Tapes #42, 43, 44 and 45

#42 - Side 2 only
#43 - Both sides
#44 - Both sides
#45 - 1 to 384 of Side 1

OREGON CRIMINAL LAW REVISION COMMISSION
Room 309 Capitol Building
Salem, Oregon

January 9 and 10, 1970

A G E N D A

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OREGON CRIMINAL LAW REVISION COMMISSION
Sixteenth Meeting, January 9 and 10, 1970

Minutes

January 9, 1970

Members Present: Senator Anthony Yturri, Chairman
Senator John D. Burns, Vice Chairman
Judge James M. Burns
Representative Wallace P. Carson, Jr.
Mr. Robert Chandler
Mr. Donald E. Clark
Representative David G. Frost
Senator Kenneth A. Jernstedt
Attorney General Lee Johnson
Mr. Frank D. Knight
Mr. Bruce Spaulding
Representative Thomas F. Young

Absent: Representative Harl H. Haas

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

Also Present: Mr. Donald R. Blensly, Yamhill County District Attorney; Member, District Attorney's Association Criminal Law Revision Committee
Mr. Robert Y. Thornton, Member, Bar Committee on Criminal Law and Procedure

Agenda: Friday, January 9, 1970

SEXUAL OFFENSES with amendments
Preliminary Draft No. 3; December 1969

PROSTITUTION AND RELATED OFFENSES
Preliminary Draft No. 2; December 1969

ABUSE OF PUBLIC OFFICE
Preliminary Draft No. 2; October 1969

RIOT, DISORDERLY CONDUCT AND RELATED OFFENSES, Sections 1 to 5
Preliminary Draft No. 2; November 1969

Agenda (Cont'd): Saturday, January 10, 1970

RIOT, DISORDERLY CONDUCT AND RELATED OFFENSES,
Sections 5 through 11 plus section on treason
Preliminary Draft No. 2; November 1969

OFFENSES AGAINST PRIVACY OF COMMUNICATIONS,
Sections 1 through 8
Preliminary Draft No. 2; December 1969

The meeting was called to order by the Chairman, Senator Anthony Yturri, at 9:30 a.m. in Room 315, Capitol Building, Salem.

Approval of Minutes of Commission Meeting of December 12 and 13, 1969

Mr. Johnson moved that the minutes of the Commission meeting of December 12 and 13, 1969, be approved as submitted. The motion was seconded by Judge Burns and carried unanimously.

Amendments dated January 9, 1970, to Article on Sexual Offenses; Preliminary Draft No. 3; December 1969

[Note: For earlier Commission action regarding the Sexual Offenses Article, see Commission Minutes, July 19, 1969, pp. 2 - 18, and Commission Minutes, December 13, 1969, pp. 51 - 57.]

General explanation of amendments dated January 9, 1970. Chairman Yturri reviewed the action the Commission had taken on the Sexual Offenses Article at the July meeting and Mr. Paillette recapitulated the further work of Subcommittee No. 2 on the draft. When Preliminary Draft No. 3 was subsequently considered by the Commission in December, he said, the staff had been directed to revise the Article to make it a misdemeanor for persons under 18 to engage in consensual sexual or deviate sexual intercourse. This had been accomplished by the amendments dated January 9, 1970.

Section 14 as redrafted, Mr. Paillette explained, was designed to protect the victim who was more than 16 but less than 18 years of age from sexual imposition by a defendant who was more than 18. This provision, he said, was similar to the present fornication statute and similar to the intent of the contributing statute which the Supreme Court had declared unconstitutional because of vagueness. The amendments preceding section 14 were changes necessary to make the draft conform to the revisions in sections 14 and 15.

Section 15 of the proposed amendment would continue the sexual misconduct statute to provide coverage for the victim who was less

than 18. Since there was no age specified for the defendant in section 15, it would be broad enough to take in defendants less than 18 who would fall outside the coverage of section 14.

The language in the subsections of the proposed section 14, Mr. Paillette explained, was the same as that in section 14 of Preliminary Draft No. 3 except that the title had been redesignated "Contributing to the sexual delinquency of a minor" and the provision would apply to a person over 18 years of age. He pointed out that "he" in subsection (3) of the proposed section 14 would encompass both male and female actors. In reply to a question by Judge Burns, Mr. Paillette said the affirmative defense that the actor was less than three years older than the victim contained in section 5 of Preliminary Draft No. 3 would no longer extend to the proposed section 14 under the amendments.

Page 2 of the amendments, Mr. Paillette advised, set forth the revision requested by the Commission in December to change the section previously designated "Lewd solicitation" to "Accosting for deviate purposes" inasmuch as the word "solicitation" was used in the Inchoate Crimes Article as a word of art. He said that "accosting" was defined in Webster's New World Dictionary (1968 College Edition) to mean "to solicit for sexual purposes."

Section 14. Contributing to the sexual delinquency of a minor. In reply to a question by Chairman Yturri, Mr. Paillette stated that section 14 as proposed by the amendments would be more restrictive than existing law insofar as adolescents 16 to 18 years of age were concerned. If two 17 year olds had intercourse at the present time, that activity would not come within the statutory rape sections, it would not be covered by the fornication statutes and would not amount to contributing to the delinquency of a minor. If the boy were 17 and the girl less than 16, she would fall within the third degree rape provisions of the proposed code but the male would be allowed the defense in section 5 because he was less than three years older than the girl. If they were both 17, however, the defense would not be permitted by the proposed amendment and their act would fall within the provisions of the proposed section 15.

Judge Burns indicated he was hopeful that the motion adopted at the December Commission meeting with respect to the treatment of sexual experimentation between adolescents would be reconsidered at today's meeting. It was, he said, a basic policy decision to determine whether to stay with the provisions of Preliminary Draft No. 3 or to go to what was comprehended by the proposed amendments and was a determination which should be made at a time when virtually all members were in attendance as they were today.

Mr. Johnson said that inasmuch as he had voted on the prevailing side, he would move to reconsider the action of the Commission by which it was decided to make it a misdemeanor for individuals under

the age of 18 to engage in sexual intercourse or deviate sexual intercourse. He intended, he said, to vote against the motion because he believed there was a strong feeling on the part of the public that the criminal law should state the basic moral code and parents particularly would like to be reassured that society would help them in controlling this kind of conduct among adolescents even though such a law was to a large extent unenforceable. Senator Burns seconded the motion.

Judge Burns expressed the view that it would be most unfortunate to pass a law which parents could use as a tool in threatening their teen age children and in the same breath admit that law to be virtually unenforceable. One of the objectives of the criminal code revision, he said, was to do away with statutes which were largely unenforceable and which, when enforced, gave rise to selective enforcement and all its attending evils. In the area of teen age sexual experimentation, if it was appropriate for a 21 year old to experiment sexually, he maintained that society would not be well served by passing a law which denied the same conduct to a 17 year old, particularly when the law would not and could not be enforced or, if enforced, would be applied only selectively.

Chairman Yturri pointed out that the charge of selective enforcement could be extended to every crime committed since it was impossible to apprehend every individual who violated a law. Nevertheless, the fact that the laws were available and were enforced when observed provided some measure of control. He contended that adoption of the proposed amendments would constitute a vehicle whereby parents would be given assistance in exercising better control over their children in this age group.

Mr. Clark stated that a statute of this kind would do little to discourage sexual activity and expressed doubt that any law enforcement agency in the State of Oregon would make arrests in this area as a matter of enforcement policy; it would, he said, be one of those areas which was set aside and ignored. Chairman Yturri stated that if a law enforcement officer ignored this statute and refused to enforce it, he should be dismissed for violation of duty.

Mr. Chandler commented he was certain that there were law enforcement agencies in the state who would enforce this statute if enacted and agreed with Chairman Yturri that uniformity of enforcement of all laws was a problem inherent in the entire criminal code.

Mr. Spaulding observed that sexual activity in this age bracket had from time immemorial been taken care of by the criminal law and if the Commission were to let it be publicized that this type of activity was no longer criminally sanctioned, this would be an argument to adolescents that they had a license to engage in sexual activity. This, he maintained, would be detrimental to the welfare of society.

Representative Carson said it was unnecessary to project what police would do in this area; a look at what had been done under the existing fornication statute would show that no one in the last 15 years had been charged with fornication, and there was no reason to believe that law enforcement agencies would suddenly begin prosecuting cases of this kind. Secondly, Representative Carson said, he objected to having a criminal code used as a tool which parents could point to and say, "Don't do that because it is a crime." If the Commission believed that the purpose of a criminal code was to help parents control their children rather than for the parents to teach them right from wrong, the list of statutes that could be included in the criminal code was endless. Furthermore, he said, inclusion of such a statute would give the teen agers something to which they could point to evidence the hypocrisy of the older generation. If the law could not be enforced, he maintained that it should not be on the books.

Chairman Yturri stated that if assistance to parents was a benefit derived from passage of this law, that benefit should not be overlooked. If it helped in a very small percentage of the cases, he said, its passage was justified.

Vote was then taken on Mr. Johnson's motion to reconsider the action taken by the Commission at the December meeting whereby the policy was approved to make it a misdemeanor for persons under the age of 18 to engage in sexual intercourse or deviate sexual intercourse. Motion failed. Voting for the motion: Judge Burns, Senator Burns, Carson, Clark, Frost. Voting no: Chandler, Jernstedt, Johnson, Knight, Spaulding, Young, Mr. Chairman.

Senator Burns explained that he had voted in favor of the motion in order to give those who were not present at the December meeting an opportunity to discuss the subject thoroughly. He also noted that regardless of the action taken today, the Commission would have further opportunities to review and to revise the draft after public hearings had been conducted throughout the state.

Senator Burns then moved that the amendments dated January 9, 1970, to Preliminary Draft No. 3 be approved as drafted. Mr. Chandler seconded and the motion carried. Voting for the motion: Senator Burns, Chandler, Jernstedt, Johnson, Knight, Spaulding, Young, Mr. Chairman. Voting no: Judge Burns, Carson, Clark, Frost.

Sexual Offenses; Preliminary Draft No. 3; January 1969

Mr. Johnson moved to approve Preliminary Draft No. 3 of the Sexual Offenses Article as amended. Senator Burns seconded and the motion carried. Voting for the motion: Judge Burns, Senator Burns, Carson, Chandler, Frost, Jernstedt, Johnson, Spaulding, Young, Mr. Chairman. Voting no: Clark, Knight.

Prostitution and Related Offenses; Preliminary Draft No. 2; December 1969

Mr. Wallingford advised that about a month ago he had attended a meeting in Judge Burns' chambers in Portland at which four members of the Portland vice squad who specialized in prostitution offenses were present. The officers had reviewed the Prostitution Article and had made certain recommendations which would be pointed out as today's discussion progressed. He suggested that section 1 containing the definitions used in the Article be considered as the terms arose in subsequent draft sections.

Section 2. Prostitution. In reply to a question by Chairman Yturri, Mr. Paillette stated that "he" under ORS 174.110 was defined to include the masculine, feminine and neuter gender so that section 2 would apply equally to both male and female prostitutes.

Judge Burns noted that the members of the Portland vice squad had asked whether "fee" as used in section 2 was broad enough to comprehend the use of a credit card. Mr. Wallingford had assured them that "fee" would include any medium of payment.

