Tape No. 86

Side 1 only

OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 3

Eleventh Meeting, October 24, 1969

Members Present: Mr. Donald E. Clark
Representative David G. Frost
Mr. Frank D. Knight

Delayed: Judge James M. Burns, Chairman

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

Agenda: RIOT, DISORDERLY CONDUCT AND RELATED OFFENSES
Preliminary Draft No. 1; August 1969
Sections 1 through 7 (Article 26)

The meeting convened at 1:30 p.m. in Room 315 of the Capitol Building, Salem, Oregon.

Riot, Disorderly Conduct and Related Offenses

Section 1. Riot, disorderly conduct and related offenses; definitions. Representative Frost asked why it was necessary to have the definitive phrase "outrage ordinary public sensibilities" in the definition of "abuse". Mr. Wallingford replied that it was because of the context in which it is used, i.e., including venerated objects and corpses.

After brief discussion on the definitions of "abuse" and "public place", Representative Frost suggested that the subcommittee move on to the rest of the draft before approving the definitions.

Section 2. Riot. Mr. Wallingford reported that this section was somewhat of a departure from present Oregon law. Representative Frost noted that this section differed from the text of the MPC in that it did not require specific types of conduct for a participant in a riot. Mr. Wallingford explained that the object of this draft was to eliminate such specifics because they ordinarily involve conduct which could be punished under another section.

Mr. Wallingford further explained that this section changes the number involved in a riot from three (under present Oregon law) to five. It was intended that the draft would shift the emphasis away from the commission of a crime to conduct which creates a risk of causing public alarm.

Representative Frost wondered if there should be some requirement that riot occur in a public place. Chairman Burns noted that present Oregon law does include this requirement.

Mr. Knight elaborated on the present law by stating that in its application, there is usually an unlawful assembly and upon orders to disperse, a refusal to do so. This then, constitutes the riot situation. The problem he saw with this section was that in many cases, it is extremely difficult for the peace officer to determine who is participating in the riot and who is not; whereas, under present law, anyone who stays after being ordered to disperse, whether he is a participant or an onlooker, is guilty of riot.

Representative Frost mentioned that section 3 covers unlawful assembly, which would probably take care of the situation of a refusal to disperse.

Mr. Clark called attention to the necessary presence of the press at a riot or unlawful assembly. He felt this area was a vital issue and he urged that exceptions for the press be spelled out to avoid further problems. He asserted his belief that the press, in pursuit of its legitimate goal, should be excluded and allowed to carry on with news coverage so long as they are identified. If police are misbehaving, he said, the press should be there to report it for the benefit of the public. Mr. Knight agreed, but stressed that a procedure must be folbwed to insure that police know who the reporters actually are.

Representative Frost compared this section with those of other states, noting that nearly all have taken this direction with the exception that two states have riot in the first and second degrees. Mr. Wallingford explained that the rationale for the two degrees was that if there was physical injury or damage to property, and since it was dif ficult to single out the person who actually committed the injury or damage, there could be joint charges filed under the aggravated level of riot.

In response to a question from Chairman Burns, Mr. Wallingford replied that his reason for not having first and second degrees of riot in this draft was that he did not think there was that much of a problem in Oregon. Actually, he said, riot legislation is not used a great deal. Even in the Watts riots, the result was that of the approximately 550 arrests made, only about 132 were made on any type of riot statute. In the majority of cases, a person was charged with another crime based on a specific act.

Chairman Burns questioned the reason for saying "tumultuous and violent conduct" rather than "tumultuous or violent conduct." Representative Frost asked if there was any judicial definition of "creates a grave risk of causing public alarm."

Chairman Burns said that language may have come from Perkins on Criminal Law where it is said, "in such a violent, turbulent and unauthorized manner as to create likelihood of public terror and alarm." His opinion was that a jury could handle cases under this

statute by stating that one of the elements is that the defendant must have intentionally or recklessly created a grave risk of causing public alarm.

Representative Frost moved to adopt section 2. The motion carried unanimously.

Section 3. Unlawful assembly. Mr. Knight maintained that the present law authorizing an order to disperse with provisions for a refusal to do so was much clearer than this section. Representative Frost called attention to subsection (6) of section 4 which restates present law on the order to disperse.

Chairman Burns asked what type of conduct would fall under section 3 rather than section 2. Mr. Paillette replied that under section 3, there has not actually been a riot, only an assembly that might develop into a riot. It also covers conduct designed to incite a riot even though riot has not yet occurred.

There followed discussion on present law defining unlawful assembly and the fact that there was no penalty assigned to this act. Mr. Knight clarified this point by stating that unlawful assembly is actually a status wherein persons who are in an unlawful assembly and who refuse to leave when ordered to do so are then considered to be in riot.

