Tapes #51 and 52

#51 - Both Sides
#52 - Both Sides

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

April 3, 1970

A G E N D A

		Page
1.	Approval of Minutes of Commission Meeting of March 18 and 19, 1970	1
2.	OBSCENITY AND RELATED OFFENSES (Article 29) Preliminary Draft No. 3; February 1970	1
3.	OFFENSES AGAINST THE FAMILY (Article 20) Preliminary Draft No. 2; March 1970	10 32
4.	GAMBLING OFFENSES (Article 30) Preliminary Draft No. 1; January 1970	22
5.	OFFENSES INVOLVING FIREARMS AND DEADLY WEAPONS Preliminary Draft No. 1; March 1970	34

# # #

OREGON CRIMINAL LAW REVISION COMMISSION

Twentieth Meeting, April 3, 1970

Minutes

Members Present: Senator Anthony Yturri, Chairman
Senator John D. Burns, Vice Chairman
Judge James M. Burns
Mr. Robert W. Chandler
Mr. Donald E. Clark
Mr. Frank D. Knight
Mr. Bruce Spaulding

Delayed: Attorney General Lee Johnson

Excused: Representative Wallace P. Carson, Jr.
Representative David G. Frost
Representative Harl H. Haas
Senator Kenneth A. Jernstedt
Representative Thomas F. Young

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

Also Present: Mr. Reginald S. Williams, representing Motion Picture Assoc. of America, Box 5, Salem, Ore.

Agenda: OBSCENITY & RELATED OFFENSES
Preliminary Draft No. 3; February 1970

OFFENSES AGAINST THE FAMILY
Preliminary Draft No. 2; March 1970

GAMBLING OFFENSES
Preliminary Draft No. 1; January 1970

OFFENSES INVOLVING FIREARMS & DEADLY WEAPONS
Preliminary Draft No. 1; January 1970

The meeting was called to order by the Chairman, Senator Anthony Yturri, at 9:45 a.m. in Room 315, Capitol Building, Salem.

Approval of Minutes of Commission Meeting of March 18 and 19, 1970.

Mr. Clark moved the minutes of the Commission meeting of March 18 and 19, 1970, be approved as submitted. The motion carried unanimously.

Obscenity & Related Offenses; Preliminary Draft No. 3; February 1970.

Mr. Paillette advised that the Obscenity Article had been considered by Subcommittee No. 1, chaired by Senator Burns. The

draft commentary, he said, traced the development of case law regarding the dissemination of obscene or pornographic material. The present Oregon statute, ORS 167.151, embodied the classic test for judging material that evolved as a result of the decision in Roth vs. United States 354 US 476 (1957). In this case a three-pronged test was established which has since been used not only by the Supreme Court of the United States but by many states in their statutory definition of the crime of disseminating obscene material. These tests, basically, were:

(1) The dominant theme of the material, taken as a whole, appeals to a prurient interest in sex.

(2) The material is patently offensive because it affronts the contemporary standards of the community relating to the description or representation of sexual matters.

(3) The material is utterly without redeeming social value or importance. The latter is probably the most difficult of the tests to apply.

The approach taken by the subcommittee departed from Roth in that it did not use the language "prurient interest," "redeeming social values," "contemporary community standards," etc. The draft approached the problem with, first, a list of generic terms which attempted to define the type of material to be covered and, secondly, focused the statute on the dissemination of materials to minors. The subcommittee considered incorporating this approach into existing law but had ultimately decided to recommend repeal of the existing statute.

Mr. Paillette related that the genesis of the draft, the terms used and the basic approach to the problem was one suggested by Richard Kuh, a former New York prosecutor, who had probably prosecuted more obscenity cases than any other man in the United States. The draft, however, did not adopt all of Mr. Kuh's recommendations. He recommended a trilogy of statutes dealing with the dissemination of obscene materials to minors, public display or commercial use of obscene material and, third, a very broad obscenity statute covering both minors and adults. The third suggestion was not adopted by the subcommittee but instead focused on the dissemination of obscene materials to minors and, secondly, on the public display of materials which would fall within certain prohibited areas, as defined in the definition section.

Mr. Paillette related that the subcommittee believed that the dissemination of obscene materials to minors was probably the one area where they would be on reasonably safe constitutional grounds to try to have any type of control. While he could not say with certainty that the proposed draft would be upheld by the Supreme Court, he did think it was more precise than the existing statute.

Mr. Clark thought obscenity involved one of the biggest policy questions the Commission would face. He was of the opinion that some acts of violence were much more obscene than sex acts and violence was frequently shown in movies, on television, in comic books and in advertisements. Other than acts involving sado-masochistic behavior, he said, he had no objection to minors viewing conduct prohibited by the proposed draft. He believed that the draft was focusing on the area that was least damaging to minors.

Mr. Paillette observed that statutes which had attempted to control the violent type of conduct described by Mr. Clark had met with very little success in the courts, particularly with television and newspaper reporting which frequently involved the reporting of violent crimes. Mr. Chandler commented that newspapers were not very explicit in their descriptions of murders and other acts of violence.

Senator Burns felt the Commission had a responsibility to try to control the dissemination of obscene material to minors. The subcommittee was convinced, he said, that the draft had a good chance of being declared constitutional because its provisions were aimed directly at minors. He could not see how anybody could object to what the draft was trying to do, i.e., stop the furnishing of obscene material to minors, the sending of obscene materials to minors, the exhibiting of obscene performances to minors and the displaying of obscene material to minors. If the individual were over the age specified in the draft or if the conduct fell within the ambit of teaching or parental control, it would not come within the provisions of the draft. He indicated that one of the concerns of the subcommittee was out-of-state purveyors of obscene material and junk mailers and this subject was treated in the draft.