Chairman Yturri asked if "fee" was defined and was told by Mr. Paillette that it was not nor was it defined in Oregon cases. Judge Burns called attention to the commentary on page 7 of the draft which said that the term "for money" would be unduly restrictive. He said he interpreted "fee" to mean money or any other valuable consideration. Senator Burns suggested the draft be amended to read "monetary or other valuable consideration."

Mr. Paillette commented that the reporters, in drafting the Articles for the proposed criminal code, had tried to retain the language of the section from which the proposed statute was derived unless there was some overriding consideration to do otherwise. If and when the proposed statutes became law, he said, the experience of courts in other states would be helpful in construing the Oregon code.

Mr. Johnson moved that section 2 be adopted. The motion was seconded and carried unanimously. Voting: Judge Burns, Senator Burns, Chandler, Clark, Frost, Jernstedt, Johnson, Knight, Spaulding, Young, Mr. Chairman.

Section 3. Promoting prostitution. Mr. Wallingford explained that section 3 was designed to reach those who profited from prostitution such as the panderer, pimp and madam.

Representative Frost asked if subsection (4) of section 3 would apply to an owner of an apartment house where one of the tenants was

carrying on the business of prostitution. Mr. Wallingford replied that this issue had been discussed by Subcommittee No. 2 and was the reason for adding the language in the opening paragraph of section 3 requiring an intent to promote prostitution. With the addition of this language the section would not be applicable, for example, to a taxicab driver who took a fare to a house of prostitution knowing it was a house of prostitution but having no interest in the transaction himself.

Mr. Johnson, referring to subsection (4) of section 1, asked why a prostitution enterprise was required to have two or more prostitutes. There might be instances, he said, where the police would suspect that a person had a string of prostitutes but could only prove the existence of one and he could see no valid reason for limiting it to two or more prostitutes. Mr. Paillette replied that if only one prostitute were involved, that conduct would be covered by subsection (4) of section 3. There was no value, he said, in calling one prostitute an "enterprise" when the one person situation was otherwise covered by the statute. Mr. Wallingford added that the typical pimp would actually violate all four of the subsections in section 3.

Mr. Knight asked if subsection (4) would cover the patron of the prostitute if it were charged that he "aids or facilitates" an act of prostitution by patronizing her. Mr. Paillette replied that none of the subsections were intended to refer to the patron because they required the intent to promote prostitution. Mr. Knight questioned whether the patron could be an accomplice under the language of section 3 and was told by Mr. Paillette that he could not. The Article on Parties to Crime specifically excluded the patron because his action was necessarily incidental to the commission of the offense.

Senator Burns moved adoption of section 3. Mr. Spaulding seconded and the motion carried unanimously with twelve members present and voting.

Section 4. Compelling prostitution. Mr. Wallingford explained that section 4 essentially restated existing law and it was anticipated that it would carry a higher penalty than section 3.

Mr. Knight pointed out that since the Article was recognizing male prostitutes, subsection (3) should include a husband as well as a wife. Mr. Chandler suggested that "wife" be changed to "spouse." Mr. Knight commented that this revision would also clarify the phrase "his wife, child or stepchild" so that courts would not construe "his child" to apply only to the father, thus excluding the mother from the coverage of subsection (3).

After further discussion, Mr. Knight moved that "wife" be changed to "spouse" in subsection (3) of section 4. Mr. Chandler seconded and the motion carried. Voting for the motion: Senator Burns, Carson, Chandler, Clark, Jernstedt, Johnson, Knight, Spaulding, Young. Voting no: Judge Burns, Frost.

In the situation where a man was procuring for a girl, then married that girl and continued to bring men home to her for the purpose of engaging in prostitution, Mr. Clark asked whether that man would be guilty of compelling prostitution as soon as he married the girl. Mr. Knight replied that when the husband brought a man home to his wife, he was causing his wife to engage in prostitution under the provisions of subsection (3). If the Commission did not want this result, the language of that subsection should be changed, he said.

Judge Burns asked if wives would be included in the coverage of section 3 and the Commission agreed that the section could be applicable to wives.

Senator Burns, commenting on the situation posed by Mr. Clark, stated that the man who procured for his wife would be guilty of a more serious offense after they were married than for the same act prior to their marriage. However, if he stopped procuring for her after they were married and she continued in prostitution without his assistance, he would not be guilty under section 4. Mr. Paillette added that if she were engaging in prostitution because of her husband, there would be good reason to charge him under section 4. If she would be engaging in prostitution even without aid from the man, the situation would be amply covered under section 3, promoting prostitution, and it would be a less serious crime even though the man were married to the girl.

Judge Burns moved that section 4 be adopted as amended. Senator Jernstedt seconded and the motion carried. Voting for the motion: Judge Burns, Senator Burns, Carson, Chandler, Frost, Jernstedt, Johnson, Knight, Spaulding, Young. Voting no: Clark.

Section 5. Promoting and compelling prostitution; corroboration. Mr. Johnson moved to delete section 5.

Mr. Wallingford pointed out that section 5 should read "section 3 or 4 of this Article" rather than "sections 4 and 6." This amendment was adopted by unanimous consent.

He explained that section 5 changed existing law to some extent because it broadened the corroboration requirement in ORS 167.140 which required corroboration of testimony for inveigling, enticing or taking away an unmarried female for the purpose of prostitution and was the only existing prostitution statute requiring corroboration.

Section 5 would broaden this to include the crime of receiving the earnings of or soliciting for a prostitute since in his opinion no logical basis existed for the distinction drawn in ORS 167.140.

Judge Burns pointed out that section 5 contained a serious policy determination because only the present inveigling statutes required corroboration and section 5 would extend corroboration to all of these prostitution situations. He was not convinced, he said, that this was a sound policy.

Mr. Chandler pointed out that in situations which would be covered by section 4 it would be almost impossible to obtain corroborated testimony.

Senator Burns said section 5 had been discussed at great length with the Portland police officers. They were concerned about the element of corroboration and felt it should be possible to prosecute on completely uncorroborated testimony. He commented that the people who would be testifying in cases of this kind were basically unstable individuals and expressed the belief that the pursuit of justice warranted requirement of an element of corroboration.

Judge Burns noted that the police officers had suggested a halfway approach to require one witness plus strong corroborating circumstances or one witness plus some type of habitual conduct. They had pointed out that there was a danger inherent in not requiring corroboration because a girl could become embittered and cause someone a great deal of trouble. In their view, however, it was asking a great deal in this type of prosecution to require two witnesses.

Mr. Johnson commented that it was a mistake to put a tougher burden on the state in this area particularly since organized vice was likely to be involved.

Mr. Chandler said that as he read section 5, one witness and strong corroborative circumstantial evidence would be permitted. Mr. Paillette agreed this was true and explained that if the section were framed in those terms, it would make an even greater burden on the state than did the section as drafted. He said he interpreted the section to require the classic test for corroborative evidence which was any evidence that tended to connect the defendant with the commission of the crime.

In reply to a comment by Mr. Knight, Mr. Paillette pointed out that the prostitute was not an accomplice to the crime of promoting and compelling prostitution. She would not be an accomplice under existing law nor would she be an accomplice under the proposed code.

Judge Burns indicated that section 5 would make her an accomplice simply for the purposes of corroboration and Mr. Paillette concurred.

Mr. Spaulding suggested that the addition of the following phrase to the end of section 5 might clarify it: "in the absence of some other evidence tending to connect the defendant with the crime charged." Chairman Yturri observed that this was what the section meant as drafted.

Mr. Johnson contended that adoption of section 5 was placing a higher burden on the state in this area than in other areas where the professional criminal was involved. Chairman Yturri commented that it was better to include some protection for the defendant, particularly in view of the type of individual who would be testifying against him in this type of case. Representative Frost remarked that the mere fact that a man was accused of promoting and compelling prostitution was enough to do him irreparable damage and expressed the view that the uncorroborated testimony of a prostitute should be insufficient evidence to convict a man.

Mr. Knight seconded Mr. Johnson's motion to delete section 5. The motion failed on a voice vote.

Senator Burns moved to approve section 5 as amended and Mr. Spaulding seconded. Motion carried. Voting for the motion: Senator Burns, Carson, Chandler, Clark, Frost, Jernstedt, Spaulding, Young, Mr. Chairman. Voting no: Judge Burns, Johnson, Knight.

Section 6. Evidence. Representative Frost pointed out that the uncorroborated testimony of a wife who was the prostitute would not be sufficient evidence to sustain conviction under section 5. However, the wife's testimony would be sufficient for conviction if it involved a child or stepchild under the provisions of subsection (3) of section 4. Judge Burns explained that if the allegation was that the defendant caused the stepdaughter to engage in prostitution and only the wife testified, that would be sufficient because the wife was not the prostitute. In that case, however, testimony of the stepdaughter alone would not be sufficient because she was the prostitute.

Mr. Knight pointed out that under section 4 a wife would be a competent witness if she testified that the defendant induced his stepchild to engage in prostitution. If section 3 were a lesser included offense of section 3 and if the jury reduced the charge from compelling prostitution (section 4) to promoting prostitution (section 3), the wife would not then be competent to testify against her husband. Judge Burns said he too was concerned about limiting a wife's competency to a prosecution under section 4 (3) and not extending it to a prosecution under section 3. If the charge involved a section 3 crime and involved a wife as the coerced person, he thought the wife should be competent in that situation also.

Mr. Spaulding commented that some charges brought under section 4 would be reduced to section 3 charges and if the quantum of evidence was not present to prove both charges, the judge would be required to set aside the conviction under section 3 unless the same rule of evidence applied to both sections.

Judge Burns expressed doubt that section 3 offenses would qualify as lesser included offenses of section 4. Representative Frost commented that section 3 (2) and section 4 (3) contained the same language and the section 3 (2) offense would therefore automatically be a lesser included offense of section 4.

Mr. Paillette explained that the rationale behind section 6 was that the present law made a wife competent to testify in cases involving criminal acts against herself or her children and this was clearly stated in section 4 (3).

Senator Burns then moved to amend the last sentence of section 6 to read:

> "In any prosecution under this Article, spouses are competent witnesses against each other."

No vote was taken on this motion.

Judge Burns pointed out that ORS 139.320 said:

> "In all criminal actions in which the husband is the party accused, the wife is a competent witness and when the wife is the party accused, the husband is a competent witness; but neither husband nor wife . . . shall be compelled or allowed to testify . . . unless by consent of both of them; provided, that in all cases of personal violence upon either by the other . . . the injured party . . . shall be allowed to testify against the other;".

He explained that removal of the lack of competency as stated by Senator Burns' motion would not take away the privilege factor. If the wife were to be available as a witness for the state, it would be necessary not only to restore her competency but also to take away the privilege factor at some place in the code. Mr. Johnson suggested the proper place to do that would be in ORS 139.320 rather than in section 6 of the draft. Judge Burns said that the problem could be solved by adding to Senator Burns' motion that neither spouse had a privilege.

Chairman Yturri was concerned that if Judge Burns' suggestion were adopted, it might not be clear that the provision referred only to the Prostitution Article. Judge Burns agreed that this was a problem created by the fact that the Commission was attempting to draw a substantive provision keyed to a procedural provision.