Representative Frost could see a valid reason for having section 3. Coupled with section 4, he felt this made a good tool for dealing with disorderly conduct. He then moved to adopt section 3 and the motion carried unanimously.

Section 4. Disorderly conduct. Mr. Clark challenged the language in subsection (3), "Uses abusive or obscene language, or makes an obscene gesture, in a public place." The subcommittee generally agreed that this section carried with it the difficulty of defining what is or is not obscene.

Mr. Knight wondered about the language "with intent to cause public inconvenience, annoyance or alarm." Mr. Wallingford replied that this part was actually the gist of the offense and he thought it was necessary.

Chairman Burns asked how one would define "public inconvenience." For example, he said, suppose he was walking in the park and made what he considered to be an obscene gesture at someone. Would that be a public inconvenience? Another example would be a man in a park making a speech. Because many people were walking in the park with the intent to enjoy the beauties of nature, could that not be considered an inconvenience to the public?

Mr. Paillette said that would not be unlawful unless with intent to cause such inconvenience, he then did something else outlined in one of the subsections.

Chairman Burns was also concerned with the possibility that the man making a speech in the park might be ranting against the war in Vietnam and using four letter words. He also reminded that "abusive language" was not defined. Further suppose, he said, that he made the statement in a public place that he thought the President's policy in Vietnam marked him as one of the greatest traitors of all time. Many people would consider that abusive comment, he said.

Mr. Paillette noted that there may have been no criminal intent and therefore no crime. Chairman Burns, however, theorized that if he were in a public park and if enough people would testify that they were inconvenienced, it might be a jury question on whether the intent element was there.

Mr. Knight's opinion was that regardless of what the Supreme Court has said about whether there is or is not any such thing as obscene language, there should be a statute prohibiting the use of such language in places where it would be offensive to the public.

Representative Frost agreed with that opinion. Although the definition of "obscene" may change occasionally, he felt it would always have some judicial meaning. He suggested that language requiring actual annoyance might be helpful in this section.

Mr. Wallingford noted that as presently stated, there would only need to be the intent to cause annoyance.

Mr. Paillette reported that under present law, it is not necessary to show actual annoyance; it is only necessary to show that other people were present. In the case of a disturbance, it is only necessary to show that the peace and quiet of a neighborhood may be disturbed, not that it actually was disturbed.

Mr. Clark moved to amend subsection (3) by changing it to read: "Uses abusive or threatening language in a public place." Representative Frost and Mr. Knight disagreed with the proposed change which would delete "obscene." Mr. Clark defended his motion on the ground that unless obscenity was threatening or abusive, it was not really a problem. In answer to his question on the definition of "obscene" language, the subcommittee felt it would be for the court to decide. Chairman Burns then asked Mr. Clark how he would define "abusive" language. Mr. Clark thought that to be abusive, it would have to be directed toward someone.

Mr. Paillette observed that in both cases, it would be necessary to use a community standard. He noted that what was obscene five years ago might not be considered obscene today. He emphasized that there was a legitimate public interest to be protected by prohibiting obscene language.

Chairman Burns observed that subsection (3) was not much different from present Oregon law in this area. He also noted that "threatening" which Mr. Clark suggested including in subsection (3) was really taken care of in subsection (1). Mr. Clark agreed. The rest of the subcommittee was opposed to deleting "obscene" from subsection (3).

Representative Frost asked what conduct subsection (7) was designed to cover. Mr. Wallingford answered that it covered a multitude of miscellaneous violations in the malicious mischief category.

Mr. Clark moved adoption of section 4.

Chairman Burns questioned the language in subsection (6), "and refuses to comply with a lawful order of the police to disperse." By what guide, he asked, does one question an order of the police to disperse? He cited the Michigan commentary which said: "A crowd about to interfere with a lawful arrest would violate this subsection if its members refused to move away at the order of police to disperse. An order by an officer that a peaceable assembly disperse would not be a lawful order." He anticipated problems with this language because, he said, in a confrontation of this kind, there will be a tendency on the part of the police to issue orders to disperse. Upon failure to disperse, the police will then charge disorderly conduct.

Mr. Clark thought there would still be a requirement to prove an intent to cause public inconvenience, annoyance or alarm. Chairman Burns contended that a jury question on "intent" was very easy to achieve. His point was that there might be public inconvenience caused by the refusal to disperse, lawful or not.

In response to a question by Mr. Clark, Mr. Paillette affirmed that there is a draft statute dealing with interference of an arrest. Mr. Clark's opinion was that there was no real need for subsection (7) if conduct of this kind would be covered under the "interference" draft.

