

HOUSE JUDICIARY
SUBCOMMITTEE ON CIVIL LAW AND JUDICIAL ADMINISTRATION

February 23, 1995 Hearing Room 357
8:30 am Tapes 28 - 29

MEMBERS PRESENT:

Rep. Del Parks, Chair
Rep. Bryan Johnston, Vice-Chair
Rep. Kate Brown
Rep. Chuck Carpenter
Rep. Lisa Naito
Rep. Eileen Qutub
Rep. Bob Tiernan

STAFF PRESENT:

Milt Jones, Committee Counsel
Sarah May, Committee Assistant

MEASURES HEARD:

HB 2692 - Public Hearing and Possible Work Session

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These minutes contain materials which paraphrase and/or summarize statements made during this session. Only text enclosed in quotation marks report a speaker's exact words. For complete contents of the proceedings, please refer to the tapes.

TAPE 28, SIDE A

002 CHAIR PARKS: Calls the meeting to order at 8:42 am

PUBLIC HEARING ON HB 2692

004 MILT JONES, COMMITTEE COUNSEL: HB 2692 creates crime of encouraging child sexual abuse in first degree.

Witnesses: Virginia Vanderbilt, Legislative Counsel
 Keith Meisenheimer, Multnomah County District Attorney
 David Fidanque, American Civil Liberties Union of

Oregon

 Jim Arneson, Oregon Criminal Defense Lawyers Association
 Mark Ramsberry, Oregon State Police

013 VIRGINIA VANDERBILT, LEGISLATIVE COUNSEL: Testifies in support of HB 2692.

 Drafter of bill. .

043 CHAIR PARKS: I don't remember a case of people going on and on about justifying what they did. Is that a common thing?

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049 VANDERBILT: Yes that is one of the things they look at, explains.

054 CHAIR PARKS: I thought that was done in the context of the bill.

057 VANDERBILT: As a drafter of legislation, I am always concerned when I hear that you want to make "good legislative history". That will not, in all cases, guide the decisions of the courts. The courts look first to the language of the statutes, not the intentions and discussions of the committee. The concern in this case was that the statute itself did not express and unwilling to infer the harm that this prohibition and is designed to eliminate.

076 CHAIR PARKS: The way you have drawn this bill, does put our words on the page.

077 VANDERBILT: That is what I tried to do. I didn't want to use "aiding" and "embedding" because they have long standing meanings in the law. Discusses why wording of the bill was used.

096 REP. BROWN: Does the same sort of argument, in terms of the content vs. harmful effect,

 apply to the stalking legislation we are working on?

101 VANDERBILT: There are some of those issues in the stalking legislation. We have tried to

 avoid that by talking about the harm, alarm, and fears that the victims of stalkers suffers.

106 CHAIR PARKS: Did you write the stalking bill also?

108 VANDERBILT: Yes.

109 CHAIR PARKS: Where are we at on that?

110 VANDERBILT: I don't know. There are some amendments that need to be made.

120 REP. JOHNSTON: Could you explain what your reasoning is that we've adequately dealt with "harmful effects", in that content?

124 VANDERBILT: I'm not going to say that this language is what will help. There is a list of crimes which are included in this bill. There is added to that, in Section 2, Subsection 1, paragraph B, if you do these things, you know or should have known, that this creation of visual recording involved child abuse. The crime isn't just possession of pornographic material, which in some cases might be hard for the prosecution to prove. Discusses definition of "child abuse".

147 REP. JOHNSTON: Discusses language on child abuse as "knows or should have known".

152 VANDERBILT: That is the definition of child abuse.

160 KEITH MEISENHEIMER, MULTNOMAH COUNTY DISTRICT ATTORNEY: Testifies in support of HB 2692. Discusses certain areas of bill that he is concerned with. You can't guarantee that this bill will completely help the "harmful effects" that it is intended to.

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199 CHAIR PARKS: Is privileged communication something that is protected by the constitution in this context?

202 MEISENHEIMER: Yes. In this context, they are referring to statutes that effect and reach communication that it wasn't intended to prohibit. We have been struggling on finding a formula that will pass constitutional review. Our recommendation would be that this be addressed by three areas, discusses. We need to write legislation that will have state wide effect with no variance from one county to the next. We know that when you find people that possess child pornography, there is a high likelihood that it is someone who is currently abusing a child or has in the past.

272 CHAIR PARKS: I am reluctant to send this same issue back to the people, when it was defeated the first time. If we limit it to child pornography, it is almost indefensible and would have passed the last time. We need to try to address this as a constitutional amendment. What would it hurt to pass this and try to do other things at the same time?

292 MEISENHEIMER: That is fine, that language could be used. This may be the vehicle to use for the corresponding enabling statute. I would be willing to work with counsel on the constitutional amendment. The other issue is an appropriate ballot title.