Chairman Yturri commented that one of the purposes of the Commission was to set down as simply as possible what the statutory criminal law should be in Oregon. He did not think it was the Commission's purpose to depart from the standard of conduct accepted by the vast majority of the people in Oregon and the acceptance of Mr. Clark's suggestion would result in the Commission proposing a view which would not represent the majority of the public. The draft definitions, he continued, were far more objective, lucid and clear than anything Oregon had ever had. Certainly, however, the draft represented a minimum of what the Commission should do in this area by limiting its provisions to minors.

Judge Burns stated that there was no question that the Commission faced a difficult problem in writing obscenity legislation that met the constitutional test because any restriction on obscenity had to be very narrowly drawn. It was his opinion that the proposed draft came as close as possible to the areas in which the Supreme Court would allow restrictions, namely, minors and public displays.

Section 1. Definitions. Judge Burns asked how the draft provisions would apply to advertising frequently found in magazines such as Playboy and the advertising found in connection with movies.

Mr. Paillette advised that this type of problem was dealt with in section 7 which utilized some of the definitions contained in section 1. It drew restrictions on outside displays when the displays fell within the definition of "advertising purposes" and also within the meaning of "displays publicly."

Judge Burns asked about the status of a display of Playboy magazines in front of a bookstore. Mr. Chandler observed that it would be the cover of the magazine which would be on display, not the centerfold, and the centerfold would be the part that would fall within the definition of "nudity." Mr. Paillette felt the draft provisions would not place any restrictions on bookstore operators that the conscientious operators were not observing at the present time.

Mr. Clark protested that a store could be prosecuted for selling many general circulation magazines to purchasers under the age of 18. He said the underground publication "Willamette Bridge" contained matter which would come within the definition of "obscenities" set out in subsection (7) and expressed the view that this and similar publications should not be banned to minors. His 16 year old son, he said, would be unable to buy a copy of Playboy magazine, a publication which contained articles by writers of considerable merit.

At the conclusion of the Commission's consideration of the Obscenity Article, Senator Burns moved that section 1 be approved and the motion carried. Voting for the motion: Judge Burns, Senator Burns, Chandler, Knight, Spaulding, Mr. Chairman. Voting no: Clark.

Section 2. Furnishing obscene materials to minors. Mr. Paillette recalled that as originally drawn, section 2 had been limited to the sale of obscene materials to minors. The subcommittee believed some loopholes would remain if the section's provisions concentrated only on sales in that there could be motives for furnishing obscene, sexually oriented materials or sado-masochistic materials other than for commercial gain. Section 2, he said, provided some very broad coverage but was still limited to furnishing to minors, which under the draft definition would be an unmarried person under the age of 18.

Mr. Clark wondered if the whole problem could not be reached in another way--for example, in the Article on Offenses Against the Family where the focus was on the welfare of children.

Mr. Chandler pointed out that the Supreme Court had not upheld the statute on contributing to the delinquency of minors. He thought enforcement would be impossible if the route proposed by Mr. Clark were adopted and Mr. Paillette concurred.

Judge Burns observed that many individuals furnished obscene materials simply for commercial gain, Some, too, gave away material in order to create a desire for it, thus creating future sales.

Mr. Paillette related that the subcommittee had discussed the possibility of excluding nudity from the scope of the draft but had decided it was best to retain the definition, recognizing the provisions imposed some tough restrictions on the dissemination of materials to minors. From the standpoint of the dealer, he continued, under the proposed statute he would at least have some degree of certainty as to what was prohibited, which was not true under existing law.

Mr. Chandler moved approval of section 2 as drafted. Motion carried. Voting for the motion: Judge Burns, Senator Burns, Chandler, Knight, Spaulding, Mr. Chairman. Voting no: Clark.

<u>Section 3. Sending obscene materials to minors.</u> Mr. Chandler moved that section 3 be approved.

In reply to a question by Judge Burns, Mr. Paillette explained that subsection (2) covered the mailing of materials to an adult which could not lawfully be furnished to a minor. It was in the form of a disclaimer and would take the distributor "off the hook" if he did not know the addressee was a minor.

Judge Burns commented that Mr. Gordon Ramstead, a Eugene attorney representing the magazine distributors, had visited with him sometime ago on the subject of this draft. Mr. Chandler advised that Mr. Ramstead had appeared before the subcommittee together with other interested individuals and had agreed that reputable magazine distributors would not be hurt by the draft provisions. The subcommittee, he said, had made every effort to protect the reputable dealers as well as persons who mailed material upon receipt of a false claim that the would-be recipient was not a minor and the employe who had no policy choice in the matter, such as the projectionist, the usher or the cashier in a theater.

Mr. Paillette concurred that the magazine distributors were interested in controlling dissemination of obscene materials to minors and had supported Senate Bill 92 in the 1969 session of the legislature which would have provided a civil remedy for injunction against a distributor prior to his being charged criminally with

selling harmful material to minors. They were in favor of the injunction procedure requiring a prior determination before prosecution could be instituted against an individual, but the draft did not subscribe to this view. He pointed out that in State v. Childs, 87 Adv Sh 495, 447 P2d 304 (1968), the Supreme Court had gone so far as to say that requiring the prosecution to have a prior determination of the material's obscenity was not and should not be the law.