Representative Frost thought that leaving this section out would cause difficulty with the dispersal order of the police at a riot because this section is really intended to help break up a riot.

Mr. Wallingford read an excerpt from an article in the Wayne Law Review, 14 WLR 991 (1968), to the effect that, "Such a provision is of vital importance in dealing with the situation where people assemble for lawful or unlawful purposes and the police fear an outbreak of violence or disorder." That would indicate, he said, that it was a judgment decision by the police on whether there was a clear and present danger.

Chairman Burns asked if there was presently any statute concerning dispersal other than in the riot section. He noted that the vagrancy section does not say anything about dispersal. He said there was no question but that it was a practical necessity in many cases. In most cases, he thought, no one's civil rights were violated by this action.

Mr. Knight felt that if anyone's civil rights were to be violated in this case, it would be as a result of the application, not the statute itself.

Chairman Burns complained that use of the word "lawful"invited a defendant to challenge the order given by the police as being "unlawful." The question then was how to determine whether it was a "lawful" order. He did not think this was clear in the language of subsection (6). He contended that if an officer tried to break up a lawful assembly, such as Easter morning services on Mount Tabor, most likely there would be refusal on the part of the persons at the assembly. On the other hand, under tense conditions on a hot summer night in the Albina neighborhood, there would not be much question that the police would have the right to order the assembly to disperse. However, he was convinced that some lawyers would argue the police had no lawful right in the latter case.

Mr. Knight assumed that right would be determined by the circumstances in each case.

Mr. Clark felt there should be some burden imposed on the officer to show reasonable cause for giving an order.

Mr. Wallingford asked if, for instance, subsection (6) were eliminated from section 4, the subcommittee could imagine any conduct which would not be covered by the remaining subsections. Representative Frost said the order to disperse would not be covered. Mr. Wallingford replied that the officer would be required to have some lawful reason to give the order and in all probability the reason would be covered by one of the other subsections covering specific conduct.

Mr. Paillette cited two recent New York cases construing their disorderly conduct statute. They have identical language as that in subsection (6). In People v. Crayton, 284 NYS 2d 672 (1967), they say: "Defendants who were among a group of protestors who sat down in

a corridor leading to the mayor's office in an area of a public building not generally open to the public and who refused to leave but stated that they wanted to see the mayor who was not there and who would not be there that day were guilty of disorderly conduct."

People v. Smith, 19 NY 2d 212 (1967), said: "Evidence showed that the crowd which had allegedly collected had in fact gathered to view arrest and apprehension of speeding motorists, while the people contended that such crowd had been dispersed and had regrouped after the defendant had words with the police officer. The transcript of testimony indicated that the crowd had started to leave in response to the order of the officer and then came back. There was nothing to indicate the extent to which the crowd had been dispersed or where they were in relation to the officer and the defendant. Evidence was insufficient to support conviction of disorderly conduct."

Chairman Burns asked if there would ever be anyone other than the police who would be giving an order to disperse, e.g., at a university convocation or a school board meeting. He wondered if that conduct would be covered under subsection (4).

Mr. Clark questioned the wisdom of giving such powers to persons other than the police.

Representative Frost considered leaving the word "lawful" in subsection (6) under the assumption that there would be certain orders that would be lawful.

Chairman Burns expressed the opinion that perhaps the best thing to do would be to say that if, in fact, people are congregating and there is a risk of impending public inconvenience and alarm, then perhaps the police officer would have the right to tell them to disperse to prevent the possibility of what is stated in the first part of section 4.

Mr. Clark mentioned rock festivals and political rallies and voiced the opinion that even though the public was inconvenienced by this type of action, good law enforcement officers would recognize that they should use great discretion in the application of these statutes.

Vote was then taken on Mr. Clark's motion to adopt section 4. The motion carried unanimously.

Section 5. Public Intoxication. Mr. Clark made a motion to delete section 5. Mr. Wallingford prefaced his explanation

of this section by reporting that the FBI Uniform Crime Report on Statistics for 1967 states that of approximately 5,500,000 arrests made in the U. S. that year, 1,517,000 were for drunkenness. Therefore the arrests for public intoxication make up about one-third of the arrests made in the U. S.

Mr. Clark announced that he thought it would be unfortunate if this subcommittee has an opportunity to take this situation out of the criminal code and give it to the Public Health Division and neglects to do it at this time. The evidence, he reported, is overwhelming that if there is no other crime committed except public intoxication, it should be handled under public health rather than criminal conduct.

Mr. Wallingford noted that there has been a move in that direction. The present statute makes it a crime to be intoxicated in a public place. This proposal varies from that by addition of the language that requires he be intoxicated to the degree that he may endanger himself or other persons or property, or annoy persons in his vicinity.

