

January 25, 2023

To: House Committee On Judiciary
From: Brian Decker, Transparency and Accountability Director

Re: **Testimony in Opposition to HB 2323**

Chair Kropf, Vice-Chairs Andersen and Wallan, and Members of the Committee,

My name is Brian Decker, and I am the Transparency and Accountability Director for the Oregon Justice Resource Center, here in opposition to House Bill 2323. I am a former federal prosecutor and public defender, having spent most of my 16-year attorney career practicing criminal law in Oregon and other jurisdictions, at both the trial level and appellate level. OJRC urges the committee to reject HB2323 because it will risk unjust outcomes in thousands of criminal cases.

The Oregon Justice Resource Center promotes civil rights and improves legal representation for communities that have often been underserved in the past, including people living in poverty and people of color. We serve underrepresented populations, train future public interest lawyers, and educate our community on issues related to civil rights and civil liberties.

OJRC opposes HB2323 because it violates a simple precept of justice: the punishment should fit the crime. HB2323 would violate this, because it would lead to defendants whose crimes are serious by mere accident receiving the same harsh penalties as those who know exactly the serious circumstances of their offenses.

The current law in Oregon recognizes that proof of some criminal mental state must attach to all material elements of a crime. This is neither novel nor unworkable—it is a fifty-year-old principle in line with the Model Penal Code, which Oregon has adopted nearly in its entirety. HB2323 proposes to change that—to make mental-state proof only necessary for *some* material elements of a crime.

Take the example of a thief who steals a comic book. Say the comic book is a rare collector's item worth \$1500. How blameworthy is that thief?

Well, *it depends*. Theft is always a crime, but currently the law recognizes that each case is different, and each might produce a different conviction and a different sentence. Consider on the one hand the mastermind who perfectly executed a purposeful theft to sell the valuable. And on the other hand the person with a developmental disability who impulsively grabbed a comic book that looked interesting and tossed it in the trash an hour later, only later learning that the book was so expensive. The planner might have a greater degree of culpability than the impulsive person. Make no mistake: both are guilty of a crime. Both are equally accountable in a civil suit, and both would pay the same \$1500 restitution to a victim no matter their

conviction. But currently the law empowers judges and juries to determine that they are guilty of different degrees of theft, because of their different mental states. In short, the law lets the punishment fit the crime.

HB2323 would instead answer: such circumstances never matter. We'll treat both thieves the same. Under the proposed radical change, only the fact that the theft was intentional matters. Because the value of the stolen property is a material element of the crime but not a *conduct* element, no mental state would factor into it. Any such thief would be convicted of first-degree theft, no matter what they knew of the circumstances. This would result in less discretion for judges, less power for juries, and more people with felony convictions, the merely unfortunate alongside those who knew what they were doing.

Mass Incarceration

Because it removes the requirement that a mental state attaches to many material elements of crimes, HB2323, if enacted, would result in more people going to prison in Oregon for more years. This is so because defendants who are currently culpable only for lesser offenses—those who didn't or couldn't see an unexpected circumstance when they undertook a criminal act—will, under the proposed law, be held to the same standard as those who knew exactly the harm they would cause. And so the less culpable person will be convicted and sentenced just as harshly as the more culpable person.

Which illustrates the point: this is a reform that is going to impact the less culpable defendants, not the more culpable ones. The people who would otherwise receive misdemeanors will instead be convicted of higher crimes. And the people who would otherwise be eligible for probation or a short jail or prison sentence will instead receive Measure 11, mandatory-minimum sentences of five years or more.

The people who committed the most heinous crime with the guiltiest mind are already going to prison under the law as it stands. This proposal collapses the less culpable defendants into a broadened, more culpable category. It's not the most blameworthy who are going to be affected by this, but the less blameworthy.

Youth

HB2323 is also going to sweep youths charged in juvenile court into its harsher penalties. Teenagers are charged in juvenile court using the same criminal statutes as adults, and by eliminating elements of crimes for adults, the bill would do the same for youth. More kids who would otherwise be held responsible for lower offenses will instead receive serious felonies or even Measure 11 –level convictions.

There is a cruel irony here. The juvenile courts are themselves a gradation of our justice system, an attempt to separate the less culpable from the more culpable. We owe the very existence of a juvenile justice system to our societal acknowledgement that there are those who, while responsible for their actions, have less of an appreciation for the foreseen or unforeseen

circumstances and results of their conduct. And yet HB2323 contemplates streamlining justice by eliminating those degrees of mental culpability.

Conclusion

Here's a key point: these mental states do not make the difference between criminal culpability and none. In all of the examples you've heard, hypothetical and from real cases, the question is which degree of a crime applies. In all of these cases there are lesser offenses that are designed to fit the offenders with a less culpable mental state because their mental state attached to a lower degree of harm. We are not talking about assaulters going free, but about intentional bone-breakers and negligent injurers receiving more serious convictions than misdemeanor-level assaulters who cause serious harm by total fluke.

Fifty years ago, the Oregon legislature, and a criminal commission it formed, deliberated on this issue. It spent three years and many hearings with multiple experts, finally adopting the Model Penal Code approach and drafting the language we're discussing: every material element of a crime has a culpable mental state attached.

In the past seven years, Oregon courts have developed detailed case law how this principle applies to jury instructions. The consistent rule is this: the mental state that attaches to each material element is at least criminal negligence. They'll leave for others to argue if some more stringent mental state applies to particular crimes. These rulings have provided more clarity than we had in the past, and the remaining project of ascertaining the particular wording that will attach to each crime is *less* complicated than it would be to upend the statutory scheme and have courts start their interpretation from scratch.

The proposal would dramatically alter nearly every crime in the Oregon code and produce countless injustices. Respectfully, we urge the committee to decline that invitation.

Thank you.