Mr. Wallingford commented that ORS 167.625 concerned special rules of evidence for nonsupport actions and provided that a wife was a competent and compellable witness.

Judge Burns suggested that language similar to that in ORS 167.625 (3) be used:

> "No provisions of law prohibiting the disclosure of confidential communications between husband and wife apply. A wife is a competent and compellable witness."

Chairman Yturri stated that if "compellable witness" were used in the draft, it would not only eliminate the privilege of the husband being able to forbid his wife to testify but would also eliminate the wife's privilege to say that she refused to testify against her husband.

After further discussion, Judge Burns observed that the problem the Commission was discussing was primarily a drafting matter which could best be resolved by the staff. He then moved that the staff be directed to amend section 6 so as to provide that spouses may testify and be required to testify in any prosecution brought under the Prostitution Article. He further explained that the intent of the motion was to provide that the state could call the wife against the husband and she would be competent and compellable. Similarly, the defendant could call his or her spouse and she or he would be competent and compellable at the behest of either party to the case. This motion was subsequently withdrawn.

Mr. Knight pointed out that adoption of this motion would mean that when a man was charged with inducing his wife to become a prostitute, the wife could be subpenaed and forced to testify against her husband even though she did not want to do so. Mr. Paillette agreed this would be true and would be the same as the provision presently applicable to nonsupport cases.

Senator Burns said he would agree to such a provision in the Prostitution Article but not in any other type of case.

There was further discussion of the language which would accomplish the intent of the Commission. Judge Burns withdrew his previous motion and moved, seconded by Senator Burns, that language suggested by Senator Burns be adopted. The last sentence of section 6 would be amended to read:

"In any prosecution under this Article, spouses are competent and compellable witnesses for or against either party."

Mr. Spaulding pointed out that it would be better draftsmanship to make the sentence a separate subsection. The Commission agreed that the first part of section 6 should be designated as subsection (1) with the sentence stated above numbered subsection (2).

Vote was then taken on the motion which carried unanimously.

Senator Burns moved that section 6 be approved as amended. Mr. Chandler seconded and the motion carried without opposition. Voting: Judge Burns, Senator Burns, Chandler, Clark, Frost, Jernstedt, Johnson, Knight, Spaulding, Young, Mr. Chairman.

Patronizing a prostitute. Judge Burns observed that it was his intention to make a motion at the proper time with respect to a section making it a crime to patronize a prostitute. Mr. Paillette advised that Preliminary Draft No. 1 of the Prostitution Article contained such a section but it had been deleted by Subcommittee No. 2.

Chairman Yturri invited Mr. Robert Y. Thornton, a member of the Prostitution Control Committee of the American Social Health Association, to present his views on this subject. Mr. Thornton explained that the Prostitution Control Committee was currently studying this topic with a view to recommending a model law. About a month ago, he said, an investigation was conducted in New York and he had spent some time with the New York District Attorney's office and with the New York City Police Department to determine what they were doing in this area. New York had retained its "customer law" as had a number of other states. While not many arrests were made under the law, it was nevertheless preserved because they considered it to be a deterrent to patronizing a prostitute. New York also had a new loitering statute, he said, which they were using to control the problem of streetwalkers.

Mr. Thornton recommended that the Commission give consideration to inclusion of a patronizing statute because of its deterrent effect upon prostitution. He left with the Commission a copy of the New York statute designed to control streetwalkers and also urged that a similar provision be considered in Oregon as a further deterrent to prostitution.

Mr. Thornton pointed out that the Albina district in Portland was experiencing considerable difficulty with white males going into the district and soliciting decent women for prostitution purposes. There had been a great deal of public protest concerning this situation, he said, and the problem could be met more easily if a customer law were in effect.

Judge Burns advised that at the time the meeting was held with the members of the Portland vice squad, the draft they were considering contained the section prohibiting patronizing a prostitute. The police officers' reaction was that they could enforce such a statute provided an exception was written in for police officers acting as decoys so that the undercover operators would not be prosecutable. They had pointed out that the present Portland city ordinance for solicitation for an immoral act was broad enough to cover the customer of a prostitute but as a matter of police department policy it had not been implemented because they would have to use female police officers as decoys and the department had been unwilling to subject the female officers to this degree of danger.

Chairman Yturri asked why the subcommittee had deleted the section on patronizing a prostitute and was told by Mr. Paillette that there were several considerations involved in the decision. One was that a self-incrimination problem arose with respect to the patronizer when he was required to testify against the prostitute. Secondly, there was an inherent danger of entrapment of individuals.

Senator Burns commented that the exception discussed by Judge Burns would alleviate the incrimination problem. Mr. Thornton added that the New York authorities were of the opinion that an exception was unnecessary because in narcotics cases undercover agents were not prosecuted for purchasing narcotics. They believed the same rationale would apply to the patronizing situation.

Mr. Thornton noted that there had been two cases in California within the last year where prostitutes defended on the grounds that failure to prosecute the customer was a denial of equal protection under the Fourteenth Amendment.

Senator Burns stated that the Portland police officers were of the opinion that a customer law would have a distinct deterrent effect on keeping white males out of the Albina area who were annoying moral women. This was a serious problem, he said, about which the black community was justifiably outraged. He indicated he was reasonably certain that such a law would be enforced in Multnomah County and would result in an exodus of patronizers once they realized they could be prosecuted.

Mr. Johnson said that one of the subcommittee's biggest concerns was that if a man went into a bar and invited a girl to his room, the girl could then file a complaint against that man. Mr. Knight said this would be unlikely because the girl would have to testify that she was a prostitute under the section as originally drafted. Mr. Johnson commented that in that event the patronizing statute would not solve the problem in the Albina district because a prostitute had to be involved.

Mr. Wallingford noted that Article VII of the Oregon Constitution also provided for forfeiture of office. Chairman Yturri pointed out that while the Constitution so provided, the provision had not been implemented by statute.

Judge Burns expressed concern over the provision in section 3 (1). For example, if a judge granted an order for discovery, he could have a writ of mandamus filed against him on the ground that he failed to deny the plaintiff's motion because it could be argued that the judge failed to perform a duty imposed upon him by law and that he intended to harm the plaintiff by granting that order when he should not have done so. He asked if this was the kind of conduct that the statute was intended to reach. Judge Burns said he disliked a provision that would apply to any public official who was subject to a mandamus for his failure to perform a duty imposed upon him by law. If the act were discretionary, he said, mandamus would not lie but if the duty of the office should clearly be performed, the official could under section 3 have a mandamus issued against him.

Mr. Chandler pointed out that the official would have to have the intent to harm another or to obtain money for himself by his action before he would be subject to the provisions of section 3. If he was acting in this manner, Mr. Chandler contended that he should not be freed of the criminal consequences.

Judge Burns called attention to the phrase "lawfully adopted rule or regulation" in section 2 and pointed out that there was a myriad of orders which would fall into this category. Senator Burns agreed that the violation of minor rules and regulations adopted administratively should not rise to the dignity of a criminal offense.

Mr. Clark advised that there was a statute requiring county commissioners or county courts to inspect jails annually. If this were not done, and he commented that it was probably not done anywhere in Oregon at the present time, county commissioners and county judges would be guilty of official misconduct in the second degree under section 2.

Chairman Yturri read section 33-3 of the Illinois Criminal Code set forth on page 10 of the draft and suggested this might be closer to the Commission's intent. Mr. Wallingford remarked that if the Commission preferred the Illinois approach, it would be wise to delete section 2.

Mr. Spaulding suggested deletion in section 2 of the phrase "or lawfully adopted rule or regulation." He said he did not object to making a person guilty for knowingly violating a statute but it was going too far to make him guilty for violating rules and regulations of administrative agencies. Thise phrase, he said, delegated legislative authority to administrative bodies when it was unknown what rule they would adopt and made it criminal to violate any such rule. Chairman Yturri expressed agreement.

Senator Burns moved to strike from section 2 the phrase "or lawfully adopted rule or regulation". Mr. Clark seconded and the motion carried unanimously.

Senator Burns moved that section 2 be approved as amended. The motion was seconded and carried unanimously. Voting: Judge Burns, Senator Burns, Carson, Chandler, Clark, Frost, Jernstedt, Knight, O'Dell, Spaulding, Young, Mr. Chairman.

Judge Burns expressed concern over the phrase "or to harm another" in section 3. He said he could live with the mandamus situation he had discussed earlier where a necessary element would have to be intention to obtain a benefit for himself but it would not be too difficult for someone to mandamus a judge and make a jury argument that he intended to harm the losing party. He did not believe that the ordinary mandamus situation should be a crime and others agreed.

Chairman Yturri inquired as to the meaning of "harm another." Representative Carson replied that the subcommittee had spent much time discussing that point and the term was not hastily chosen. It was not the intent of the subcommittee to cover mandamus situations.

Judge Burns noted that Michigan defined "harm" to mean "loss, disadvantage or injury to the person affected."

Mr. O'Dell suggested that inasmuch as section 3 was directed at a corrupt act, it would place the section in its proper perspective to insert "corruptly" therein. Chairman Yturri remarked that this was the language used in some states and called attention to the quotation from Burdick on page 4 of the draft. He suggested that the phrase "or to harm another" be deleted from section 3 because the intent was to get at the act which was in the nature of corruption.

Representative Frost commented that deletion of that phrase would mean that if the official failed to act in a specific situation which did not necessarily benefit him personally, he would not be covered by the section. Judge Burns suggested this might be solved by saying "with intent to obtain a benefit for himself or another" and after further discussion, he so moved. The motion was subsequently withdrawn.

Mr. Wallingford pointed out that "benefit" was defined in section 1 to mean "gain or advantage to the beneficiary or to a third person pursuant to the desire or consent of the beneficiary."

Representative Frost advised that if Judge Burns' motion were adopted, the statute would be getting away from coverage of the malicious act of a person using the benefit of his office to harm another and maintained that the section should be aimed at the

situation where the official intended to harm another. Senator Burns said he was persuaded to Representative Frost's logic but did not see how the statute could be drawn to avoid the objection raised by Judge Burns. Judge Burns said he too agreed with Representative Frost and noted that ORS 162.510 said virtually the same thing as section 3 and had caused no great problems thus far. If the harm was of no benefit to the official, his failure to act should still be covered if it caused detriment to a citizen, he said. Judge Burns then withdrew his motion to amend section 3.

Mr. Chandler moved that section 3 be approved. Mr. Spaulding seconded and the motion carried. Voting for the motion: Carson, Chandler, Frost, Jernstedt, Spaulding, Young, Mr. Chairman. Voting no: Clark, Johnson. Abstaining: Judge Burns, Senator Burns.

Section 4. Official oppression. Senator Burns noted that not infrequently in the defense of persons charged with a criminal offense that person had been subjected to an illegal search in which the defense prevailed on its motion to suppress. Those individuals were usually begging to sue the police for false arrest. A statute such as section 4, he said, would make it even easier for those persons to charge the police officer by creating a jury question as to whether the officer should have known that his search was illegal. There were so many times when an officer was required to make an arrest or a search on the spur of the moment and a provision such as section 4 would increase the possibilities for charges being filed against him. Mr. O'Dell agreed that many times the decision had to be made in a few seconds and there was no time for the officer to refer to his textbook.