Vote was then taken on Mr. Chandler's motion to approve section 3 and the motion carried. Voting for the motion: Judge Burns, Senator Burns, Chandler, Knight, Spaulding, Mr. Chairman. Voting no: Clark.

Section 4. Exhibiting an obscene performance to a minor. Mr. Chandler advised that Mr. Ed Whelan, representing the Oregon AFL-CIO, was particularly interested in section 4 because of its connection with employes in theaters such as projectionists and cashiers. Mr. Paillette explained that section 4 had been amended in subcommittee by adding subsections (2) and (3) which excluded an employe from prosecution providing he was acting within the scope of his regular employment.

Judge Burns asked how the theater owner was to solve the problem of the 17 year old who looked like he was over 21 and was admitted to view an obscene motion picture. Senator Burns replied that this was analogous to the situation of selling liquor to minors and was the seller's problem. Judge Burns asked if it would be a defense to the charge if the theater owner could prove that he in good faith believed that the individual was over 21. Mr. Spaulding replied that the subcommittee had discussed this problem and had decided against including such a defense. Judge Burns commented that the owner could probably contradict the allegation that he "knowingly" admitted the minor inasmuch as "knowingly" was one of the culpability requirements in subsection (1). Mr. Spaulding remarked that this would be true if he had used reasonable care to try to determine the person's true age.

Mr. Knight asked what would happen in a situation where the theater manager lived out of town and the ticket taker decided to let someone into the theater when he knew him to be under age. Mr. Chandler replied that the assumption was that there would always be someone on the premises who would be in charge. It was, however, the manager's responsibility; he was supposed to control the acts of his employes. Judge Burns agreed that this was the proper approach inasmuch as the manager was the one who chose to show the movie. Professor Platt pointed out that vicarious liability was always a troublesome area but the courts had generally held that the manager was liable for the acts of his agents. In section 4 there was a mens rea element in that the

act had to be "knowing" not only on the part of the agent but also on the part of the management. He said he would hope that the courts would not impose liability on the manager unless he acted knowingly.

Mr. Spaulding advised that subsections (2) and (3) had been added to section 4 at the behest of Mr. Whelan because the subcommittee agreed with his position that the employed ticket taker should not be prosecuted for following the directions of the manager.

Mr. Chandler moved that section 4 be approved. Motion carried. Voting for the motion: Judge Burns, Senator Burns, Chandler, Knight, Spaulding, Mr. Chairman. Abstaining: Clark.

Section 5. Displaying obscene materials to minors. Mr. Paillette explained that section 5 dealt with the magazine distributor or bookstore dealer who displayed obscene materials on his premises in such manner as to make them accessible to minors. The section would permit him to maintain a portion of the premises for adults only.

Judge Burns pointed out that subsection (2) referred to a "magazine...that reveals a person or portion of the human body that depicts nudity" and noted that this description could fit a picture of a foot or a hand. His concern was that magazines displaying a picture fitting that description would not necessarily be an obscene or "dirty" magazine. The problem arose, he said, when "portion of the human body that depicts nudity" was considered in conjunction with the definition of "nudity."

Senator Burns asked if this problem could be solved by deleting "that reveals a person or portion of the human body" from subsection (2). Chairman Yturri noted that the same language appeared in subsection (1) and observed that if Senator Burns' suggestion were adopted, there would be no proscription against, for example, depicting a nude from the neck down.

Judge Burns said perhaps his objection went to the phrase "less than opaquely covered" in the definition of "nudity." Mr. Paillette advised that this was the so-called "pasty" amendment and was very similar to both the definition recommended by Mr. Kuh and to the definition contained in Senate Bill 92. In effect, he said, it meant that if the human female breast had a "pasty" that covered the nipple and the areola only, it would still fall within the definition of "nudity."

Mr. Clark again expressed opposition to labeling nudity, as such, obscene and asked what was so wrong with nudity or display

of the human body. Senator Burns replied that as a matter of art, there was nothing wrong with nudity, and the draft made allowance for this fact, but as a matter of profiteering on young minds, there was a great deal wrong with it.

After further discussion, Judge Burns commented that this was an area where the Commission would have to rely on the sound discretion of the prosecutors. He then moved that section 5 be approved and the motion carried. Voting for the motion: Judge Burns, Senator Burns, Chandler, Knight, Spaulding, Mr. Chairman. Voting no: Clark.

Section 6. Defenses. Judge Burns asked what subsection (3) of section 6 was designed to achieve and was told by Mr. Knight that it was to permit the sale of magazines such as Newsweek or National Geographic. They might have pictures of nudes in them but their basic purpose was not titillation. Judge Burns said the language was vague but he could see the necessity of providing some kind of an escape clause. Mr. Chandler advised that the subcommittee's intent was to prohibit an over-zealous prosecutor from declaring a publication obscene merely because it contained nude pictures.

Mr. Chandler moved that section 6 be approved and the motion carried. Voting for the motion: Judge Burns, Senator Burns, Chandler, Knight, Spaulding, Mr. Chairman. Abstaining: Clark.

Section 7. Publicly displaying nudity or sex for advertising purposes. Mr. Paillette read section 7 and explained that it was aimed at prohibiting offensive displays in places such as bus stations where persons would be unwillingly subjected to them. If a store displayed such material in its front window or in such a manner that it could be seen from the street, he said, it would be covered by this section. However, if the owner placed the display where it could not be seen from the street, he would not violate this section so long as minors did not patronize his place of business.