307 REP. BROWN: Is the bill, in it's current structure, as well written as it could be?

312 MEISENHEIMER: It appears to me, well written. I don't have any criticisms. It seems in my first reviews to be well written.

323 REP. NAITO: In section 2, what does the language "knowingly reproduces" mean? Gives
example of someone developing film but not knowing the content of the film.
How would that
be

handled?

331 MEISENHEIMER: That would require the state to establish that the "knowingly" mental element

went to the essence of the crime. That would include that there was a child involved in sexual explicit conduct in the photograph. We would have to show that the person knew what was depicted was a child.

351 DAVID FIDANQUE, AMERICAN CIVIL LIBERTIES UNION OF OREGON: Testifies in opposition to HB 2692. Discusses ACLU policy beliefs. Discusses adding of language to bill.

433 CHAIR PARKS: Where would that language be placed?

TAPE 29, SIDE A

006 FIDANQUE: Explains where language would go. Discusses Stoneman case decision. There is no need for a constitutional amendment and we would strongly oppose that.

030 REP. JOHNSTON: Are we opening the door for the creation of similar legislation aimed at the restrictions on other forms of expression by virtue of the activity contained? Gives statutory rape example. Could we see HB 2692 encouraging that kind of behavior?

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042 FIDANQUE: Where this whole area of potential regulation would get the most problematic is the issue of violence in mass media, explains. Any attempt to regulate that kind of material would violate the federal constitution. The statute, as it is written with the amendments, would change it, could be interpreted to cover films. If they tried to proceed with that type of prosecution, they would be violating the first amendment. We believe it is permissible to criminalize conduct involving those who finance the sexually explicit films and videos or those who get the children to make those films.

083 CHAIR PARKS: Do you want to comment on the amount of penalties?

084 FIDANQUE: We don't have any comment on those. To the extent that you make the possession of the material a felony, it may have some effect on what kind of scrutiny the courts give this. Pornography, under the first amendment, is protected within someone's home.

103 CHAIR PARKS: It is my intention that without the customer, (inaudible) is a vital link in this industry (inaudible). One way of protecting children is to (inaudible) who is monetarily fueling the citizen that makes this whole industry possible. I don't have any problem with passing the bill to make sure that we make this conduct criminal.

111 FIDANQUE: I understand your feelings. I have heard on many occasions the statement that the possession of having this type of material is the key element of the continuing market. The other issue the courts will look at is the fact that this conduct involves children, which is a very critical issue.

143 JIM ARNESON, OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION: Testifies with no position on HB 2692. There are some language changes that could be made that would make sure that this will pass constitutional requirements, explains those changes.

207 REP. BROWN: "Should have known" isn't typically used in the criminal statutes?

209 ARNESON: It is not typically used as elements in a criminal prosecution. It is used in civil cases and sometimes in criminal settings, explains.

223 REP. BROWN: We discussed the phrase "should have known" when dealing

with the stalking bill. Those words were rejected for that very reason.

227 CHAIR PARKS: Discusses counseling cases. In the circumstances that they purchased the product, that would indicate the possession of material.

240 ARNESON: I'm not familiar with the language you are talking about. Like any other element of a case, a prosecutor can prove circumstantial evidence, and a jury can decide that someone knew something when faced with certain evidence.

251 REP. QUTUB: Are you saying that if we leave "should have known" in there, it would be a problem to prosecute them, or it just makes it tighter?

254 ARNESON: From a practical standpoint, it would make it easier to prosecute.

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258 MEISENHEIMER: If you add the word "reasonably" that would address your concern. Under ORS 163.325 there is precedent for the notion that ignorance or mistake, is not a defense in

certain instances which applies to statutory rape.

292 REP. JOHNSTON: If we pass this legislation, it shouldn't be as tight as these standards. We are

still talking about that this defendant "reasonably should have known".

299 MEISENHEIMER: Yes, under all the circumstances. That could include some mental

impairment on the defendants part. It might be better to go on that a reasonable person "in the circumstances of the defendant at the time".

313 REP. JOHNSTON: The defense offers that he can't read, that would be a defense under

"reasonably should have known". We have a reasonable standard, but we still

have to prove it against the specific defendant being prosecuted.

318 MEISENHEIMER: That is correct. We would have to show that the person had the reasonable

opportunity to be aware that the photo was of the prescribed nature.

326 MILT JONES, COMMITTEE COUNSEL: There is a reporting requirement on sex offenders

who are discharged, paroled, or released. Is that what you suggested?

331 MEISENHEIMER: The registration of sex offenders?

333 MILT JONES, COMMITTEE COUNSEL: Is there another registration provision that you would

like to see included?