Judge Burns said that in perhaps one out of 20 arrests the officer would give a faulty Miranda warning and he would hate to see it written into the statute that the faulty warning could be the basis for a criminal prosecution.

Mr. Chandler stated that as he read section 4, the officer would have to decide in advance that he was going to issue a faulty warning, knowing in advance that it was illegal.

Representative Frost contended that the official misconduct sections covered the situations which were intended to be taken care of by section 4 and called particular attention to section 3, subsection (2), which said, " . . . performs an act constituting an unauthorized exercise of his official duties."

Mr. Chandler pointed out that "knowingly" was defined in the General Definitions Article to mean "that a person acts with an awareness that his conduct is of a nature so described or that a circumstance so described exists."

Mr. Clark moved that section 4 be deleted and Mr. O'Dell seconded the motion.

Chairman Yturri commented that most of the situations covered by section 4 appeared to be covered elsewhere in the code and made specific reference to sections 2 and 3, official misconduct.

Mr. Chandler said that he understood section 4 to be a third and more serious gradation of the basic offense of official misconduct. Official oppression actually existed, he said, and was conduct which should be subject to criminal sanction.

Representative Carson explained that the difference between sections 3 and 4 was that section 3 required an intent to obtain a benefit or harm another whereas section 4 required only that the public servant knew that his act was illegal and it was unnecessary to prove that he intended to hurt anyone or obtain a benefit. If it could not be proved that he acted in a manner to obtain personal benefit or that he was purposely trying to harm another, his conduct would not fall under the provisions of section 3.

After further discussion, vote was taken on the motion to delete section 4. Motion carried. Voting for the motion: Judge Burns, Senator Burns, Clark, Frost, Jernstedt, O'Dell, Young, Mr. Chairman. Voting no: Carson, Chandler, Spaulding.

Section 5. Misuse of confidential information. Mr. Chandler moved, seconded by Mr. Spaulding, that section 5 be redesignated as section 4 and approved.

Judge Burns questioned the meaning of the phrase "which has not been made public" and asked how information was made public. He urged that the commentary contain some explanation of what was intended by the use of that phrase and asked if it was sufficient that action was taken at a meeting which was open to the public or if the action had to be recorded in the official minutes of the organization. Chairman Yturri said in his opinion it would not be necessary to require that the action be recorded in official minutes inasmuch as many actions were taken by county courts which were not entered in the minutes and yet they were public actions. He said he would interpret the phrase to apply to any meeting which was open to the public and at which an action was taken or an announcement made. Even though no member of the public was present, the meeting was nevertheless open to anyone who wanted to attend. The Commission was generally agreed that the phrase "which has not been made public" was to be interpreted very broadly and that some explanation of the term should be incorporated in the commentary.

Mr. Spaulding suggested that the phrase be stricken. Chairman Yturri explained that if this were done, the information would then be confidential because it had not been made public and also advised that the phrase contained the time element which determined when the information lost its confidentiality. Mr. Paillette added that deletion of the phrase would prevent a public servant from doing a legitimate act such as investing in property.

Mr. Spaulding maintained that there was no definition available of what had been made public or what information was confidential. Chairman Yturri assured him that the commentary would contain the necessary explanation.

Vote was then taken on the motion to adopt section 5 and renumber it as section 4. Motion carried unanimously. Voting: Judge Burns, Senator Burns, Carson, Chandler, Clark, Frost, Jernstedt, O'Dell, Spaulding, Young, Mr. Chairman.

Section 6. Concealing a conflict of interest. Mr. Wallingford advised that the subcommittee had spent a great deal of time on this section and that it had been redrafted since the members had last seen it.

Chairman Yturri asked what "substantial" was intended to mean and was told by Mr. Spaulding that the word had been defined by the courts in other relationships such as "substantial evidence" and "substantial interest."

Senator Jernstedt asked if section 6 would apply to members of the legislature. Chairman Yturri replied that legislators were not excluded from the definition of "public servant" and the section would therefore be applicable to them.

Senator Jernstedt said that by declaring he had a conflict of interest on a particular measure before the legislature and thereby being excused from voting, he would in effect be casting a "no" vote which could very well be the way he would have preferred to vote. Mr. Chandler indicated that a legislator would declare that he had a conflict of interest and then vote his conscience. So long as his conflict was known, there was nothing wrong with his exercising his discretionary function as a legislator.

Chairman Yturri asked if that legislator under the provisions of section 6 would be required to disclose his conflict of interest to the district attorney who would then go to the Attorney General and Mr. Chandler replied that he would disclose to the Attorney General in the first instance.

Senator Burns indicated that he owned stock in an oil company and at the last legislative session the committee which he chaired considered bills in connection with games of chance operated by oil companies. Under section 6, he said, he could not have voted on those bills without first disclosing his interest in the oil company. Mr. Chandler said he would not be in conflict with the proposed statute if his interest were not substantial. Judge Burns noted that the commentary on page 22 said that the problem of defining "substantial pecuniary interest" had not been resolved.

Mr. Spaulding advised that there was a federal statute on conflict of interest which had proved workable. That statute was not drawn on the basis of concealment but was based on acting while having a conflict of interest.

Chairman Yturri pointed out that a legislator who had a million dollars worth of investments in mutual funds would thereby have an interest in hundreds of diversified industries and businesses. Virtually all of his votes would be affected in one way or another. Mr. Chandler maintained his connection with individual companies would be far removed in a case of that kind.

Mr. Spaulding was of the opinion that "substantial interest" should relate to the interest as it applied to the official because it affected his vote and the exercise of his discretion. Mr. Chandler held the opposing view that the "substantial interest" should apply to the amount of stock he held in the company in which he owned an interest. Mr. Spaulding replied that the corruptness of the official's act and the place where the public would be deprived of the benefit of the sincere exercise of his duty would rest on whether his interest was of importance to him personally.

Representative Frost pointed out that the statute was stated in terms of concealment of a conflict of interest and, logically, a conflict of interest successfully concealed was not actionable since it remained unknown. Therefore, this statute was raising again the question of official misconduct as stated under sections 2 and 3, the difference being that the conduct described in section 6 concerned discretionary conduct. He called attention to subsection (2) of section 3 which read: "He knowingly performs an act constituting an unauthorized exercise of his official duties." No one could successfully argue, he said, that doing something for personal benefit was part of the official's authorized duty. He contended that it was not the concealment which should be punished but rather the conflict of interest.

Mr. Chandler remarked that the rationale of this entire Article was that people had the right to demand of their elected or appointed representatives a higher standard of conduct than they demanded of anyone else. He expressed the view that the public had a right to expect and demand an exceptionally high standard of conduct from public officials who wielded so much power over their daily lives.

Representative Carson commented that one of the problems which the subcommittee had considered was exactly what constituted a conflict of interest. The statute, he said, was aimed at the reporting or declaring of the conflict of interest and the intent was to let the public know what the potential conflict was. Perhaps, he said, Representative Frost was correct and the statute was circumventing the thrust by not punishing the conflict of interest itself but this was difficult to do.

Mr. Chandler said it was virtually impossible in today's society for any individual to be without some potential conflict of interest. If he owned life insurance or government bonds, he was placed in this position. The thrust of the statute should be aimed at protecting the public so they would know in advance before official action was taken that a possible conflict existed.

Judge Burns said that if that was the purpose of the proposed statute, it should also impose a duty upon the district attorney and the Attorney General to disclose this information once it was given to them.

Representative Carson agreed with Judge Burns and pointed out that another problem with the proposed statute was that it referred not only to elected public officials but encompassed the acts of the appointed and the civil servant. The public, he said, had some control over the elected official because he could be defeated at the polls but there was no way to touch the civil servant who was, for example, granting contracts for large state purchases.

Chairman Yturri contended that if the disclosure was to be made to the Attorney General, the statute should further state that if the Attorney General said a conflict of interest existed, the public official should not then be permitted to exercise his discretionary function. Judge Burns commented that the Attorney General would then be making the purchasing decisions for the school board in, for instance, Deschutes County.

Representative Frost suggested that the statute be framed in terms of requiring a disclosure rather than in terms of concealment.

Mr. Paillette pointed out that section 6 was drawn from the Michigan code and Michigan also had a civil counterpart mentioned in the commentary to section 4720:

> " . . . The complexity of the issue is also recognized by Michigan's newly adopted conflict of interest law [Public Act No. 317 of 1966] which provides a special procedure for obtaining advisory opinions as to potential conflict of interest situations. The remedy afforded by that law,

> namely, making the contract subject to being voided by the state agency plus possible non-criminal disciplinary action provided by other provisions, e.g., removal from office . . . should be entirely satisfactory in most instances. The Committee did feel, however, that if a public servant knows that he has a possible conflicting interest in a situation, he should at least disclose this information in advance."

Mr. Johnson arrived at this point.

Michigan, Mr. Paillette said, was apparently using the provisions of section 6 as complementary to the civil conflict of interest statute. He further suggested that the treatment of complicated conflict of interest situations might be better dealt with by civil remedies rather than in the criminal law. Chairman Yturri expressed agreement and Mr. Chandler held the opposing view. This was a public problem and the public should prosecute violations, he said.

Judge Burns said that section 6 was based upon the Michigan code which applied only to certain situations because it was drawn in light of the existence of a civil conflict of interest statute. He suggested that further consideration of section 6 be deferred and in the meantime the staff could furnish Commission members with complete copies of the 1966 Michigan civil Act. Mr. Spaulding approved of this proposal and suggested that the members also be furnished with copies of the federal conflict of interest statutes.

Judge Burns then moved that the staff furnish all Commission members with copies of the 1966 Michigan conflict of interest statute plus copies of the federal statutes in this area and that the subject be further considered at a subsequent meeting. Mr. Spaulding seconded and the motion carried unanimously.

Chairman Yturri was of the opinion that there should be a requirement for members of a legislative body to disclose a substantial conflict of interest. Once disclosed, the Oregon Constitution provided that the unanimous consent of that body determined whether the conflict was of such degree as to prevent that person from voting. He suggested that the Commission members consider in the interim the possibility of the same type of requirement being applied to county commissions and other bodies whereby the members of the body would decide whether the conflict was substantial. He urged that some method be found of making a disclosure other than requiring members to go to the district attorney or the Attorney General. That provision in section 6, he said, had apparently resulted from an effort to include every public servant in one package and it was virtually impossible to treat them all alike.

Riot, Disorderly Conduct and Related Offenses; Preliminary Draft No. 2; November 1969

Mr. Paillette advised that the area in the Riot Article which gave Subcommittee No. 3 the most difficult and had given other states similar difficulty was the area of disorderly conduct and the so-called vagrancy statutes. They had, he said, attempted to draft a constitutional statute but he expressed doubt that this was possible where loitering was concerned.