Mr. Clark maintained that if the police were given the tool to take a person to a public health agency under a civil commitment, there would be no need for that language or for section 5.

Mr. Wallingford referred to the text of the Proposed Connecticut Penal Code. They have a procedure which is directed mainly at the alcoholic, whereby they may take a person to the Department of Mental Health.

Mr. Knight doubted whether this Commission would have the authority to make the change suggested by Mr. Clark. The legislature would have that prerogative, he said.

Mr. Clark presumed the Commission had the power to recommend the deletion of this statute and at least recommend that it be included in the public health code.

Chairman Burns observed that the Commission had considered that they had the power to spell out a detailed code of what to do with persons who were acquitted by reason of lack of criminal responsibility.

Mr. Wallingford commented that nearly all authorities agree that the present method of handling the drunk person under criminal provisions is inadequate.

Mr. Paillette pointed to one distinction between recommendations the Commission could and should make in this area as opposed to the

insanity defense. In that case, the Commission was satisfied that adoption of the standards and the procedural changes that were being recommended with respect to insanity could be incorporated into the law without any substntial increase in the number or nature of facilities to handle these people. In this case, the subcommittee must take into consideration that if alcoholics are taken out of the criminal court system, there must be some other provision made for dealing with them. He thought any discussion of a change of this type would not be practical without defining the facilities needed to accomodate the change.

Mr. Clark reiterated his view that now is the time to take this problem of intoxication out of the criminal code. He further stated that if this subcommittee felt it had a responsibility to map out every point of a program, he thought that could be done also.

Mr. Wallingford expressed the view that it would be a very expensive program.

Mr. Clark disagreed with that view stating that it would actually be less expensive. He pointed to the fact that it now took expensive time of the policeman, the court and the corrections division. In spite of this, he said, the fact was that the present method did not work at all.

Mr. Wallingford agreed that the present approach was very costly also.

Mr. Paillette remarked that taking this statute out of the criminal code was not going to prevent cities from handling their problem on a municipal ordinance basis.

Mr. Clark reported that the City-County Health Committee in Portland is presently studying what is necessary to establish this type of health model. He would hope that by the time this revision is submitted, the model would be operable in Multnomah County.

Mr. Frost was not in disagreement with the idea expressed by Mr. Clark, he said, and could see where this approach would be adopted in the future. However, at this point, he said, we are dealing with anti-social behavior and public intoxication is generally considered anti-social behavior.

Mr. Clark's feeling was that this was a crime without a victim except for the possibility of self-victimization. Representative Frost said the prostitute could very well come within that definition, as well as the person who was intoxicated, because she

might also be mentally sick. But, he said, the fact remains that if someone is drunk in a public place and annoys someone, it is a form of disorderly conduct. There may be other and better ways to handle this problem, but at this point they are not available, he added.

Mr. Clark contended that the present system fouls up the criminal justice system and no just cause is served by continuing this process. He saw nothing wrong with having a drunk driving statute which makes that action criminal but he objected to handling any other intoxicated person under the criminal code.

Chairman Burns questioned Mr. Knight on his view since there was a definite difference of opinion between Mr. Clark and Representative Frost. Mr. Knight replied that he did not think the Commission had authority to propose institutions for treatment and care of intoxicated persons and until such time as these facilities were available and legislation enacted, there was a need for a criminal statute.

Mr. Clark indicated that he would like to discuss this question further when it comes up in the full Commission and would also request permission to have witnesses at that meeting. Chairman Burns said the consensus was that Mr. Clark's motion had failed for lack of support.

Representative Frost moved to adopt section 5. The motion passed with Representative Frost, Mr. Knight and Chairman Burns voting "aye" and Mr. Clark voting "no".

Section 6. Loitering. Representative Frost thought probably the first thing to determine was what requirement was necessary for the public safety of a person who is not about the school building for legitimate or justifiable reasons.

Mr. Wallingford explained that subsection (1) should present no problem because it restates present Oregon law. An identical New York statute was attacked on constitutional grounds this year and was found to be constitutional.

Mr. Paillette added that there were two main reasons for keeping people off the school grounds unless they had legitimate reasons for being there. The first was because of the disturbance they are likely to create and the second was the danger to the children themselves, e.g., molesters, cases of indecent exposure, pushers of narcotics.

In response to a question from Mr. Clark, the subcommittee agreed that "school building or grounds" referred to all schools from kindergarten through college, including private schools.

Mr. Clark said he assumed there would be less of a requirement for a specific or legitimate reason to be on a college campus than the grounds of a primary school. However, Mr. Knight pointed out that not having a specific reason for being in or about a school building or grounds was the issue.