Judge Burns commented that if this section were enacted, a night club could not display pictures of its "Go Go" girls in front of the club but could place the pictures advertising the evening show in the lobby. Mr. Chandler agreed and explained that the section was intended to say that the owner had no right to intrude upon the sensibilities of passersby who had no interest in their advertising. Judge Burns added that a store such as Meier & Frank could not display this type of advertising inside their store because there was a reasonable expectation that minors would be inside that store.

Mr. Knight pointed out that under this draft it would be possible to put up any type of picture or use any type of language so long as the display was not used for advertising purposes or for commercial gain. Senator Burns concurred that this was correct.

Judge Burns asked what effect subsection (2) of section 7 would have if the man who owned the premises had them leased out to someone who violated the provisions of this Article. Senator Burns pointed out that the culpability element of "knowing" was included in section 7 and unless the lessor knew that the lessee was, for example, showing "I Am Curious Yellow" to minors regularly, he would not come under section 7.

Mr. Knight asked if public displays not connected with advertising or commercial gain were covered elsewhere in this draft. Judge Burns explained that Mr. Knight was concerned with a situation where someone might show "I Am Curious Yellow" in the park blocks in Portland without charging admission and without an intent to advertise anything. In that situation he would not fall under the provisions of section 7. Judge Burns pointed out that if a "Go Go" dancer decided to put on a performance in the park blocks, this would not be prevented either because subsection (1) of section 7 did not cover personal displays. Mr. Chandler commented that the subcommittee had felt that the possibility of that type of activity was quite limited.

Mr. Paillette advised that under the Article on Offenses Against the Family there was a section entitled "Endangering the welfare of a minor" which could be used to get to that problem. Senator Burns commented that it was clear that such a situation would not be covered under the Obscenity Article.

Mr. Clark asked if a nude statue in the park would be considered obscene and Chairman Yturri pointed out that section 8 would exempt a statue from the draft. Mr. Clark expressed the view that the Obscenity Article was not offering any kind of meaningful protection and the statutes were only clouding the issue and placing an impossible burden upon the police. Senator Burns replied that the draft was considerably narrower and would give the police a great deal more direction than did the existing statute.

Mr. Clark pointed out that Mr. Knight had said that a person could display any type of a picture in his front yard and so long as he did not do so for personal gain, there would be no proscription against that activity. Senator Burns said this would be true under this draft but when the Commission considered Offenses Against the Family, this loophole would be closed. This subject was discussed subsequently. See pages 17-18 of these minutes.

Mr. Chandler moved that section 7 be approved. Motion carried. Voting for the motion: Judge Burns, Senator Burns, Chandler, Spaulding, Mr. Chairman. Abstaining: Clark, Knight.

Section 8. Defenses. Judge Burns questioned the advisability of including "similar" in subsection (2). Senator Burns indicated this was an "including but not limited to" type of definition.

Judge Burns moved that section 8 be approved. Motion carried. Voting for the motion: Judge Burns, Senator Burns, Chandler, Knight, Spaulding, Mr. Chairman. Abstaining: Clark.

Offenses Against the Family; Preliminary Draft No. 2; March 1970.

Section 1. Offenses against the family; definitions. Mr. Wallingford explained the three terms defined in section 1 as outlined in the commentary thereto. The inclusion of stepchildren and lawfully adopted children in subsection (2), he said, would broaden existing law because these two classes were not presently included.

Mr. Chandler moved that section 1 be approved. Motion carried unanimously. Voting: Judge Burns, Senator Burns, Chandler, Clark, Johnson, Knight, Spaulding, Mr. Chairman.

Section 2. Bigamy. Mr. Wallingford explained that section 2 made no change in existing law except to alter the name of the crime from "polygamy" to "bigamy." He noted that subsection (2) provided a defense if the actor reasonably believed he was eligible to marry.

Mr. Clark asked if there were a substantial number who believed this crime should be handled civilly rather than criminally and was told by Mr. Paillette that the staff's research had not uncovered anyone advocating this policy.

Mr. Spaulding inquired if the meaning of the phrase "purports to marry" in subsection (1) was clear. He noted that the commentary on page 4 stated this language was "intended to negate the defense that since a prior existing marriage was still in full force and effect, the subsequent marriage was null and void and therefore not in law or in fact a marriage." He questioned whether it was intended to cover such conduct as a couple registering as man and wife at a hotel when they were not married.

Mr. Paillette explained that the language was intended to cover a situation where a person tried to raise the defense that he could not have entered into a second legitimate marriage contract because his first marriage was valid. The provision, he said, was intended to permit a reasonable mistake of law or fact to be a defense.

Mr. Paillette advised that section 2 extended present law because it covered both parties to the transaction even though one was not married. If an unmarried individual married someone he knew to be married, he would violate the proposed statute but not present law.

Mr. Clark suggested it would be preferable to invalidate second marriages contracted while the first marriage was valid rather than to make the conduct a crime. Mr. Wallingford replied that the second marriage would not be valid in any event; however, so many rights and liabilities attached to a marriage contract, particularly when children were involved, that it was desirable to discourage second marriages with a criminal sanction. Mr. Spaulding observed that the public had a real stake in the validity of marriages and Mr. Chandler agreed, adding that the government licensed them, licensed those who performed them and set the conditions by which they were dissolved.