Mr. Paillette called attention to an additional section he had drafted dealing with the subject of treason. This section, he said, had not been through the subcommittee. It was included because it was a crime provided for under the Oregon Constitution and the original plan was to include treason as a separate Article in the criminal code. Further examination, however, revealed a complete lack of cases in this area. In the United States there had been only two prosecutions for treason against a state since the early 1800's. If the Commission decided to include the statutory crime of treason, bearing in mind that most treason crimes would be federal offenses, this could be considered by the full Commission at this time rather than taking it through a subcommittee. Further discussion of this subject will be found on page 38 of these minutes.

Section 2. Riot. Senator Burns inquired as to the meaning of "with" as used in section 2 and Judge Burns pointed out that the commentary said it was necessary to prove that the rioters were involved in a common disorder and it was not enough to show that numerous individuals were engaged in similar unrelated activities. Senator Burns asked if this would encompass individuals who were working independently toward a common goal and was told by Mr. Wallingford that situation would not fall under the concept of riot but would be covered by the concept of conspiracy.

Representative Frost asked why the number "five" was chosen. Mr. Wallingford replied this was an arbitrary figure. The present riot law required three persons; New York had two degrees of riot, one involving ten and the other four persons; Connecticut also had two degrees, involving six and two persons.

Mr. Wallingford remarked that most prosecutions arising from a riot were the result of charges for other substantive crimes such as arson, malicious destruction of property, assault, etc.

Judge Burns moved that section 2 be adopted and Senator Burns seconded the motion.

Representative Frost questioned the use of the term "tumultuous and violent." He noted the commentary said that this term was designed "to imply terroristic mob behavior involving ominous threats of personal injury and property damage." He suggested "terroristic"

might be a better term than "tumultuous and violent." Mr. Wallingford pointed out that "tumultuous and violent" had been traditionally used in riot legislation and there was a considerable body of case law construing the term. He pointed out that pages 8 and 9 of the commentary cited examples of tumultuous and violent conduct.

Judge Burns commented that section 2 would not change the present law in Oregon as to what constituted a riot except as to the number of persons involved. Mr. Wallingford said that the proposed section not only required a greater number of rioters but also shifted the emphasis from the commission of the crime to the conduct that created a risk of causing public alarm. In that respect, he said, it made a rather substantial change from existing law.

Mr. Paillette disagreed that section 2 would make a substantial change in existing law. He pointed out that ORS 166.040 said, "Any use of force or violence, or threat to use force or violence . . . " Mr. Johnson asked where a threat to use force or violence was covered in section 2 and was told by Chairman Yturri that conduct creating public alarm could be a threat when five people were shouting, "We'll kill all of you." Mr. Johnson said he was not convinced that section 2 was a duplicate of the existing law on riot.

Vote was then taken on the motion to adopt section 2. Motion carried unanimously. Voting: Judge Burns, Senator Burns, Chandler, Clark, Frost, Jernstedt, Johnson, Spaulding, Young, Mr. Chairman.

Section 3. Unlawful assembly. Mr. Wallingford explained that subsection (1) was similar to ORS 166.040 (2) which defined unlawful assembly but carried no penalty.

Chairman Yturri asked if some sort of disturbance of the peace was usually required in this type of statute to constitute an unlawful assembly and was told by Mr. Paillette that they required an intent but not an actual disturbance.

Judge Burns commented that section 3 essentially carried forward present Oregon law and the decision in the case of State v. Stephanus, 53 Or 135, 99 P 428 (1909), held that an unlawful assembly was where persons were assembled even though, for some reason, the conduct was stopped or discontinued before it reached the riot stage. It was the intent of the drafters to carry through with this theory.

Mr. Spaulding moved that section 3 be adopted. The motion was seconded by Senator Burns and carried. Voting for the motion: Judge Burns, Senator Burns, Chandler, Frost, Jernstedt, Johnson, Spaulding, Young, Mr. Chairman. Voting no: Clark.

Mr. Clark explained that he had voted against the motion because he believed there would in all probability be no prosecutions under section 3 as written and if the same conduct was covered in other sections, it was unnecessary to clutter the Oregon law with it.

Mr. Johnson asked if section 3 was covered by the Article on Inchoate Crimes. Representative Frost explained that the principal difference was that the persons under section 3 would be assembled in one particular spot and were not at some other site soliciting a riot. Mr. Wallingford commented that section 3 would not be covered by an attempt statute; it would be closer to a conspiracy to riot because it lacked the substantial step element. Judge Burns agreed that the substantial step required by the Inchoate Crimes Article for an attempt would not reach the kind of conduct that section 3 was intended to reach.

Section 4. Disorderly conduct. Mr. Wallingford read and gave a brief explanation of the provisions of section 4.

Tape 3 begins here:

Subsection (3). With respect to subsection (3) of section 4 Judge Burns explained that the subcommittee was troubled by the use of the term "abusive or obscene language" but finally decided that cases of this kind would probably not get into the question of prurience as would a case banning an obscene book and they would let the jury take care of the question. Chairman Yturri expressed approval of this approach. Judge Burns explained that this was not intended to cover the situation where one person walked up to another and used obscene language but was aimed at conduct which caused public inconvenience.

Subsection (4). Judge Burns said the subcommittee also had difficulty with subsection (4) because it involved situations such as a sit-in at a meeting of the Model Cities Board. Chairman Yturri noted that it nevertheless required the person to have the intent to cause public inconvenience, etc., so that it should not cause unnecessary problems.

Subsection (6). Senator Burns asked what was meant by the use of the term "lawful order of the police" in subsection (6) and was told by the Chairman that it meant an order they were legally authorized to make.

Judge Burns explained that one of the purposes of subsection (6) was to have a statute which would aid in dispersing groups of people before a riot or a serious situation developed in a public area by having a lesser charge to file against them.

Subsection (7). Several members commented that subsection (7) was excessively broad. Senator Burns said it was virtually impossible to define "legitimate purpose."

Chairman Yturri asked if it would be possible to phrase subsection (7) to the effect that no one could create a hazardous or offensive condition by any act that was not necessary to the pursuit or furtherance of some proper work, effort or labor in which he was engaged.

Mr. Wallingford replied that subsection (7) was derived from the Model Penal Code and the objective was to protect, for example, a rendering plant operator. He called attention to the language of section 191 of the Proposed Connecticut Penal Code which said, "he creates a public, hazardous or physically offensive condition by any act which he is not licensed or privileged to do."

Representative Carson pointed out that the meaning of "legitimate purpose" as used in subsection (7) could change with the passage of time and it would probably be very few years before rendering would no longer be considered a "legitimate purpose." Judge Burns said that the language of the Connecticut statute "licensed or privileged" would take care of that problem.

Representative Frost inquired as to the meaning of "privilege" as used in the Connecticut statute and was told by Chairman Yturri that it meant a privilege which was legally permitted, an example being a driver's license which was not a right but a privilege.

After further discussion, Senator Burns moved to amend subsection (7) of section 4 to read:

> "Creates a hazardous or physically offensive condition by any act which he is not licensed or privileged to do."

The motion carried unanimously.

Judge Burns then moved that section 4 as amended be adopted. The motion was seconded and carried unanimously. Mr. Johnson left the meeting at this point and Mr. O'Dell took his place. Voting on the motion were: Judge Burns, Senator Burns, Carson, Chandler, Clark, Frost, Jernstedt, O'Dell, Spaulding, Young, Mr. Chairman.

Section 5. Public intoxication. Mr. Wallingford explained that section 5 departed from existing Oregon law by making public intoxication a crime only if the person endangered or annoyed other people. Intoxication would not be a crime so long as that person disturbed no one.

Mr. Clark moved to delete section 5. He explained that it was not his intent to ignore the public problem of intoxication but he believed that it should be handled as a socio-medical problem rather than under the criminal code. So long as a statute such as section 5 remained in effect in Oregon, he said, nothing would be done to improve the situation. Deletion of the statute would in his opinion force the Multnomah County Commissioners to use a wing of the county hospital as a civil detoxification center to take care of persons who were picked up by the police for being intoxicated.

Mr. Chandler said he did not see how elimination of this statute would solve the problem that existed because civil detoxification centers were not available at the present time and without a statute of this kind, society would have no way to handle inebriates.

Judge Burns said he was in sympathy with Mr. Clark's motion but until the legislature furnished enough money to provide detoxification centers throughout the state, deletion of section 5 would not solve the problem nor make any meaningful attack upon it.

Senator Burns said that section 5 would perpetuate a concept which had been in the criminal code from time immemorial. The detoxification centers under discussion, he said, would be at least a partial solution to the problem of chronic alcoholics but he noted that not every person picked up for intoxication was a chronic alcoholic; many times it was someone who was out for a good time on Saturday night and perhaps it was the first time he had ever been intoxicated in his life. No purpose would be served, he said, by sending such a person to a detoxification center.

Chairman Yturri pointed out that the more sparsely populated areas of the state would probably never be in a position to build detoxification centers and noted that this law was being written for the entire state, not just for Multnomah, Marion and Lane Counties.

After further discussion, Chairman Yturri indicated discussion of this subject would be resumed on the following day. The meeting was recessed at 5:00 p.m.

January 10, 1970

Members Present: Senator Anthony Yturri, Chairman
Senator John D. Burns, Vice Chairman
Representative Wallace P. Carson, Jr.
Mr. Robert Chandler
Mr. Donald E. Clark
Representative David G. Frost
Senator Kenneth A. Jernstedt
Mr. Frank D. Knight
Mr. Bruce Spaulding
Representative Thomas F. Young

Delayed: Mr. Thomas D. O'Dell, Chief Trial Counsel, Department of Justice, representing Attorney General Lee Johnson

Excused: Judge James M. Burns
Representative Harl H. Haas

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

Also Present: Mr. Ben I. Swank, General Security Manager, Pacific Northwest Bell

Agenda: RIOT, DISORDERLY CONDUCT AND RELATED OFFENSES, Sections 5 through 11 plus section on treason Preliminary Draft No. 2; November 1969

OFFENSES AGAINST PRIVACY OF COMMUNCATIONS, Sections 1 through 8 Preliminary Draft No. 2; December 1969

The meeting was reconvened at 9:30 a.m. by Chairman Yturri in Room 315 Capitol Building, Salem.

Riot, Disorderly Conduct and Related Offenses; Preliminary Draft No. 2; December 1969

Section 5. Public intoxication. Chairman Yturri explained that Mr. Clark had moved on the previous day to delete section 5 and the motion would be further discussed today.

Mr. Clark passed around a copy of the daily arrest log of the Portland police department for May 7, 1969, to give the members an opportunity to see how the police were spending their time and called attention to the high percentage of time spent on alcoholics.

Mr. Clark then quoted from the results of a study made by the Law Enforcement Study Center, Washington University, St. Louis. They had picked Portland, Oregon, as one of the locations for a portion of their study. The report stated that in Portland in 1963 there were 11,000 law violations involving drunkenness but only about 2,000 different persons accounted for these arrests.

The President's Crime Commission Report published in February of 1967 contained a series of recommendations by the task force on drunkenness and emphasized that the special problem of public drunkenness should be approached from the socio-medical standpoint rather than treated as a legal criminal problem.

In further support of his position Mr. Clark cited a quotation from a speech made by Representative Edith Green in November of 1968 in which she stated that on one Monday morning in Portland 35 persons had been sentenced for offenses involving drunkenness to a collective total of 1,510 days in jail. She pointed out that the local taxpayer was bearing the cost of the room and board for these offenders. One such individual had been arrested over 1,000 times for being drunk in public and it was estimated that he had cost the taxpayers of Multnomah County more than $400,000.

