one or more of the four mental states which this draft set up as a test of whether a crime had been committed. Chairman Burns indicated he had the same thought and noted section 1 implied that every specific statute would have to embody within its own definition the fact that a person was "not guilty of a crime unless he acts intentionally, knowingly, recklessly or with criminal negligence, as the law may require." Professor Arthur agreed that adoption of the draft under consideration would require reviewing every crime which had been acted upon thus far to insure that each crime was drawn to conform to the definitions of the culpable mental states.

Mr. Chandler inquired if it would be possible to include a general statement in the code that one of the four mental states was to be applied to each crime rather than going back into the individual statutes and was told by Professor Arthur that the draft would take care of a general statement for certain situations. If a criminal statute did not say which mental state was required, this draft provided that a person could be proved guilty of that crime if he committed the act recklessly, knowingly or intentionally but not negligently. If he were to be guilty on the basis of criminal negligence, the statute must specifically so provide.

Representative Elder inquired if a distinction existed between a person who knew he was by his act violating the law and one who did not recognize his act as a violation of law. Professor Arthur called attention to section 3 (3) of the draft which stated that if a defendant did not know what the law was, this was not a defense and did not relieve him of liability for his act.

Mr. Paillette expressed the view that the committee should not be too disturbed about reviewing the drafts the Commission had approved. When the statutes were drawn, the subcommittees had discussed the mens rea elements of the crime and used language, such as "recklessly," which had not yet been defined but which they anticipated would be defined as in the Model Penal Code. In most of the drafts, he said, the mens rea element was implicit in the definition of the crime. Many of the present ORS statutes did not specifically say "intentionally," for example, but it was implicit in the statute that the crime did not refer to a negligent crime of conduct but was talking about intentional conduct on the part of the actor.

Chairman Burns noted that Oregon courts had built up a body of case law which was known as "specific intent crimes" under which the judge would tell the jury that the defendant could not be found guilty unless the state had proved specific intent. He asked if this draft would abrogate that body of law. Professor Arthur replied that present statutes nowhere defined "specific intent" but the court decisions had defined the term. This draft would place specific intent in the statute in language that was readily understandable to a jury.

Mr. Chandler pointed out that present statutes defined seven mens rea elements and asked Professor Arthur if it was his belief that "intentionally," "knowingly" and "recklessly" would cover those seven elements. Professor Arthur replied affirmatively. Mr. Paillette pointed out that the draft was not intending to say that the defined terms could be used interchangeably and Professor Arthur concurred.

Chairman Burns asked if "practically" as used in section 2(2) was a word of art and Mr. Spaulding replied that he did not think so. In reply to a suggestion that "likely" be substituted for "practically," Mr. Chandler commented that "practically" drew a finer distinction than "likely."

Professor Arthur read section 2 (3) and Mr. Spaulding inquired if the phrase "constitutes a gross deviation from the standard of care that a reasonable person would exercise in the situation" referred to gross negligence. Professor Arthur replied that it did not and noted that subsection (3) applied the community standard of judgment to each particular situation and each case then became a jury question. He called attention to the alternative draft of section 2 (3) on page 6 of the draft which made provision for a person who created a substantial risk but was unaware of that risk by reason of voluntary intoxication. He also pointed out that State v. Hodgdon, 244 Or219, adopted Mr. Justice O'Connell's conclusion in Williamson v. McKenna, 223 Or 366, that gross negligence was identical with recklessness, so the court at present was saying that to be guilty of negligent homicide because a person was grossly negligent, he had to be reckless. (Note: See commentary on page 4 of draft.) Professor Arthur said he thought the Oregon Supreme Court in saying a person had to be reckless to be guilty of a crime requiring gross negligence, was saying that he did not have to realize the risk, but his conduct was unjustifiable under circumstances where the normal person would have realized the risk. The court, he said, was setting up an objective standard, and the draft would let the jury decide how big that risk was.

Chairman Burns noted that section 2 (3) adopted the Model Penal Code approach of making recklessness a subjective awareness and rejected the Oregon Supreme Court construction of an objective standard. The objective standard was then inserted in subsection (4) of section 2 and presumably made adherence to the standard a lesser degree of crime.

Chairman Burns read the proposed statute on Unauthorized Use of a Motor Vehicle which had been approved by the Commission and asked if it would be necessary to insert a culpable mental state in that statute if this draft were adopted. Professor Arthur replied that the statute should be reviewed, but as it was now written, one of the three mental elements of intentionally, knowingly or recklessly would be required to prove guilt. Unless the Commission specifically wished to include only one of those elements, an amendment would be unnecessary. If the Commission wanted one of the mental states of the crime to be criminal negligence, it would be necessary to include a statement to that effect. Under this draft, he explained, intent, knowledge or recklessness would be implicit in every crime and it was only incumbent upon the Commission to make affirmative exceptions.