335 MEISENHEIMER: I'll look into that.

341 REP. JOHNSTON: Looking at the penalties that are listed for this offense, are they in keeping

with other similar offenses?

347 MEISENHEIMER: Yes, gives examples.

358 REP. JOHNSTON: I'm looking at the class C felony, gives example. That person, under this

statute would be guilty of a class C felony?

374 MEISENHEIMER: I would have to review the whole statutory scheme to answer that. If the

state could show that the purpose of the retention was outside the scope of employment and had

to do with personal gratification, I would think that would be an appropriate application. I don't

know if that makes the statute clear.

391 REP. BROWN: Regarding the registration of sex offenders, doesn't it make sense to add those

who are convicted of sex abuse in the second degree within the registration

of sex offenders

provision?

399 MEISENHEIMER: I think so. My experience with people that possess child

pornography is that
they are generally people who are involved in sexually abusing children.

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408 REP. BROWN: They rejected the "should have known" language in the stalking bill because

they were concerned that it makes the distinction that it would go more towards "reckless" as

opposed to "knowingly". Can you respond to that?

418 MEISENHEIMER: It seems to me that in all the years of prosecuting crimes, the difficulty is

proving the mental element of a person. When you have a crime like "knowingly", defendants

will say they didn't focus on the child or the age of the person. It should be "reasonably should

have known" as opposed to an undefined standard.

TAPE 28, SIDE B

012 CHAIR PARKS: How do you prove the person in a picture is a child?

015 MEISENHEIMER: You don't have, in most capacities, the ability to tell who the child is. You

are going to get into a case area, where the persons that is supposedly a child is in that teen age

range, where it would be very difficult to tell their age. The state is going to have to prove

beyond a reasonable doubt to a jury that the person in the photo is a child, and that the

defendant "knew" or "should have reasonably known" that the person was a child.

024 CHAIR PARKS: Gives example of child definitely looking the age of a child. Is that enough to

be "beyond a reasonable doubt"?

030 MEISENHEIMER: Yes.

031 REP. NAITO: Would there be a way to allow a film maker to certify that there was no child

abuse involved even though some of the ideas conveyed may rise to some of these levels?

047 MEISENHEIMER: That is a valid point. There are a lot of scenes in movies that are inferred as

to what was going on. You don't have to simulate explicitly to infer to the audience what is

going on, to develop the theme of the movie. We are balancing competing constitutional

interests.

078 MARK RAMSBY, OREGON STATE POLICE: Testifies in support of HB 2692. Discusses

registered crime issues. Discusses case.

112 REP. JOHNSTON: Section 9 also adds this offense to one of those that cannot, after any period

of time, be expunged. Do you support that conclusion?

116 RAMSBY: Yes.

Takes recess at 9:48 am

Re-adjourns at 9:55 am

WORK SESSION ON HB 2692

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123 MOTION: REP. BROWN: Moves to add "SECTION 3 OFFENDERS" to the
"REGISTRATION OF SEX OFFENDERS LIST".
VOTE: Hearing no objection the amendment are ADOPTED. All members are
present.

129 MOTION: REP. BROWN: On pg. 2, line 20 F, change "LEWD EXHIBITION OF
GENITALS OR ANUS" TO "LEWD EXHIBITION OF SEXUALLY
INTIMATE PARTS", to make it consistent abuse and sex assaults statutes.

135 REP. TIERNAN: Does that mean that it would include those two words?
Would the new
definition include "genitals and anus"?
136 REP. BROWN: It is not necessary.
137 REP. TIERNAN: Would it mean the same thing?
137 REP. BROWN: It is more encompassing, yes.
139 VOTE: Hearing no objections that amendment is ADOPTED. All members
present.

140 MOTION: REP. BROWN: On page 1, line 31, add "AND B THE PERSON KNOWS
THAT THE CONDUCT INVOLVED CHILD SEXUAL ABUSE".
148 VOTE: Hearing no objection the amendments are ADOPTED. All members
present.

149 REP. BROWN: Gives suggestive language change options to "should have
known".

158 MOTION: REP. BROWN: Moves to delete "SHOULD HAVE KNOWN" and insert
"RECKLESSLY" .

160 REP. TIERNAN: Why?
161 REP. BROWN: My understanding of recklessly is that it is the language
used in the criminal
statutes. The language means someone acting with a conscious disregard and
that a reasonable
person in that circumstance "should have known".
171 REP. QUTUB: To delete the other, does that make it more encompassing or
does it just lower
the standard?
176 REP. BROWN: Discusses Mr. Meisenheimer's definition of "should have
known". Reads
statute. "Recklessly" is more encompassing.
186 CHAIR PARKS: The higher standard includes everything below it. What
we've done is made it
a lower burden of proof for the District Attorney that includes the higher
standards.