Mr. Clark indicated he had been in contact with Representative Green and had determined that federal funds might be available during the next year and, if so, Multnomah County could have a detoxification center, probably in the county hospital. He stated that the cost offset for treating people in this manner would be immense and would also save police and criminal justice time so that those agencies could be more effective in other law enforcement areas.

Chairman Yturri suggested it would be more timely to repeal the public intoxication statutes when the legislature could be certain that the detoxification centers were available. Mr. Clark replied that the Commission should go on record that they wanted concrete action taken toward solution of the alcoholic problem and deletion of section 5 would affirm this policy.

Senator Burns said he was in complete sympathy with the position taken by Mr. Clark and agreed that the Portland metropolitan area should have a detoxification center. The Commission, however, had the responsibility of proposing a code for the entire state and it was highly unlikely that there would ever be a detoxification center in Jordan Valley or Dufur or Rufus.

Mr. Spaulding said he too agreed with Mr. Clark's position and as long as criminal intoxication statutes were retained, no one would do anything about building detoxification centers.

Senator Jernstedt also expressed sympathy for Mr. Clark's motion but pointed out that in the area which he represented it would cause a tremendous problem if alcoholics were suddenly taken to the hospitals rather than to the jails.

Mr. Chandler agreed that the criminal process did not help the alcoholic but the drunk posed another problem for society in that he was extremely offensive to other people. If facilities other than jails were available or even if the Commission could be assured that they would be available within the next year, he said he would support Mr. Clark's motion. The facilities, however, did not exist and the legislature was in no position in the state's present financial condition to furnish funds to set up these centers. Until the facilities and funding were available, he said he could not support the motion.

Representative Carson stated he would support Mr. Clark's motion. His concern was that everything which caused inconvenience to the public was made a crime and the problem of alcoholism would never be answered so long as it was looked upon as a criminal and police matter.

Representative Frost commented that he would agree that habitual alcoholism was a sickness but the criminal intoxication statutes were a useful deterrent in keeping inebriated persons off public streets.

Mr. Knight said that the Commission was not in a position to tell the legislature that it was going to have to spend a certain number of dollars to set up detoxification centers.

Senator Jernstedt expressed the view that very little money would be saved by deletion of section 5 because the police would still have to pick up the drunks to take them to the detoxification centers and those centers would probably cost more to operate than the jails.

Mr. Clark indicated that research conducted on the problem of alcoholism had shown that people who had been in detoxification centers maintained longer periods of sobriety and showed a higher percentage of cures than those who went untreated. He was certain that in the long run such a program would save money.

Senator Burns asked if it would be possible to find a middle ground by providing that the officer would take the person to a detoxification center if one were available; otherwise the matter would be handled as a criminal offense. Representative Frost replied that this would pose an equal protection problem under the Constitution.

Mr. Wallingford said that at the time he drafted this Article he had considered omitting section 5 because he felt most of the conduct covered by section 5 would fall under section 4. One problem, however,

was that the penalty would probably be more severe under section 4. Therefore, insofar as the alcoholic was concerned, he would be exposed to a possibly greater penalty if arrested for disorderly conduct than if arrested for public intoxication. One of the reasons which had persuaded him to include section 5, he said, was the case of Texas v. Howell. The majority of the court agreed with Mr. Clark but concluded:

> "However, facilities for the effective treatment of indigent alcoholics are woefully lacking throughout the country. It would be tragic to return large numbers of helpless, sometimes dangerous, and frequently insanitary, inebriates to the streets of our cities without even the opportunity to sober up adequately, which a brief jail term provides. Presumably no state or city will tolerate such a state of affairs. Yet the medical profession cannot and does not tell us with any assurance that even if the buildings, equipment and trained personnel were made available, they could provide anything more than slightly higher class jails for our indigent and habitual inebriates. Faced with this unpleasant reality we are unable to assert that the use of the criminal process as a means of dealing with the public aspects of problem drinking can ever be defended as rational.
>
> "The picture of the penniless drunk propelled aimlessly and endlessly through the laws of the revolving door of arrest, incarceration, release and re-arrest is not a pretty one, but before we condemn the present practice across the board, perhaps we ought to be able to point to some clear promise of a better world for these unfortunate people. Unfortunately, no such promise has yet been forthcoming."

Mr. Clark commented that it was about time Oregon held out such a promise to these unfortunates.

Vote was then taken on Mr. Clark's motion to delete section 5. Motion failed. Voting for the motion: Senator Burns, Carson, Clark, Spaulding. Voting no: Chandler, Frost, Jernstedt, Knight, Young, Mr. Chairman.

Chairman Yturri commented that the minutes of this meeting would be of considerable aid to Mr. Clark in the future support of his position and noted that the entire Commission was in sympathy with his objective. The quotation from Texas v. Howell which Mr. Wallingford had read, he said, summed up the problem very well.

Mr. Chandler moved to approve section 5. Senator Burns seconded and the motion carried. Voting for the motion: Senator Burns, Chandler, Frost, Jernstedt, Knight, Young, Mr. Chairman. Voting no: Carson, Clark and Spaulding.

Mr. O'Dell arrived at this point.

Section 6. Loitering. Mr. Wallingford remarked that loitering was an extremely difficult area in which to draft a constitutional statute. Subsection (1) of section 6, he said, restated existing law. Similar provisions had been challenged a number of times throughout the United States but had never been held unconstitutional so far as he was able to determine. Subsection (2) covered what had generally been covered in vagrancy statutes in this state and throughout the United States, most of which had been found in the last few years to be unconstitutional. One of the important points in that subsection was to require that the person "give a reasonably credible account of his presence and purposes" which was a subjective test to the police officer on the beat. It had been construed to mean that a failure to give an account was not grounds for arrest; it was merely one of the facts the officer could take into consideration. The key circumstance was that which warranted "justifiable alarm for the safety of persons or property."

Mr. Paillette advised that the subcommittee felt this was an area where law enforcement needed a statute of some kind to meet the problems caused by prowlers. The difficulty was to define it narrowly enough so that it was constitutional but broad enough to be of value to the officer on the beat. The subsection used Model Penal Code language and a Model Penal Code test. It was unknown, he said, whether the language would be upheld in court. The language in the opinion in Portland v. James, 86 Adv Sh 1287 (1968), gave some glimmer of hope that the Oregon Supreme Court might hold this language to be constitutional. He called attention to the court's holding in that case set forth on page 41 of the draft.

Mr. Chandler said he was concerned with the language in subsection (1). He asked who would have authority to give written permission for a person to be near a school building or grounds and was told by Mr. Paillette that it would presumably be the school administrator.

Mr. Paillette indicated that Judge Burns, Chairman of Subcommittee No. 3, had asked him to write to the Superintendent of Public Schools in Portland in connection with the school problem. He read the letter he had written together with the reply thereto. Copies of this correspondence are attached hereto as Appendix A and Appendix B.

Senator Burns said he had recently had an opportunity to meet with Dr. Clark, President of the University of Oregon. Dr. Clark had stated that the single biggest tool he had when he was at San Jose State came out of Governor Reagan's law enforcement package and was a statute which made it a crime for a suspended student to loiter in or near a school grounds. Many students, he said, who were part-time agitators while students became full-time agitators after they had been expelled and the loitering statute was of great assistance in controlling this kind of conduct.

Representative Young commented that the language in subsection (1) "not having any reason or relationship involving custody of or responsibility for a student" could be interpreted to mean that a person who had a legitimate purpose for being in the school would be barred from going there if he had no relationship or responsibility for one of the students. A meeting of the National Guard held in the school building would be an example of this type of situation. Mr. Paillette pointed out that written permission would be required in any event.

Mr. Wallingford pointed out that section 195 of the Proposed Connecticut Penal Code added the phrase "or any other license or privilege to be there." Mr. Paillette commented that this language would not give the administrator the control he should have over those who had no reason to be on the grounds.

Mr. Spaulding inquired how a person would receive authority to grant written permission in these situations and wanted to know whether a parent would have authority to grant permission for someone to go into the building and wait for his child. Mr. Paillette replied that the subcommittee intended to leave that decision to the individual school administrator. Mr. Spaulding expressed the view that if this was the intent, it should be spelled out.

Chairman Yturri contended that a mother should have authority to send her 18 year old son to pick up his six year old sister. Mr. Knight said the brother in that situation would not need written permission because he would have a relationship to the student. Representative Carson pointed out that subsection (1) was written in the conjunctive so that he would need both the relationship and the written permission.

Representative Young said that if someone remained in a school building having an illegal or unlawful reason for being there but did have permission, he would not be violating the law. Mr. Spaulding agreed this would be true. Mr. Paillette advised that the "reason" in subsection (1) pertained to the student.

In an attempt to make the term "near" more definitive, Mr. Spaulding suggested that subsection (1) state "within 1/4 mile of the outside boundary of the school." Representative Frost commented that the physical locations of schools were such that every school was different. In many areas there were residences across the street from a school and the resident's brother-in-law could not be prohibited from loitering on the grounds of that residence. Mr. Frost advised that the subcommittee had discussed this subject at some length and had tried a number of terms including "about" and "in the vicinity of" but none of them completely solved the problem.

Chairman Yturri proposed to answer the problem by drafting a provision with a built-in exception to take care of those areas where there was a residence or store or park within the limits specified by the subsection. Mr. Chandler commented that the park or the corner candy store could well be the place which would cause the most serious loitering problems.

Senator Burns suggested that authority be incorporated into the statute to let the school administrator designate the proper perimeter around each individual school.

Mr. O'Dell proposed to include a definition of persons who were authorized to give permission and to include in that definition the school administrator. Chairman Yturri added that the parent should also have that authority in some instances.

Subsection (1) as written, Chairman Yturri said, would require written permission to attend a basketball game in the school building. Mr. O'Dell thought that buying a ticket would constitute permission. Chairman Yturri remarked that if that were the case, the statute would permit a person to go to a ball game without written permission but if that person "loitered or remained" after the game had ended, he would be subject to a charge of loitering under section 6.

Representative Carson pointed out that a person "remained" at a game and there was nothing wrong with that type of conduct. Senator Burns suggested that "or remains" be stricken from subsection (1) and that the commentary contain a statement that the act of buying an admission ticket to a school function would constitute written permission to be in the building or on the grounds.

Representative Carson noted that problems often were caused by persons who bought tickets to attend school functions but who were then rowdy at that basketball game or dance. Mr. O'Dell advised that the disorderly conduct statute would cover rowdyism.

Mr. Paillette said that the subcommittee had talked about including the phrase "or other specific legitimate reason for being there" in subsection (1) but with that language the problem arose as to the person who was going to decide which individuals had a legitimate reason.

Mr. Spaulding suggested that one solution might be to include an affirmative defense if the actor could prove that he was related to a child or had another specific legitimate reason for being on the premises. Mr. Paillette said he was not too enthusiastic about including such a defense. He contended that the school administrator had to be granted authority to say, "Get off these premises. You have no reason to be here and the reason you have no excuse to be here is because you don't have my written permission." Mr. Spaulding said he

had intended for his suggestion to give administrators the right to arrest an individual who was loitering but that person could not then be convicted if he could prove that he had legitimate reason to be there. It would apply to everyone and in that way would avoid any constitutional question of selectivity.