Mr. Paillette noted that in view of the recent disturbances on school and college grounds, there was a great need for a provision such as this so school officials could deal effectively with this problem.

Mr. Clark questioned the need for the language, "unusual or unnatural attire" in subsection (2). Mr. Knight wondered if there was really any difference in subsections (2) and (3) because it seemed to him that subsection (3) actually covered the problem. Mr. Frost said he could see no reason for subsection (2). Mr. Wallingford explained that the historical reason for this section was the problem of secret societies such as the Ku Klux Klan. The only other rationale he could think of would be conduct preparatory to another criminal act.

Mr. Clark asked if the term "justifiable alarm" in subsection (3) was intended to mean what would alarm a reasonably prudent person. Mr. Paillette answered that was not necessarily the intent. He said that while drafting this statute, it was necessary to find some standard in this particularly difficult area and that was the reason for use of that test which is Model Penal Code language (§250.6). Similar statutes have in the past been notably deficient on constitutional grounds because of vagueness and because of interference with the freedom of the individual, he explained. He mentioned a recent Oregon case, City of Portland v. James, in which Portland's vagrancy ordinance was found unconstitutional. This subsection, he added, was drafted on what seemed to be reasonably safe constitutional ground because the Court, although not approving the MPC loitering section, did call attention to it in the James opinion.

Mr. Clark wanted to know what "justifiable alarm" actually meant. Representative Frost replied that it would probably be whatever the police officer thought it was, depending on circumstances at the time.

Representative Frost moved to delete subsection (2) of section 6. The motion passed unanimously.

Representative Frost felt subsection (1) was all right because he could see an overwhelming reason for it.

Chairman Judge Burns arrived at this point in the meeting.

Mr. Knight asked if the language, "in or about a school building or grounds" would include "near". He wondered if a person parked in a car either along the school grounds, or across the street, would be included. An interpretation of "about the school grounds", he thought, would probably mean "on the school grounds".

Mr. Wallingford pointed out that ORS 166.060 uses the language, "wilfully loiters about any public or private school building or the public premises adjacent thereto." It was agreed that this would include parks, streets and sidewalks close by a school. He noted that the New York language, "loiters or remains in or about a school without written permission" was upheld in a recent New York case.

Mr. Paillette said that in any given case, a person would have to be near the school grounds before a complaint would be made. Mr. Knight said he was still concerned about whether the language would include on a sidewalk by the school, in the parking lot, or in a car parked alongside the school grounds.

Mr. Frost stated that he could see no need for changing the wording in subsection (1). It seemed to clearly indicate the premises lying adjacent to or nearby the school, he said.

Mr. Knight wondered how a judge would interpret this section in a case where a person was parked in his car on the public street near the school. Could he not argue that he was not in or about the school building; he was only near the school building. Judge Burns replied that in this case, there would be a problem of whether that would be a question of law or a question for the jury and he could not supply the answer at the moment.

Mr. Knight took this to mean that there might be some judges who would rule that that situation did not fall within the statute.

Chairman Burns observed that in a statute of this type, it is obvious that you cannot include geographical descriptions or distances.

Mr. Clark asked what the effect would be if "about" were changed to "near" in subsection (1). Judge Burns replied that he did not think it would make any difference. It would still be a question of the circumstances in the case. However, Mr. Knight felt that use of the word "near" would clearly be a question of fact. His concern was that "about" meant within the boundaries of the school grounds.

Representative Frost stated that there was as much social reason for controlling the area around the school as the school itself.

Chairman Burns wondered then if a person who was standing across the street from a school was brought to trial and the case subsequently went to the jury, how a judge would instruct the jury. Mr. Knight thought a judge would have to instruct that "about" means "nearby" and therefore, he said, it could be clarified at this point by using the word "near".

Representative Frost contended that "near" was no more specific than "about" or "in the vicinity of". However, Mr. Knight explained that use of the word "near" would require that the jury determine whether what a person was doing, was near enough to the school to fall within the prohibition of this statute. With the word "about" the judge must make the determination of just what is meant by this statute and whether "about" includes on a sidewalk, in the street, or across the street.

Representative Frost then moved to delete the word "about" in subsection (1) and insert "near". The motion carried unanimously.

Chairman Burns asked who determined what was a legitimate reason. Mr. Paillette replied that he thought the school administration should determine that. Chairman Burns then asked if anyone would devine that from the wording of the statute to which Mr. Paillette replied that he did not think anyone could.