Mr. Chandler moved approval of section 2 as drafted. The motion carried unanimously. Voting: Judge Burns, Senator Burns, Chandler, Clark, Johnson, Knight, Spaulding, Mr. Chairman.

Professor Platt called attention to subsection (2) of section 2 providing for a specific defense for a mistake of fact or law. He recalled that when the Article on Principles of Liability was considered, a general defense of ignorance or mistake of law or fact was purposely omitted because of the manner in which the various levels of mens rea were articulated in the proposed code. He expressed the view that insertion of a defense such as that in section 2 (2) relating to a specific crime was inconsistent. Future problems might be caused, he said, if an argument was made that it was not the Commission's intent to create this defense for other specific crimes. He advised that the Model Penal Code had a specific, general section setting up ignorance or mistake of fact or law as a defense and believed that this was the better way to handle the problem. The defense had been omitted for certain other crimes, he said, and to be consistent it should be placed in the General Liability Article so it would apply to all crimes.

Mr. Paillette recalled that the first draft on Principle of Liability did include such a defense. He observed that most of the cases dealing with mistake of law or fact were domestic relations type cases and agreed that the defense would be better included in the Article on General Principles of Criminal Liability.

Mr. Clark moved to reconsider the action by which section 2 was approved and the motion carried.

Mr. Paillette pointed out that the Article on Sexual Offenses permitted a defense of reasonable mistake of age or of ability to consent. This too would be an inconsistency, he said, and Professor Platt's argument on inconsistency would apply to those provisions as well.

Professor Platt observed that the crimes of statutory rape and bigamy had traditionally been crimes which required no mens rea element, even at common law. He said he was not suggesting that the deletion of subsection (2) of section 2 should be construed as a return to the common law that bigamy was an absolute liability offense nor should it be construed this way so far as statutory rape was concerned.

Judge Burns was of the opinion that in the absence of strong commentary and legislative history, most courts would construe the word "knowingly" in section 2 to mean that the individual went through the second marriage ceremony "knowingly."

Mr. Paillette pointed out that the commentary on page 3 said that the mens rea element of "knowingly" referred to marriage, purported marriage and to the fact that one of the parties had lawfully contracted a prior marriage which had not been dissolved. Judge Burns commented that in view of this commentary statement, it was inconsistent to retain subsection (2).

Mr. Johnson moved to delete subsection (2) of section 2. Motion carried. Voting for the motion: Judge Burns, Senator Burns, Chandler, Clark, Johnson, Spaulding. Voting no: Knight.

Mr. Knight commented that he had voted against the motion because he favored the draft approach which placed the burden on the defendant to prove mistake rather than requiring the state in its case-in-chief to prove otherwise.

Section 3. Incest. Mr. Wallingford noted that section 3 changed existing law in that stepchildren and adoptive children were included which was not true under existing statutes. Also, section 3 would not include conduct between first cousins whereas this classification was not excepted by present law. Mr. Paillette added that it was a policy question as to whether the Commission believed there were sound genetic or social reasons for prohibiting this conduct between first cousins.

Mr. Clark asked what recommendations biologists made with respect to this question and was told by Mr. Wallingford that authorities disagreed on the subject. He advised that marriages between first cousins would still be prohibited in Oregon. Mr. Johnson observed that one of the principal purposes of an incest statute was to preserve the family relationship.

Professor Platt asked if the provisions of section 3 would cause a problem in a situation where a father and an adult son engaged in private, homosexual activity. The Sexual Offenses Article, he related, contained no proscription against private, homosexual activity between consenting adults but the conduct he described would be prohibited by section 3. Mr. Paillette agreed the two provisions were inconsistent in this respect. If the sexual conduct between father and son took place when the son was a minor, he said, it would fall under first degree sodomy but would not be covered when the son had reached the age of consent.

Chairman Yturri observed that incest and homosexuality were two entirely different concepts. Judge Burns agreed and said that even though the two provisions referred to by Professor Platt might be slightly inconsistent, the number of fathers and sons engaging in this type of activity would be extremely minute. He said he would be less offended by retaining the inconsistency than by writing in an exclusion.

Mr. Johnson moved approval of section 3 as drafted. Motion carried. Voting for the motion: Judge Burns, Senator Burns, Chandler, Johnson, Knight, Spaulding, Mr. Chairman. Voting no: Clark.

Mr. Clark explained that he had voted against the motion because he thought the issues had not been clarified with respect to consenting, nonblood relatives.

The Commission recessed for lunch at this point, reconvening at 1:15 p.m.

Members Present: Senator Anthony Yturri, Chairman
Senator John D. Burns, Vice Chairman
Judge James M. Burns
Mr. Robert W. Chandler
Mr. Donald E. Clark
Attorney General Lee Johnson
Mr. Frank D. Knight
Mr. Bruce Spaulding

Delayed: Representative Wallace P. Carson, Jr.

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

Also Present: Mr. Donald R. Blensley, Yamhill County District Attorney; District Attorney's Associaton Criminal Law Revision Committee
Mr. Jacob B. Tanzer, Solicitor General, Justice Dept.; Chairman, Oregon State Bar Committee on Criminal Law and Procedure

<u>Section 4. Abandonment of a child in the second degree.</u>
<u>Section 5. Abandonment of a child in the first degree.</u>
Mr. Spaulding asked why "wholly" was used to modify "abandon" in sections 4 and 5. Mr. Paillette replied that "wholly" was included to show that the individual intended to make no provision for the child's care and Mr. Spaulding thought this was clearly stated by "abandon" without the modifier. Senator Burns agreed and added that the term "wholly" could create problems of proof for the prosecution.