Mr. Wallingford said he did not feel a serious constitutional question was involved in subsection (1). Pages 42 to 45 of the commentary cited a number of Supreme Court cases construing statutes with almost identical language and they had not been declared unconstitutional.

Mr. Clark pointed out that the Commission had frequently mentioned police discretion and district attorneys' discretion and the good judgment of the courts. This was, he said, another instance which required some faith in those who would be applying this statute. Mr. Paillette agreed and pointed out that there had been no problem with parents being arrested under ORS 166.060.

Senator Burns moved to delete "or remains" from subsection (1) of section 6, the purpose being to make it clear that the subsection was aimed at the loiterer. The motion carried unanimously by a voice vote.

Senator Jernstedt moved to approve section 6 as amended. Mr. Clark seconded and the motion carried unanimously. Voting on both of the above motions: Senator Burns, Carson, Chandler, Clark, Frost, Jernstedt, Knight, O'Dell, Spaulding, Young, Mr. Chairman.

Section 7. Harassment. Chairman Yturri asked if subsections (1) and (2) were covered by the disorderly conduct sections. Representative Frost explained that harassment was intended to be a private crime as opposed to the public crime of disorderly conduct.

Chairman Yturri commented that the phrase "anonymously or otherwise" in subsection (3) could apply to a person who wrote to one of his creditors with the intent to annoy him enough to make him pay his bill. Mr. Knight advised that the subsection was directed at obscene telephone calls. Senator Burns asked if the Article on Privacy of Communications would cover obscene telephone calls and was told by Mr. Paillette that it would not.

Mr. Paillette explained that subsection (1) was similar to what is now assault and battery but the assault draft required an actual physical injury. Subsection (1) did not require a physical injury but was designed to cover situations where there was physical contact with no resulting injury and would take care of misdemeanor assault and battery situations.

Senator Burns was of the opinion that subsection (2) was identical to subsection (3) of section 4. He moved to delete subsection (2) and Representative Carson seconded the motion.

Mr. Paillette explained that subsection (2) of section 7 contained a different intent because it was directed at one individual rather than requiring intent to cause public inconvenience as did subsection (3) of section 4. The act might take place in public, he said, but would be directed at a single individual. After further discussion, Senator Burns withdrew his motion.

Senator Burns said he was not persuaded that subsection (3) was superior to ORS 165.550. Prosecutors, he said, had experienced good success with that statute and he was in favor of retaining it. Mr. Clark expressed the view that alarming and threatening letters should be covered by the statute and if subsection (3) were deleted, this feature would be lost.

Chairman Yturri asked if section 7 would be satisfactory if the Commission were to retain subsection (1) and rewrite subsection (3) to incorporate the provisions of ORS 165.550 with an additional provision to make it applicable to written communications. Mr. O'Dell expressed the view that all of section 7 should be retained or none of it and Mr. Chandler agreed.

Mr. Chandler then moved to adopt section 7. Mr. Frost seconded and the motion carried. Voting for the motion: Chandler, Clark, Frost, Jernstedt, Knight, O'Dell. Voting no: Senator Burns, Carson, Spaulding, Young, Mr. Chairman.

Section 8. Abuse of venerated objects. Senator Burns was of the opinion that the malicious destruction statute would cover everything covered by section 8. Mr. Chandler held the opposing view. Malicious destruction, he said, required some damage. While the damage under section 8 could perhaps be removed or repaired, the section nontheless provided a means to deal with this type of offensive conduct.

Mr. Clark moved that section 8 be approved. Mr. Spaulding seconded the motion and it carried. Voting for the motion: Carson, Chandler, Clark, Frost, Jernstedt, Knight, O'Dell, Spaulding, Young, Mr. Chairman. Voting no: Senator Burns.

Section 9. Abuse of corpse. Mr. Paillette explained that "abuse" was defined in section 1 of the draft to mean "deface, damage, defile or otherwise physically mistreat in a manner likely to outrage ordinary public sensibilities."

Mr. Spaulding inquired as to the meaning of "ordinary public sensibilities" and was told by the Chairman that it would refer to acts which would ordinarily disturb most people.

Mr. Clark moved that section 9 be approved. Senator Burns seconded and the motion carried unanimously with the same eleven members voting as voted on the previous motion.

Section 10. Cruelty to animals. Senator Burns inquired if a range cow would be considered to be under human custody and thereby

fall within the provisions of subsection (1). Mr. Paillette replied affirmatively and explained that "animal" had not been defined because it was too difficult, but the section was intended to include both domestic and pet animals as well as birds. It would therefore cover game cocks.

Mr. Spaulding pointed out that the existing cruelty to animals statute said "cruelly abandons" and asked if this concept would be encompassed by section 10. Mr. Paillette noted that subsection (2) referred to "cruel neglect" and this would include abandonment.

Mr. Clark moved that section 10 be approved. Mr. O'Dell seconded and the motion carried unanimously with the same eleven members voting as had voted on the previous motion.

Section 11. Falsely reporting an incident. Mr. Paillette explained that section 11 amounted to an aggravated disturbance of the peace.

Senator Burns moved to approve section 11. Mr. Chandler seconded the motion and it carried unanimously with the same eleven members voting as had voted on the previous motion.

Treason. Mr. Clark moved to delete the section and Senator Burns seconded the motion. He subsequently withdrew his second.

Mr. Paillette explained that the purpose of the section was to preserve the statutory crime of treason as defined in the Oregon Constitution and was in essence a restatement of the constitutional provision.

Mr. Chandler said that this provision did no harm and supported its inclusion in the code. Senator Burns withdrew his second to Mr. Clark's motion to delete the section and the motion died for want of a second.

Mr. Clark contended that this was a useless provision and was covered in other portions of the code.

Chairman Yturri said there was a possibility that it could be of use to the state in an extreme emergency and this possibility should not be overlooked.

Mr. Knight questioned the meaning of the phrase "or upon confession in open court" and was told by Mr. Paillette that this was constitutional language taken from Article I, section 24.

Mr. Clark asked who was referred to by the term "its enemies" and was told by Mr. Paillette that it referred to a wartime enemy.

Mr. Chandler moved that the treason section be approved and Senator Burns seconded. The motion carried. Voting for the motion: Senator Burns, Carson, Chandler, Frost, Jernstedt, Knight, O'Dell, Spaulding, Young, Mr. Chairman. Voting no: Clark.

Mr. Paillette asked if the Commission had any preference as to where the treason section should be placed. The members were generally agreed that it should appear at the beginning rather than at the end of the draft.

Offenses Against Privacy of Communications; Preliminary Draft No. 2; December 1969

Mr. Paillette explained that Subcommittee No. 1 had considered this Article on January 8. At that time the subcommittee had intended to consider sections 9 through 18 which were the procedural sections designed to provide a means for obtaining an eavesdropping warrant. Those sections, he said, were patterned after the New York statute. It was then discovered that New York had recently amended its code in order to comply with the requirements of the Omnibus Crime Control Act of 1968 which was very explicit with respect to wiretap. The subcommittee, therefore, had not had time to change the draft but the Commission could nevertheless consider the substantive portion of the Article; i.e., sections 1 through 8.

Mr. Paillette read from Chapter 119, of U. S. Code Title 18 which contained the wiretap provisions from Title III of the Act and explained the changes which would have to be made in the draft to make it conform. If the Commission wanted to recommend provisions to allow lawful wiretap under certain circumstances, it would be necessary to enumerate all of the felonies in the State of Oregon to which the law would apply. Senator Burns advised that for this reason it would not be possible to finish the Communications Article until the grading subcommittee had graded all of the substantive crimes.

Mr. Clark said he noted there was no provision in the draft for the sale of eavesdropping devices. They could, he said, be bought by mail order or in any number of novelty shops and would probably not be covered by section 3, possession of an eavesdropping device, because they were not sold for an illegal purpose.

Section 2. Eavesdropping. Mr. Wallingford pointed out that the first part of section 2 was drafted with sections 9 to 18 in mind which authorized ex parte orders and which would have to be redrafted.

Mr. Wallingford read subsection (1) and explained that it covered the situation traditionally thought of as "bugging." Mr. Knight said the subsection went beyond the bugging situation and prohibited, without a warrant, the police officer from hiding in a rest room, for example, to overhear the conversation of two suspects. Chairman Yturri explained that so long as he was overhearing the conversation with his own ears, he would not be violating the section. Mr. O'Dell agreed it would not prevent his overhearing the conversation with his own ears and at the same time recording the conversation.

Mr. Knight asked what effect this subsection would have on an informant who carried a tape recorder and turned the tape over to the police. Mr. Wallingford replied that he could not record a conversation in the absence of a warrant. Mr. O'Dell further explained that an undercover man could not be wired for sound even though he heard the conversation himself.

Mr. Clark pointed out that there was a practical matter which should be dealt with by this Article. In a number of cases dealing with undercover police officers, the officers were wired for sound for their own protection and the officer's receiving equipment was monitored. That officer's protection should be provided for in some manner, he said.

Mr. O'Dell stated there was a long line of federal cases which permitted an undercover agent, if present to hear the conversation, to be wired for sound and courts had held this was not an invasion because the agent was there to hear the conversation himself. The only prohibition was against those who for various reasons could not hear the conversation and used a bugging device to overcome that disability. If section 2 struck the ability of the police department to wire an undercover agent for sound, he said he could not support it.

Senator Burns said this point was not discussed in subcommittee. Section 2, he said, was derived from the Michigan and New York codes and asked if New York provided any such privileges or immunities for police officers. Mr. Wallingford replied that they did not because the recent trend in the law as indicated by the Supreme Court was becoming much stricter in this area and in requiring search warrants.

Mr. Paillette remarked that the Article contained a section on defenses but did not contain a defense for the police officer in the situation posed by Mr. Clark.

Senator Burns suggested that an additional subsection be inserted in section 2 which would include an affirmative defense for the peace officer acting as an undercover agent. Mr. Wallingford noted that a peace officer could be wired for sound under this draft so long as he had a warrant. Mr. Clark said that it more often than not was a long, involved procedure to obtain a warrant, particularly if it was needed after or before regular office hours. The provision would have to permit prompt action by the officer or it would be worthless, he said.

Senator Burns suggested that a concensus of the Commission be obtained and if the section were approved, it could then be rereferred to the subcommittee for the purpose of drafting a provision to take care of the situation under discussion.

Mr. Chandler moved to approve section 2 in principle with the understanding that the subcommittee would add language to protect the undercover police officers. This motion was later amended.

Mr. Knight asked if an informant should also be excepted when he was carrying a tape recorder to make a buy in a narcotics case--an act clearly prohibited by section 2. Mr. Wallingford replied that the informant was prohibited from this type of conduct under the present law in the absence of a warrant except on narcotics investigations.