Mr. Wallingford pointed out that the present Oregon statutes use the the language "without a lawful purpose". Mr. Clark suggested that perhaps a "lawful" reason would be easier for administrators to identify than a "legitimate" reason. Representative Frost was inclined to agree with Mr. Clark that "lawful" might be a better word to use.

Chairman Burns questioned whether a determination of "lawful" or "unlawful" purpose was any easier to make after 1 o'clock in the morning. He referred to the case of City of Portland v. James, in which the city ordinance was said to be too vague. It seemed to him that a person might defend himself on the grounds that as far as he was concerned, he had a legitimate reason to be where he was at that time. He wondered if it mattered whether "legal", "lawful" or "legitimate" were used.

Mr. Clark believed that a person would have to use his own discretion of what was "legitimate"; he would not with the word "lawful".

Chairman Burns noted that in the James case, the court said that with respect to a police officer having a suspicion that a suspect does not have a lawful purpose in being where he is, this criterion for arrest is too vague to provide a standard. He wondered if a person were arrested under subsection (1) of section 6, but contended he had a legitimate reason for being where he was, there would not be the same problem that brought the James case to the Supreme Court.

Mr. Knight wondered if this problem could be solved by including something similar to the present trespass statute where, after someone is asked to leave and refuses, he is then arrested. An example,he said,is the possible child molester who parks every day near the school ground, but uses the excuse that he works nights and just likes to sleep there during the day. Since there is nothing that says it is unlawful to sleep in a car in the daytime, how could this person be reached without a statute similar to subsection (1), he asked.

Chairman Burns noted that some of the statutes of other states were framed in terms of someone who does not have a "reason or relationship involving custody of or responsibility for a pupil." They also emphasize "or any other legitimate reason, he said. Mr. Paillette added that another important distinction is that they also require "and not having written permission from an administrator."

Chairman Burns approved of that policy because it meant that the ultimate decision was up to the school administration. He complained, however, that if this statute merely says "without a legitimate reason" without qualifying it with "reason or responsibility for custody or relationship to a pupil", he was afraid there would be a problem of its constitutionality.

Representative Frost explored the possibility of adopting subsection (3) and deleting subsections (1) and (2). Chairman Burns did not feel that this would solve the problem because, he said, this section was not generally concerned with safety of person or property but avoiding trouble in or around the schools. It seemed to him that subsection (3) alone would not cover this problem.

Mr. Wallingford reported that the New York statute says, "Loiters or remains in or about a school...without having any written permission...."

Chairman Burns noted that this section of the New York statute also emphasizes "not having any reason...or any other specific, legitimate reason...." He suspected a court would interpret that

language to mean a reason involving custody or relationship to a pupil. He anticipated another problem with this section in that enlarging the area to be considered by insertion of the word "near" in subsection (1), a defendant could argue that he certainly had no duty to get written permission from the school administration in order to drive by or park his car near a school.

Representative Frost asked if the problem posed by Chairman Burns was not covered in subsection (3) where it is non-specific as to a school, but specifies a public place, which would include a school.

Mr. Paillette agreed that in this case the person would probably be charged under subsection (3) which is broader than subsection (1).

Mr. Wallingford mentioned a recent New York case (upheld) which involved the handing out of pamphlets near a school An arrest in this situation invites the constitutional issue of freedom of assembly and freedom of speech. The defendant might argue that in order to exercise his right to freedom of speech, he would be required to get a permit from the school principal. Mr. Knight replied that he could see where the case would be upheld on the grounds that handing out leaflets or demonstrating could be quite distracting to the children studying in school. Therefore, there seemed to be a legitimate reason for controlling that kind of activity.

In reply to a question from Chairman Burns, Mr. Wallingford replied that he did not think it was necessary to use New York and Michigan language with respect to custody and relationship to pupils. Present Oregon law is more in line with that, he said, because it states, "Any person who is not enrolled as a student or who is not employed by the public or private school...",which exempts students and employees.

Chairman Burns observed that school administrators in Portland, who have had to cope with this type of problem might be of some help in determining the best course to take. Besides learning of their experience along these lines, he thought the subcommittee might find out what they now feel free to do and whether they feel a need for more or less authority. He suggested writing to some administrators to obtain their impression of the present law, i.e., whether it is effective, and get their suggestions on what they would like to have in a statute on this subject. Mr. Paillette commented that they could be sent copies of the present draft with a request for their opinion.

Mr. Knight asked if under the proposed draft the school principal would have authority to go out into the street and ask someone to move on. Chairman Burns did not think he would. Mr. Knight thought that since there appeared to be enough concern to allow the police to order a person to move on under this statute, there should also be authority on the part of the principal to make the same order for the protection of the students for whom he was responsible.