Mr. Paillette explained that the subcommittee was attempting to avoid situations where a parent left the child but had made some reasonable accommodations for his care prior to his departure. Under ORS 167.605, he said, abandonment and nonsupport went together whereas the draft attempted to segregate the two into separate crimes. Chairman Yturri asked if "wholly abandon" accomplished this purpose and it was generally agreed that it did not.

Judge Burns moved to strike "wholly" in sections 4 and 5. The motion was subsequently withdrawn.

Chairman Yturri asked if "abandonment" would be defined in the proposed code and received a negative reply from Mr. Paillette. Mr. Spaulding noted that "abandonment" had been construed a number of times by case law.

Chairman Yturri asked if a person would be abandoning a child when he left him with someone, made arrangements for his care and came back to see him every month. Mr. Spaulding expressed doubt that this would constitute abandonment.

Mr. Spaulding inquired whether "lawful guardian" in sections 4 and 5 was intended to refer to the guardian of the estate, the guardian of the person, or both. Mr. Paillette replied that the term meant the guardian of the person and advised that this same language was used in several places in the proposed code to make it clear that the provision was not limited to parents. Mr. Spaulding was of the opinion that the term would be more clear if it read "parent, or other person lawfully charged with the care...."

Chairman Yturri asked how the subcommittee arrived at the age of 18 in section 4 and was told by Mr. Paillette that this was the result of a compromise and was intended to cover the nonsupport type of situation.

Replying to a question by Mr. Spaulding, Mr. Paillette advised there was nothing in the existing statutes comparable to section 4. The intent was to separate the offense of abandonment from that of nonsupport, he said.

Senator Burns expressed the view that it would be as detrimental to a child to abandon him at age 10 as it would be to abandon him at age eight. He suggested that section 5 be deleted and that the two sections be combined into one entitled "Abandonment of a child."

Chairman Yturri proposed to define "abandon" or "abandonment" in the code. If this were done, he said, section 4 could be deleted and the provisons of section 5 retained. He would, however, raise the age from eight to 16. Mr. Wallingford advised that New York used the age of 14.

Senator Burns moved to amend the draft to follow the New York approach by retaining but one degree of the offense and using the age of 14. This motion was later withdrawn. Chairman Yturri pointed out that since the draft said "less than," "14" would include 13 year olds but not14 year olds. He suggested the age be raised to 15 for this reason.

Mr. Johnson asked how the conduct of parents who left a two year old alone while they went out for a good time would be covered. Judge Burns observed that there were fairly frequent cases where parents left children in the car while they spent an evening in a tavern. Mr. Johnson was of the opinion that this conduct should be condemned and was a good argument for including a definition of "abandonment" in the code.

Mr. Paillette advised that the proper approach was not to define a term if its intended meaning were the ordinary, dictionary definition and he felt this was the case with "abandonment." The Commission had tried to follow this approach in previous drafts. Chairman Yturri suggested the commentary should reflect this fact.

Senator Burns proposed to include another crime in this Article entitled "neglect." Neglect was presently covered by ORS 167.215, he said. Chairman Yturri suggested this might be taken care of by adding another subsection to section 8, endangering the welfare of a minor.

Chairman Yturri asked Mr. Paillette if the proposed criminal code covered a situation where a two year old child was left alone in a house for a weekend. Mr. Paillette replied that this type of conduct would presently be covered by ORS 167.215 but the statute was probably constitutionally infirm on the same grounds enunciated by Hodges in declaring the contributing statute unconstitutional.

Judge Burns withdrew his motion to delete "wholly" from sections 4 and 5.

Senator Burns withdrew his motion to adopt the New York approach and moved to combine sections 4 and 5 to read:

> "Section 4. Abandonment of a child. A person commits the crime of abandonment of a child if, being a parent, lawful guardian or other person lawfully charged with the care or custody of a child less than 15 years of age, he deserts the child in any place with intent to abandon it."

This motion was unanimously adopted by voice vote.

Mr. Chandler moved approval of section 4 as amended and this motion also carried unanimously. Voting: Judge Burns, Senator Burns, Chandler, Clark, Johnson, Knight, Spaulding, Mr. Chairman.

Senator Burns moved to delete section 5 and the motion carried unanimously on a voice vote.

Section 6. Criminal nonsupport. Senator Burns recalled that the Obscenity Article defined a "minor" as "an unmarried person who has not reached his eighteenth birthday" and asked if this definition would create a problem in section 6. He suggested the section be amended to read "...charged with the support of an unmarried child less than 18 years of age...." Mr. Knight observed that once a child married, he was emancipated and the parent or guardian had a lawful excuse to discontinue support.

Professor Platt was of the opinion that nonsupport should be prosecuted under the civil law rather than the criminal. He said that it was his understanding that the existing nonsupport statute was used most often as a tool of the civil law as a threat to force payment by the husband to the wife.

Senator Burns acknowledged there was a civil remedy available through reciprocal agreements with other states but in many states reciprocal obligations were not enforced. A criminal statute such as section 6, he said, was used principally for extradition purposes. Mr. Johnson agreed that this type of statute was used as a club and added that one of the greatest weaknesses in the welfare recovery program was the Attorney General's lack of criminal jurisdiction.

Mr. Paillette expressed the view that a criminal nonsupport statute had a desirable deterrent effect and disagreed with an earlier statement that nonsupport statutes were not enforced.