Mr. Knight, in reply to a question by Senator Burns, said he believed it was more reliable to have a tape recording of what was said than to have the informant go back to the police station and tell what was said as he remembered it. Senator Burns was of the opinion that it was preferable to require the informant to go before the court to obtain a warrant. Mr. Knight replied that the time factor again had to be considered in these situations and it was often a time consuming process to obtain a warrant.

After further discussion, Mr. Chandler amended his earlier motion. He moved to approve section 2 with the understanding that the staff would add language to the section to take care of the undercover police officer situation discussed by Mr. Clark and to take in the informant as well. The motion, he said, would give leeway to the staff in drafting a provision to broaden the present restrictions on eavesdropping. The motion carried unanimously. Voting: Senator Burns, Carson, Chandler, Clark, Frost, Jernstedt, Knight, O'Dell, Spaulding, Young, Mr. Chairman.

The staff was further instructed to circulate Chapter 119, U. S. Code Title 18 to members of the Commission together with the redraft of section 2.

Tape 4 begins here:

Mr. Paillette pointed out that in the Criminal Law Reporter sometime ago there was an article concerning a speech made by Senator McClellan with respect to the Omnibus Crime Control Act. The Senator noted that at that time there were about six states which had enacted legislation to conform to the Act. Although not all of the states had yet enacted such legislation, Mr. Paillette said in his opinion it was necessary for Oregon to conform to the bill if wiretapping were to be permitted in Oregon; otherwise, the statute would be in violation of the federal law. He asked if it was the concensus of the Commission to provide for these wiretapping situations and the majority expressed approval of their adoption.

Section 3. Possession of an eavesdropping device. In reply to a question by Chairman Yturri, Mr. Paillette explained that the references in the commentary to carrying concealed and dangerous weapons were examples of legislation prohibiting possession of certain instruments of crime.

Senator Burns moved that section 3 be approved. Mr. Chandler seconded and the motion carried unanimously with the same eleven members voting as voted on the previous motion.

Mr. Clark asked if it would be possible to license parabolic and other listening devices. He objected to the fact that under section 3 anyone could buy such a device so long as he had no intent to use it unlawfully. Mr. Wallingford replied that the chief problem in this area was caused by the fact that there were so many legitimate uses for these devices. Chairman Yturri commented that legitimate uses far exceeded the illegitimate uses and since tape recorders were in such wide use generally, he believed that it was going far enough to prohibit their purchase by those who intended to use them unlawfully.

Section 4. Forfeiture of eavesdropping devices. Senator Burns said the only question he had with regard to section 4 was one which was not discussed in subcommittee. He asked who would have the authority to dispose of forfeited eavesdropping devices under section 4. Mr. Wallingford replied that in the original draft of this section, forfeited devices were given to the State Police.

Mr. Wallingford noted that section 5635 of the Michigan Revised Criminal Code provided that the devices "shall by court order be turned over to the department of state police for whatever disposition its director may order." Mr. Paillette suggested a comma be placed after "state" in section 4 and the Michigan language added to the section.

Chairman Yturri asked what would happen if the tape recorder was being bought on time and had not been completely paid for. Mr. Chandler replied that the lien holder could enforce his lien.

Mr. Chandler moved to approve section 4 with the following amendment:

> "...shall be forfeited to the state, and shall by court order be turned over to the Superintendent of State Police for whatever disposition he may order."

The motion carried unanimously with the same 11 members voting as had voted on section 3.

Section 5. Divulging an eavesdropping warrant. Mr. Wallingford read section 5 and Mr. Spaulding moved that it be adopted. Mr. Clark seconded and the motion carried unanimously. Voting: Senator Burns, Carson, Chandler, Clark, Frost, Jernstedt, Knight, O'Dell, Spaulding, Young, Mr. Chairman.

Senator Burns gave notice that he might later move to reconsider section 5 because it contained no element of culpability.

Chairman Yturri asked if there was any objection to requiring in section 5 that the person must intentionally disclose the information. The section would then be in conformity with section 6 and also contain an element of culpability.

Mr. Spaulding was of the opinion that section 5 should require strict liability. Mr. Paillette explained that without an element of culpability the section would not impose strict liability because of the provisions in the Culpability Article which said that if no culpability was stated, the statute would require the lowest form of culpability. If the Commission wanted to make it strict liability, this would have to be expressly stated in the section.

After further discussion, the Commission decided to leave section 5 as drafted with notice having been given by Senator Burns that he might move to reconsider.

Section 6. Divulging illegally obtained information. Mr. Spaulding moved that section 6 be adopted and Mr. Chandler seconded. Motion carried without opposition with the same 11 members voting as had voted on the previous motion.

Section 7. Defenses. Mr. Knight asked if the definition of "public servant" was broad enough to cover a person acting under the direction of a police officer. He contended that a person acting under the direction of a police officer should be exempted from section 7. Mr. Wallingford replied that under subsection (1) he would be included because that subsection referred to warrant procedures and the warrant procedures provided that they could be executed by a police officer or someone acting under his direction.

Mr. Paillette expressed the opinion that a person acting under the direction of a peace officer should be specifically provided for in subsection (1).

Mr. Knight moved that subsection (1) of section 7 be amended to read:

> "The person charged was a public servant, or a person acting under his direction, performing official duties...."

Mr. Chandler seconded and the motion carried unanimously by a voice vote.

Mr. Spaulding inquired if it was necessary to define "emergency" as used in subsection (3). Chairman Yturri commented that if it were defined, the draft would be running the risk of omitting a situation which could not be anticipated.

Mr. Clark moved that section 7 be approved as amended and Mr. O'Dell seconded. The motion carried unanimously with the same 11 members voting as had voted on the motion to approve section 6.

Section 9. Tampering with private communications. Senator Burns posed a hypothetical situation where a person working for a communications company overheard someone plotting a crime and told his supervisor about the conversation. By so doing, he asked if that person would be committing a crime under subsection (3) by divulging this information to another person. Mr. Wallingford said he believed that this type of conduct would be encompassed by subsection (3). Representative Carson said this posed a problem of whether someone who overheard a crime being plotted should be permitted to divulge that information to the police.

Chairman Yturri expressed the belief that there were some people who had the right to know of certain communications, the police being one of them. Mr. Clark said he though there was an existing statute which extended this type of exemption when a person was acting in a situation where there was an immediate threat to life.

Mr. Wallingford said that New York had a statute in point, section 250.35 entitled "Failure to report criminal communications", which read:

> "1. It shall be the duty of a telephone or telegraph corporation...employee...having knowledge that the facilities of such corporation are being used to conduct any criminal business...to furnish or attempt to furnish to an appropriate law enforcement officer or agency all pertinent information within his possession...."

Mr. Wallingford commented that any conspiracy or illegal agreement would be covered by the New York section.

Chairman Yturri expressed approval of including a similar provision in the proposed code. Mr. Spaulding said that if the Commission wished to be this prosecution oriented, a provision similar to that just read by Mr. Wallingford could be incorporated as subsection (4) of section 8 and a phrase added to the end of subsection (3) which would say "except as provided by subsection (4)."

After further discussion, Chairman Yturri asked the staff to consider section 8 further and draft a subsection similar to that in the New York code.

Next Meeting of the Commission

Chairman Yturri expressed his appreciation for the amount of time and effort the Commission members were devoting to the criminal code revision.

The next meeting of the Commission was set for January 23, 1970, at 9:30 a.m. Inasmuch as several members were unable to be present the following Saturday, January 24, it was agreed that the Commission would meet on January 23 only.

The meeting was adjourned at 1:30 p.m.

Respectfully submitted,

Mildred Carpenter, Clerk
Criminal Law Revision Commission

STATE OF OREGON
CRIMINAL LAW REVISION COMMISSION
311 CAPITOL BUILDING
SALEM 97310

October 29, 1969

Mr. Robert W. Blanchard
Superintendent of Public Schools
631 NE Clackamas Street
Portland, Oregon

Dear Mr. Blanchard:

A subcommittee of the Criminal Law Revision Commission is presently examining the laws relating to riot, disorderly conduct, loitering and related offenses and is studying a draft statute that proposes certain changes in this area.

Judge James Burns, subcommittee chairman, recently talked with Mr. Robert Ridgley about obtaining the opinions of school administrators regarding section 6 of the draft which contains provisions relating to loitering in or about school buildings. Mr. Ridgley suggested that we contact your office regarding the matter.

Accordingly, I am sending under separate cover three copies of our draft and direct your attention to pages 34 - 45 which set out our proposal along with commentary and copies of similar proposals of other states.

The subcommittee tentatively decided at a meeting on October 24 to delete subsection (2) and to amend subsection (1) of section 6 to read as follows:

> "Loiters or remains in or near a school building or grounds, not having any reason or relationship involving custody of or responsibility for a pupil or any other specific, legitimate reason for being there, and not having written permission from a school administrator."

PORTLAND PUBLIC SCHOOLS
631 Northeast Clackamas Street / Portland, Oregon 97208
Phone (503) 234-3392
OFFICE OF THE SUPERINTENDENT

November 7, 1969

Mr. Donald L. Paillette
Project Director
Criminal Law Revision Commission
State of Oregon
311 Capitol Building
Salem, Oregon

Dear Mr. Paillette

I appreciate the opportunity to have staff members review your proposed legislation directed at dealing with the problems of loiterers around school. In recent years the greatest distress caused by loiterers is the threat of riot and violence. In addition, carloads of non-school youth antagonize and harass school students as well as adults entering and leaving school buildings in ways that create tensions and distress within the school.

We have a concern about the language in the proposed statute because "hangers on" of the kind mentioned above almost always claim to have a legitimate purpose such as waiting for a brother, sister, or friend to meet them during a noon hour or after school. Often these loiterers have acquaintanceship with students in school and use this acquaintance as a reason for being there. Disproving their reason is often difficult, if not impossible, because the loiterer will have a cohort in school primed to testify that he had an appointment to meet the loiterer.

In answer to your second question, a loitering ordinance to be effective would necessitate that the loiterers not be able to remain within sight of the school or school grounds. A carload of youth in sight of the school often draws other problem youth out of school to contribute to the problem. Another kind of loiterer is the person who may be providing narcotics or marijuana to students. He will loiter in the park area or some other place not too distant from the school where he can meet students in a secluded setting.

Whether the proposed language would be more effective than the present statute's language is questionable. At present it is our understanding that the loitering law is ineffective because a person may be apprehended only if he has no "legitimate reason" for being there, and nearly everyone seems able to provide some kind of reason that might be difficult to disprove as legitimate. The new language still permits a person to loiter if he can provide a "legitimate reason".

Many discussion have been held with our school principals, as well as with law enforcement officers and attorneys, concerning the problems resulting from having no effective loitering law. I am not sure how such a law that would be constitutional should be rewritten, but it seems unreasonable that it is possible for people with no good purpose to loiter near school, promote unrest, and be a threat to students by assault or to the school by potential riot. Last year and this fall there have been several instances in which groups of non-school people assembled near schools and threatened the security of other students, but nothing could be done unless an actual assault occurred.

We are very concerned with this matter and appreciate assistance that can be provided. We will continue to review the materials and will send other reactions as they develop.

The work your committee is doing is most worth while.

Sincerely

Robert W. Blanchard
Superintendent of Schools

RWB
lm
c.c. to Judge James Burns