194 REP. QUTUB: If you prove the higher standard, then?
195 CHAIR PARKS: Then, it proves everything above below it.

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197 VOTE: Hearing no objection the amendment are ADOPTED. All members
present.

198 MILT JONES, COMMITTEE COUNSEL: Asks how the statute should now read.

200 REP. BROWN: Acting "knowingly or recklessly".

202 CHAIR PARKS: Do we need to add a definition?

206 REP. BROWN: My motion was to delete "should have known" and insert
"recklessly". Do we need a definition for that?

207 CHAIR PARKS: What we are relying on is the "recklessly" as already
defined by Oregon Revised Statute.

213 REP. JOHNSTON: We had a discussion about a movie with sexual relations
between a child and his mother. Under this bill, if we pass it, that movie
could not be shown or rented in Oregon. We need to attach this to Section
3-lea, explains. We would be the only state in the union that couldn't show
a movie like this, which isn't the position we as the legislature should be

taking.

243 REP. QUTUB: Are you sure that there isn't any other state that hasn't been allowed to show that movie?

245 REP. JOHNSTON: I am not positive, but am sure that we would have heard about it.

247 REP. TIERNAN: What did the movie show?

248 REP. NAITO: Discusses film and what controversial issues it included.

263 REP. JOHNSTON: If it exists, it isn't to gratify someone's sexual desire. That is a condition that we attached in subsection B. If we attached it in subsection A, the issue might be resolved.

267 REP. TIERNAN: Can we hear from Mr. Meisenheimer about this?

270 MEISENHEIMER: If there was such a scene imported into the United States, it would violate

Federal laws. Federal statutes prohibit transportation of child pornography. I will take a look at this proposal and see if it corresponds with federal law.

282 REP. JOHNSTON: Would the amendment I'm seeking impose a burden on any of the

prosecutions you currently have?

286 MEISENHEIMER: Can you repeat the proposed amendment?

288 REP. JOHNSTON: Discusses proposed amendment language.

290 MOTION: REP. JOHNSTON: Moves to add the language "FOR THE PURPOSE OF AROUSING OR GRATIFYING THE SEXUAL DESIRES OF THE PERSON OR OTHERS".

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298 MEISENHEIMER: I'm not sure. That language is consistent with the language in Chapter 163

- which defines sexual contact.

315 CHAIR PARKS: Let's take Rep. Johnston's language as an amendment. This bill will be in Full

committee on Monday.

330 MEISENHEIMER: Perhaps then I can provide some input on the consistency with the federal

law.

334 REP. QUTUB: Often we hear that rape is not a crime that has anything to do with sexual arousal

or for the purpose of sexual gratification. Would something like that be considered as a defense for someone? When people defend criminals, they bring up strange ideas as their defense.

Would this bill make a District Attorney less able to convict a person?

355 REP. JOHNSTON: This language would make them tell the jury that they didn't commit the

crime for the sexual content, but the violence. Therefore, the odds of their conviction would then increase.

372 REP. TIERNAN: I don't feel good about voting on an amendment that I am not certain is

necessary or understand the repercussions of .

390 VOTE: 5-2 MOTION PASSES

AYE: Brown, Carpenter, Johnston, Naito, Parks

NO: Qutub, Tiernan

400 CHAIR PARKS: We will take another look at the amendment when it comes back to the

committee.

412 REP. BROWN: The only other issue raised was the ballot title change. I can't support that

approach.

418 CHAIR PARKS: Mr. Meisenheimer will come up with something for the committee.

427 REP. TIERNAN: Would this cover the pornographic television show where there are small children running naked in the presence of and with adults?

435 MEISENHEIMER: If there were lewd exhibition of the genitals. We need to distinguish between taking a picture of child at home in the bath and the televising of this. What your describing is potentially within lewd exhibition of the sexual or intimate parts. Would have to see what is being portrayed before I can answer. Clarifies balancing the general legislative process and not suggesting that there is a balancing that needs to happen in the application of this statute.

TAPE 29, SIDE B

016 REP. NAITO: Suggest committee watch the movie of controversy. It was made in the sixties and is available on video.

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023 MOTION: REP. JOHNSTON: Moves HB 2692 AS AMENDED TO THE FULL COMMITTEE with a DO PASS RECOMMENDATION.

VOTE: 7-0 MOTION PASSES
AYE: Brown, Carpenter, Johnston, Naito, Qutub, Tiernan, Parks
NO: None

034 CHAIR PARKS: Adjourns the hearing at 10:17 am.
Submitted by, Reviewed by,

Sarah May
Committee Assistant

Debra Johnson~
Committee Coordinator

EXHIBIT SUMMARY:

- A. Testimony on HB 2692 - Staff - 43 pages
- B. Testimony on HB 2692 - Staff - 4 pages

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