Mr. Chandler moved approval of section 6. The motion carried unanimously. Voting: Judge Burns, Senator Burns, Chandler, Clark, Johnson, Knight, Spaulding, Mr. Chairman.

Section 7. Criminal nonsupport; special rules of evidence. Mr. Wallingford explained that section 7 restated the special rules of evidence for nonsupport in existing Oregon law.

Mr. Johnson moved approval of section 7 as drafted. The motion was adopted unanimously. Voting: Judge Burns, Senator Burns, Chandler, Clark, Johnson, Knight, Spaulding, Mr. Chairman.

Section 8. Endangering the welfare of a minor. Mr. Wallingford advised that section 8 attempted to cover everything the statute on contributing to the delinquency of a minor encompassed which had not been provided for elsewhere in the proposed code.

Senator Burns asked how subsection (2) would apply where the individual causing or permitting this conduct was, himself, under 18 years of age. Mr. Paillette replied that such an individual would have to be at least 14 years of age since that was the minimum age for criminal responsibility.

Judge Burns said a situation where minor children were permitted to witness an act of sexual conduct between their mother and father could well arise in migrant housing areas, for example. Would the parents, he asked, be subject to prosecution under the provisions of subsection (1).

Mr. Wallingford said it had not been his intention to include parents but admitted that the way section 8 (1) was worded, they would be included. Mr. Paillette added that the purpose of the section was to cover some of the acts previously prosecutable under the contributing statute. Judge Burns commented that a constitutional question would probably be raised if a parent were prosecuted under subsection (1).

Mr. Paillette asked if it was the Commission's desire to have a defense or an exception for parents written into the subsection. Some members were reluctant to do so because there might be instances where a parent should be prosecuted under this provision.

Chairman Yturri requested that the commentary state that it was not intended, under normal circumstances, for subsection (1) to apply to acts between husband and wife within the home where there was no intent to improperly influence minor children.

Mr. Knight recalled that when the Obscenity Article was discussed, it was mentioned that section 8 might take care of situations where someone posted an offensive picture across the street from a school. He said he could not see where the provisions in this section would cover that situation inasmuch as it pertained to witnessing an actual act of sexual conduct, not to a reproduction. Mr. Paillette agreed.

Mr. Wallingford questioned the advisability of labeling this type of conduct "endangering the welfare of a minor" since it would be directed at the public at large. He thought it might fit into the disorderly conduct statute.

Mr. Paillette cited section 5 of the Article on Riot, Disorderly Conduct & Related Offenses, T.D. No. 1:

> "A person commits the crime of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:
>
> "(3) Uses abusive or obscene language, or makes an obscene gesture, in a public place; or...."

Tape 2 begins here:

Mr. Knight moved the staff be directed to draw a subsection to be added to section 8 prohibiting public displays of obscenity where minors were likely to see them.

Mr. Paillette was of the opinion that this was a form of disorderly conduct and would more properly be included in that Article.

Vote was taken on Mr. Knight's motion and it failed. Voting for the motion: Knight, Spaulding, Mr. Chairman. Voting no: Judge Burns, Senator Burns, Chandler, Clark, Johnson.

Mr. Chandler noted that subsection (2) established 18 as the minimum age for one entering or remaining "in a place where unlawful narcotic or dangerous drug activity is maintained or conducted" while subsection (3) set 21 as the minimum age for one participating "in unlawful gambling activity." It seemed to him the ages should be reversed.

Mr. Wallingford acknowledged the inconsistency inasmuch as a minor was defined as being under the age of 18 throughout the criminal code. However, the subsections relating to gambling and liquor were bound by the regulatory codes which set the age of majority at 21.

Senator Burns commented that if the 19-year-old ballot measure passed, the legislature would unquestionably change liquor, gambling, etc., to conform to the age of 19.

Mr. Chandler moved to change the age of majority to 21 in section 8 and to review the action after the May primary if the 19-year-old vote was approved. The motion was later withdrawn.

Mr. Wallingford pointed out that one inconsistency adoption of this motion would create would be to permit consenting sexual conduct between persons over 18 under the Article on Sexual Offenses but to make it illegal for persons under 21 to view this conduct.

Mr. Clark suggested amending the motion by inserting the age of 18 throughout section 8.

Professor Platt suggested that subsection (5), proscribing the sale of tobacco, was one of the areas where the criminal law was being brought into disrepute since everyone knew it was not enforced. Mr. Paillette commented that the staff agreed with this view but felt the retention or deletion of the provision should be a Commission decision. Because the use of tobacco was being criticized so severely at this time and so many health programs had been launched against smoking, it seemed incongruous to repeal the laws prohibiting the sale of tobacco to minors. Mr. Clark supported deletion contending it would recognize the fact that there were other and better ways than the criminal law to attack areas presenting serious health problems. Mr. Johnson disagreed and asked why the statute should sanction the action of the cigar store operator who sold cigarettes to a minor.

Mr. Chandler restated his motion to change the age in section 8 to 21 and to delete subsection (5). Mr. Johnson moved to amend the motion by limiting revision to subsection (2). Mr. Chandler withdrew his motion. The new motion, by Mr. Johnson, was to amend subsection (2) of section 8 to read:

> "Permits a person less than 21 years of age to enter or remain in a place where unlawful narcotic or dangerous drug activity is maintained or conducted; or"

Mr. Clark asked if it would do great harm to Oregon law to use the age of 18 throughout the section. Mr. Johnson replied that essentially, except for control exercised by the State Liquor Commission, this would lower the drinking age to 18.