Mr. Wallingford asked what the subcommittee would think of redrafting subsection (1) to include just in a school building or on the school grounds and enforce the other cases of "near" the school grounds under subsection (3). In other words, he explained, if a person was off the school grounds, it would be necessary to show some justifiable alarm for the safety of persons or property in the vicinity. This would cover cases of potential child molesters and dope peddlers. In the latter case, the school authorities would not have the authority to make decisions but they could call the police, who would then make the inquiry.

The problem Chairman Burns saw with including the area beyond the boundary of the school grounds was that the person who is a nuisance and to whom the loitering statute is aimed, would not necessarily be there under circumstances which would warrant justifiable alarm for the safety of persons or property.

Mr. Paillette questioned the subcommittee on their reaction to incorporating New York and Michigan language in subsection (1) so that it would include "not having any reason or relationship involving custody of or responsibility for a student [and] not having written permission from anyone authorized to grant the same."

Mr. Clark so moved and the motion carried unanimously.

Mr. Wallingford gave some of the background on subsection (3). He started with the Portland city ordinance which the James case held to be unconstitutional. It read:

> "Between the hours of 1:00 and 5:00 o'clock A.M., Pacific Standard time, it shall be unlawful for any person to roam or be upon any street, alley or public place without having and disclosing a lawful purpose."

Mr. Wallingford next read from 12 ALR 3rd 1453, which stated, in discussing recent legislation:

> "The little authority found on the point indicates that legislation which makes it punishable as disorderly conduct simply to 'loiter' is impermissibly vague, but

'loitering' under described conditions may validly be included within the offense."

Subsection (3), he reported, was almost identical in substance to the New York provision. In addition, the MPC language, "which warrant justifiable alarm for the safety of persons or property in the vicinity", was used, The New York language was: "under circumstances which justify suspicion that he may be engaged or about to engage in a crime." Although it did not reach the constitutional issue, the court upheld the statute in a 1969 case, People v. Schanbarger. In that case, he reported, the defendant was walking along a public highway about 3 a.m., in an area where there had been a rash of burglaries. He was stopped by a state trooper but refused to answer questions about his identity and the reason for his presence on the highway. He was then arrested for loitering but the decision was reversed on the grounds that:

"It is unnecessary to deal with the constitutional argument. Clauses in subsection (6) are conjunctive, rather than disjunctive, and in order to sustain conviction, each of the conjunctive elements must be proved beyond a reasonable doubt. The information in this case nowhere states that the circumstances were such that the trooper was justified in suspecting that the defendant might be engaged or was about to engage in crime. The defendant was convicted for his failure to answer the trooper's questions. His failure to answer cannot constitute a criminal act under subsection (6) of section 240.35."

Mr. Wallingford concluded that applying that principle to subsection (3) would mean that the state would have to prove justifiable alarm for the safety of persons or property in the vicinity. The refusal of a person to answer questions would not be sufficient to charge him with loitering.

Mr. Paillette commented that the primary reason for the proposed section was crime prevention. There was a legitimate public interest in this type of legislation, assuming that it could be specific enough to provide adequate guidelines for the police. He referred to the commentary on the James case on page 41, in which the court made it very clear that valid legislation in the area was possible.

"It is not our intention to say that the police may not stop and question persons who arouse a reasonable suspicion that they are connected with criminal activity. Nor do we express any opinion as to the validity of an ordinance case in language similar to that used in the Model Penal Code

permitting, under proper safeguards, the arrest of persons who loiter or prowl under circumstances creating a justifiable alarm for the safety of persons or property."

Chairman Burns wondered why it was that Michigan had not used the language "justifiable alarm" while New York had apparently adopted the MPC approach on "warrant alarm". Mr. Wallingford noted that New York had changed that approach slightly by using, "under circumstances which justify suspicion that he may be engaged or about to engage in crime." He thought the reason for the variance from the MPC approach taken by Michigan was probably on advice of their counselors. He mentioned an article in which Professor Israel said that if there were to be loitering type laws, they ought to be specific and try to avoid the overly broad dragnet provisions.

The problem, Mr. Paillette suggested, was that a statute must not be so narrowly drawn that it is of little value to law enforcement in crime prevention. In agreeing with Mr. Paillette, Mr. Knight expressed disagreement with part of the James case opinion which said, "The principal evil of such vague legislation is that it invites arbitrary and discriminatory enforcement." He submitted that any law in existence invites arbitrary and discriminatory enforcement if that is the intent of the particular law enforcement agency.

Chairman Burns asked if a person were stopped and questioned by a peace officer early in the morning but refused to give any information other than his name could then be convicted under subsection (3). Mr. Wallingford thought it would be a jury question whether the facts warranted the justifiable alarm for the safety of persons or property in the vicinity. In his opinion, a defendant could always argue that his presence in that place at that time did not warrant justifiable alarm.