Professor Arthur suggested the committee discuss whether section 2 set forth the correct order of increasing blameworthiness by placing "intentionally" first and descending to criminal negligence. Chairman Burns replied that he thought this was the correct order for most crimes but the ranking would not necessarily hold true with respect to negligent homicide. Professor Arthur agreed that negligent homicide was a confusing area of the law. He traced some of the history of the present negligent homicide law and noted on the one hand it was tough on the driver who killed someone in an automobile accident by limiting him to a three year negligent homicide sentence and on the other hand was protecting him from a manslaughter sentence.

Mr. Spaulding commented that he was on the Legislative Committee of the District Attorneys' Association at the time the negligent homicide statute was enacted. The reason that Association requested the statute, he said, was that district attorneys were not getting convictions under the manslaughter statute when automobiles were involved in killings and they thought they could get convictions if the statute carried a lesser penalty.

Section 5. Culpable mental states; when inapplicable. Chairman Burns said he could not think of an example which the subcommittee had acted upon thus far where a proposed law clearly indicated a purpose to dispense with any culpable mental state. He said he was assuming that section 5 pertained to both misdemeanors and felonies and expressed doubt that a strict liability felony would be constitutional. Mr. Paillette said he could not think of a specific instance in the proposed criminal code of a strict liability crime. He did not, however, oppose inclusion of section 5 because the Commission might later come upon an area where the section would be needed.

Chairman Burns asked how section 5 would fit into a situation where a city had enacted a state statute in its entirely and what would happen if that statute were repealed or amended when the new criminal code was enacted. Since no one was able to answer his inquiry, the Chairman suggested that Miss Lavorato research the question and present a brief on the subject at the next meeting of the subcommittee.

Alternate Section 2, subsection (3). (Page 6 of draft). Mr. Chandler expressed approval of alternate subsection (3) because it took an affirmative stand on the question of recklessness caused by intoxication. Mr. Paillette indicated that the subsection would not change existing Oregon law with respect to intoxication because voluntary intoxication was not presently a defense except as it went toward the ability to form a specific intent and Professor Arthur added that the proposed subsection would not be inconsistent with ORS 136.400.

Chairman Burns was of the opinion that it would be preferable to reject alternate subsection (3) and adopt section 1 (3) as it appeared on page 1 of the draft. The Commission could then insert at another place in the code a general intoxication section to be applied to the entire criminal code. Mr. Paillette apprised the committee that Subcommittee No. 3 had decided not to include an intoxication section in the Responsibility draft on the assumption that the subject would be dealt with in the general provisions but they were of the opinion that a section on intoxication should be included in the code. He called attention to Model Penal Code section 2.08 which stated:

"(1) Except as provided in Subsection (4) of this Section, intoxication of the actor is not a defense unless it negatives an element of the offense.

"(2) When recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial.

"(3) Intoxication does not, in itself, constitute mental disease within the meaning of Section 4.01.

"(4) Intoxication which (a) is not self-induced or (b) is pathological is an affirmative defense if by reason of such intoxication the actor at the time of his conduct lacks substantial capacity either to appreciate its criminality (wrongfulness) or to conform his conduct to the requirements of law.

"(5) Definitions. In this Section unless a different meaning plainly is required:

(a) "intoxication" means a disturbance of mental or physical capacities resulting from the introduction of substances into the body;

(b) "self-induced intoxication" means intoxication caused by substances which the actor knowingly introduces into his body, the tendency of which to cause intoxication he knows or ought to know, unless he introduces them pursuant to medical advice or under such circumstances as would afford a defense to a charge of crime;

(c) "pathological intoxication" means intoxication grossly excessive in degree, given the amount of the intoxicant, to which the actor does not know he is susceptible."

The committee was in agreement that Professor Arthur should draft a separate intoxication section to be included with the general provisions.

Section 1. Culpability. Professor Arthur explained that the material elements of conduct, the result thereof and the attendant circumstances would be more specifically defined in a subsequent section.

Chairman Burns inquired as to the derivation of the term "attendant circumstances" and was told that the phrase was used in Model Penal Code section 1.13 (9). The committee discussed the meaning of the phrase and Professor Arthur explained that although it was a new term to Oregon law, it was in use in New York, Michigan and Illinois and for that reason would have a uniform construction.

Chairman Burns suggested that section 1 be amended to read: "Except as provided in section 5, a person is not guilty of a crime unless in the course of commission of the crime he acted intentionally, knowingly, recklessly or with criminal negligence." Professor Arthur was opposed to Senator Burns' proposal because the section as drafted would require the courts to look at all the elements of the crime. The problems connected with the crime of statutory rape, he said, made adoption of section 1 highly desirable inasmuch as the attendant circumstances became very important in that crime. He noted that in Oregon a person could be guilty of statutory rape even though culpability did not exist with respect to the girl's age and he contended that should be spelled out in the statute.

Mr. Spaulding inquired if venue was a material element of a crime and was told by Professor Arthur that venue was not a material element for purposes of culpability and this would be set forth in a subsequent draft which would specifically say that matters of venue and jurisdiction were not material elements.

Chairman Burns contended that the distinction between conduct and attendant circumstances was not sufficiently clear.

Mr. Spaulding said he too was having difficulty in determining how "attendant circumstances" improved the draft when it had to be shown that the act was done intentionally, knowingly or recklessly with respect to the conduct itself. He contended that section 1 was placing a significant burden on the prosecution. Professor Arthur agreed this was true and added that he thought it was a burden the prosecution should have and one they had at the present time even though it was not spelled out in existing law. The draft would delineate that burden in the statute.

In reply to a question by Mr. Paillette, Professor Arthur said he intended to define both "element" and "material element" in a subsequent draft but did not intend to define "attendant circumstances."

There followed a lengthy discussion concerning the meaning of the term "attendant circumstance." Attendant circumstance was applied to hypothetical situations involving statutory rape, burglary and robbery but members were unable to agree precisely on what the term was intended to cover or to articulate a clear-cut distinction between attendant circumstance and conduct.

Mr. Paillette then indicated that if the state were required to prove beyond a reasonable doubt that the requisite culpability was present with respect to each material element, that was a heavy burden without getting into "attendant circumstances." If that requirement were the committee's objective, it could be accomplished by eliminating the concluding clause in section 1 and amending section 1 to read:

> ". . . or with criminal negligence, as the law may require, with respect to each material element of the crime."

Mr. Paillette indicated that the statute could then be read in connection with the definition of "material element" and would then accomplish its purpose and at the same time circumvent the necessity of deciding what was or was not an attendant circumstance.

Mr. Chandler moved the adoption of the amendment suggested by Mr. Paillette and

Representative Elder seconded the motion which carried unanimously.

Section 2. Culpable mental states: definitions.

Subsection (1). Senator Burns noted that "intentionally" was not presently defined in the Oregon statute but was defined in case law. He asked if it would be advisable to insert "specific" before "intent" in subsection (1) in view of Professor Arthur's earlier comment that subsection (1) dealt with specific intent whereas subsection (2) referred to general intent. Professor Arthur replied that "specific intent" carried connotations which it would be wise to avoid and he would much prefer to say either "intentionally" or "with intent." Mr. Chandler remarked that subsection (1) was clear as drafted and he would oppose inserting "specific intent" or "general intent" in section 2.

Representative Elder moved, seconded by Mr. Chandler, that subsection (1) be approved as drafted and the motion carried.

Subsection (2). Mr. Paillette asked if the amendment to subsection (1) which the committee had just approved made that subsection incompatible with subsection (2). Professor Arthur expressed the view that the two provisions were compatible without further revision and both Mr. Chandler and Mr. Spaulding agreed.

Mr. Chandler moved, seconded by Representative Elder, that subsection (2) of section 2 be approved and the motion carried.

Subsection (3). Chairman Burns noted that "gross deviation" was employed in subsection (3) and had also been used in the draft on Unauthorized Use of a Motor Vehicle. He asked if it was anticipated that the term would be defined and was told by Mr. Paillette that a definition was not contemplated in the general provisions.

Draft format. Chairman Burns then expressed the view that the format used by the Model Penal Code with respect to definitions was preferable to that used in the draft, and asked the committee if they would agree that the material should be redrafted along the lines of section 2.02 of the Model Penal Code by saying, "As used in this criminal code, the following definitions apply: (1), (2), (3), etc." Mr. Paillette suggested that some reference to material element should be contained in subsections (1), (2), (3) and (4) of section 2. Chairman Burns then proposed that Mr. Paillette's objective be put into effect by amending section 2 to read:

> "(1) A person acts intentionally with respect to a material element of the offense when it is his conscious purpose to engage in the conduct or cause the result.
>
> "(2) A person acts knowingly with respect to a material element of the offense when he is aware of the nature of his conduct and the existence of the attendant circumstances.
>
> "(3) A person acts recklessly with respect to a material element of the offense when he acts in awareness of a substantial risk . . ."

The Chairman explained that his proposal was an attempt to make the draft uniform between the subsections and to clarify the fact that the section was intended to

refer explicitly to the material elements of the crime.