Chairman Burns understood this statute to mean that a person must not only identify himself but also give a reasonably credible account of his presence. To whom, then, would the account have to be credible, he wondered.

Representative Frost answered that it would have to be credible initially to the police officer and secondly, to the jury. Chairman Burns was of the opinion that even if the police officer reported that he did not believe the defendant, if the jury believed that the account was reasonably credible, the defendant would be acquitted as a question of fact.

Mr. Wallingford reported that the New Jersey Supreme Court just this year had held that: "Any person who is apprehended

and cannot give a good account of himself, and who is in this state for an unlawful purpose is a disorderly person. In any prosecution under this section the fact that the person apprehended cannot give a good account of himself is prima facie evidence that he is present in the state for an unlawful purpose." State v. Zito, 248 A2d 254 (1968); 254 A2d 7769 (1969). The Supreme Court upheld that statute up to the last sentence, which they found to be invalid, he added. In another case, State v. Salerno, 142 A2d 636 (1951), they said: "We are satisfied that a failure to give a good account may not itself be punished or be made an essential element of a crime. A failure to give a good account may not serve as affirmative proof of presence for an unlawful purpose. We stress that an arrest cannot be made because a person refused or failed to give a good account. An arrest can be made only if in the total circumstances there is probable cause to believe that the individual was present at the place for an unlawful prupose...."

This, he said, was similar to our provision. We would stress that an arrest cannot be made because a person refused to identify himself or give a reasonably credible account of his presence and purpose. An arrest can be made only if the total circumstances were such that there was justifiable alarm for the safety of persons or property in the vicinity. He concluded that the key to prosecution would be in proving justifiable alarm; not the credibility of the account.

Chairman Burns indicated approval of "justifiable alarm" as an objective standard.

Section 7. Harassment. Mr. Wallingford compared this section to the one on disorderly conduct. While that section was directed toward public nuisances, this one is directed toward private nuisances, he explained.

Representative Frost observed that subsection (2) which refers to a public act would seem to be inconsistent with the explanation that harassment is a private crime.

Mr. Knight pointed out that, like disorderly conduct, the action must not only be offensive to the person who is being abused or insulted, it must also be offensive to other persons.

Chairman Burns wondered what kind of conduct would be covered by subsection (1). Several examples were given, such as pushing or shoving someone about, and touching someone without permission.

In answer to a question on assault, Mr. Wallingford reported that under the proposed criminal assault draft if there is no physical injury, there is no crime. Therefore, he reasoned that these minor physical contacts would not be considered criminal assaults.

Representative Frost noted that the preferred pronounciation of the word "harassment" was with the accent on the first syllable.

Mr. Clark moved to adopt section 7.

After further discussion about various situations in which persons could be pushed and shoved about, as well as offensive physical contact, Chairman Burns pointed out that again, as in section 4, there would be the possibility of a jury question because of the language, "with intent to harass, annoy or alarm." And again, he noted that the intent would have to be determined by the circumstances in each case.

Representative Frost asked if subsection (3) took care of those existing statutes on obscene telephone calls. Mr. Paillette replied that there was one exception. As Mr. Wallingford had pointed out in the commentary, the present law the present law has a venue provision. Page 47 of the commentary cites ORS 165.550 (3):

> "Any offense committed by use of the telephone as set out in this section may be deemed to be committed either at the place from which the telephone call as made or at the place where the telephone call was received."

Mr. Paillette was not sure whether that statute needed to be retained for effective prosecution.

In reply to a question by Chairman Burns, Mr. Wallingford agreed that adoption of this section would repeal present statutes dealing with obscene telephone calls. Chairman Burns asked if there were any cases from other states construing their new sections similar to this one. Mr. Wallingford did not think there were any cases.

Representative Frost asked if subsection (3) would include "junk" mail. Mr. Wallingford replied that the assumption would be that the intent here was not to harass or annoy the person. He pointed out that the section was framed in terms of the intent of the actor; otherwise if the result of the actor was the object of this draft, there would be some very difficult problems involved in determining what would annoy one person and what would annoy another.

After further discussion, a vote was taken on Mr. Clark's motion to approve section 7 and the motion carried unanimously.

Other Business:

Chairman Burns called attention to an article in the present issue of the Newsweek magazine on homosexual behavior and suggested that Mr. Paillette write for more information on the report mentioned in that article.

The meeting adjourned at 4:45 p.m.

Respectfully submitted,

Connie Wood, Secretary
Criminal Law Revision Commission