Mr. Spaulding explained that what the law had traditionally referred to as a material element of a crime, or the elements of a crime, were those things that the state had to prove with respect to each charge that was made. He thought it was not improper to use material element in a sense different from that historical concept, and the meaning of the term as employed in this draft was entirely different; it referred to criminal conduct in general, the result of that conduct and the attendant circumstances.

Mr. Paillette indicated that he was bothered by the fact that the draft required the state to prove the conduct, the result thereof, and the attendant circumstances of the crime beyond a reasonable doubt. Professor Arthur did not agree that the draft accomplished this result, and Chairman Burns commented that if there were doubt as to the meaning of the draft within the committee, it should be revised because it was virtually certain that the statute would later meet with diversity of opinion among judges and district attorneys.

Mr. Paillette said that the Model Penal Code and the Illinois code were talking about material elements that involved certain things, such as the nature of the conduct and attendant circumstances, whereas the draft, derived from the California code, seemed to say in effect that these were the material elements. It seemed to him, he said, that it was far different to say, as the Model Penal Code did, that a person acted purposely with respect to a material element if that element involves the nature of his conduct than to say that his conduct was a material element. Professor Arthur commented that his only reason for using the California verbiage was for the sake of uniformity; he had no quarrel with the Model Penal Code language and would be perfectly willing to go along with that approach.

Chairman Burns indicated that it was apparent, because of the apprehension of the committee members, that more work of a drafting nature would be necessary before the members could reach unanimity. If the draft were to be redrawn to conform more closely to the Model Penal Code format, each section would have to be rewritten and he suggested the committee make a policy decision regarding a format which would be most likely to escape the conflicts discussed at today's meeting. The Chairman then asked each member of the committee to express his opinion.

Mr. Chandler indicated that if the choice was between the Model Penal Code or the draft, the Model Penal Code approach appeared to be the safer of the two.

Mr. Spaulding said he would have to give the subject further study in order to make a recommendation but expressed agreement with the objective of the draft.

Representative Elder commented that the trial process was sufficiently complicated for the district attorney at the present time and he would be opposed to inserting provisions which would impose additional burdens of proof unless there was an important reason for doing so. He said before making a final judgment he would like to know what the experience had been in states which had adopted a code similar to New York's and whether the code had proved to be an aid to the people administering justice and provided a basis for them to proceed on a reasonable and logical basis.

Chairman Burns said he would personally prefer to see each crime carry within its own definition in the statute the culpability element, whether intentional,

reckless or knowing. In the general definition section he would then propose to set forth as simply and concisely as possible, somewhat on the order of the present Oregon code, a definition section which would say:

"As used in this code, the following definitions apply:
"(1) 'Intentionally' means . . .
"(2) 'Knowingly' means . . .
Etc."

He suggested that Professor Arthur and Mr. Paillette work together in redrafting the material discussed at today's meeting.

Mr. Spaulding noted that section 2 (3) referred to recklessness with respect to the actor's conduct, and conduct was usually considered to be affirmative action. He asked if this definition would cover crimes that were committed by a failure to act. Professor Arthur replied that an omission could undoubtedly be reckless and, while this proviso should not necessarily be included in the definition of "recklessly," the subject would be dealt with in a subsequent draft.

Arson; Preliminary Draft No. 4. Section 2. Unlawful use of fire. Mr. Paillette explained that the Commission had approved the arson draft with the exception of section 2 which had been rereferred to the subcommittee. The early arson drafts considered by the committee, he said, had not included this section but the committee later decided that because it was tied into the forestry code and the civil actions brought under that code and because the case law which construed the statutes had looked to this criminal section to define and establish the standard of care that should be imposed in containing fires, the section should be incorporated in the arson draft. There was considerable dissatisfaction expressed at the Commission meeting with retaining the section in the criminal code. One solution proposed at that meeting was to eliminate the section entirely, but the Commission opposed this course of action. Since the Commission obviously did not want to include the section in the arson draft, an alternative solution would be to do nothing with the section except to recommend as a part of the Commission's report to the legislature that this statute be transferred from the penal code to the forestry code. Mr. Paillette indicated that the statute was poorly drawn for a number of reasons, but this appeared to be the most satisfactory solution to the problem.

After further discussion, Mr. Spaulding moved to delete section 2 from the arson draft and to transfer ORS 164.070, without amendment, to ORS chapter 477. Implicit within the motion was renumbering of the sections in the arson draft necessitated by the deletion of section 2. The motion carried unanimously.

The meeting adjourned at 2:45 p.m.

Respectfully submitted,

Mildred E. Carpenter, Clerk
Criminal Law Revision Commission