Mr. Johnson's motion carried unanimously on a voice vote.

Mr. Blensley called attention to subsection (4) and advised that the present statute included the phrase "makes available." He asked the reason for not using the same language in subsection (4).

Mr. Knight moved section 8 (4) be amended to read:

> "Gives or sells, causes to be given or sold or otherwise makes available, any alcoholic liquor to a person less than 21 years of age...."

The motion carried on a voice vote.

Chairman Yturri suggested inserting the following as subsection (6) of section 8:

> "(6) Leaves unattended in or at any place a child less than eight years of age for such period of time as may be likely to endanger the health or welfare of such child."

Mr. Johnson observed that since most of section 8 dealt with persons who were not parents or guardians, the Chairman's suggestion should be set out in a separate section. Senator Burns agreed that the provisons should be in a separate section.

Senator Burns then moved that the amendment proposed by Chairman Yturri be incorporated as section 5 entitled "Child neglect." The motion carried unanimously. Voting: Judge Burns, Senator Burns, Chandler, Clark, Johnson, Knight, Spaulding, Mr. Chairman.

Mr. Chandler moved to delete subsection (5) of section 8. The motion failed. Voting for: Senator Burns, Clark, Spaulding. Voting against: Judge Burns, Chandler, Johnson, Knight, Mr. Chairman.

Mr. Chandler moved to approve section 8, as amended. Motion carried. Voting for: Judge Burns, Senator Burns, Chandler, Johnson, Knight, Spaulding, Mr. Chairman. Voting against: Clark.

Supplemental provisions. Mr. Paillette directed attention to page 30 of the draft which explored the areas involving family-oriented offenses not covered in the Article. The Commission, he said, might want to take a second look at some of these areas.

Mr. Spaulding observed that the proposed code would not prohibit a minor under 18 from smoking but it would make it unlawful for someone to sell him tobacco. Mr. Paillette remarked that this conduct could be covered under the Article on Miscellaneous Offenses if the Commission so desired.

Mr. Spaulding asked if the proposed code contained anything on the offense of child stealing. Mr. Paillette replied that the Kidnapping Article covered this type of conduct under the section entitled "custodial interference."

Replying to a question by Senator Burns, Mr. Wallingford advised that the proposed code did not retain the provisions of ORS 167.635, which made it a crime for a person over the age of 21 to fail or neglect to support his indigent parent without just cause. This statute had rarely been used and civil remedies were available.

Mr. Paillette noted that under the proposed nonsupport draft failure to support a wife would not be a crime.

Mr. Wallingford reported that two other existing statutes were not continued in the proposed code: ORS 167.235, employment of minors in place of public entertainment, applied to minors under 18 who perform at public dances or public performances and ORS 167.237, which made some exceptions to ORS 167.235. Without continuing the provisions of these two statutes, he said, it would be legal for a bar to employ a 16-year-old "Go Go" dancer.

Senator Burns recalled that this had been discussed in subcommittee and it was felt this type of regulation should be administered by the Liquor Control Commission. Mr. Paillette added that it might be necessary to make some amendments outside of the criminal code to compensate for these deletions.

Mr. Wallingford advised that the provisions were recently transferred to the criminal code from ORS chapter 653, Employment of Women and Minors, and he would recommend they be transferred back, virtually intact. Mr. Paillette agreed that even though the conduct would not be a crime, some control should probably be maintained.

Mr. Wallingford stated that the subcommittee had deleted a section entitled "Concealing birth of an infant" which was aimed at situations where a decomposed fetus was found and it could not be determined whether the infant was born dead or alive. Mr. Knight observed that most cases of this kind where a conviction had been obtained were reversed on the grounds that the state did not prove that the baby had ever lived. The only charges available to the state were abandonment or attempting to conceal a birth, he said.

Replying to a question by Mr. Clark, Mr. Knight stated that many abandoned infant bodies were probably born alive and killed. He related that a medical examiner from Baltimore had testified that 20 to 30 babies washed up in the bay every year and it was impossible to determine whther they were born dead or alive. It would be possible to prosecute such cases under the type of provision he proposed, providing it could be determined whose child it was that was found.

Mr. Paillette pointed out that ORS 163.660 was limited to "any unmarried woman who conceals the death of any issue of her body...." Mr. Knight's opinion was that this should be changed to cover all children and not just illegitimate births.

Senator Burns moved to include a section in the Article on Miscellaneous Offenses to cover the crime described by Mr. Knight. Motion adopted by unanimous consent.

Mr. Wallingford advised that the subcommittee had also deleted a subsection involving minors in pool halls. ORS 167.295, he said, stated that minors were not allowed to play pool in pool halls. It further defined a recreation facility and permitted minors to play pool therein. Mr. Wallingford stated that if the pool hall served alcoholic beverages, it would be controlled by the OLCC; if not, permitting minors access to the premises was best left to local option.

Gambling Offenses; Preliminary Draft No. 1; January 1970.

Mr. Paillette advised that the Gambling Article had been considered by Subcommittee No. 2, chaired by Representative Carson. He said the draft, in its generic approach, followed many of the recommendations of the Model Gambling Act. In its structure and form, however, it was more similar to the language of the Michigan and New York codes. Probably the biggest change it would make in existing law was that it attempted to draw a distinction between the social gambler and the professional gambler. The Model Gambling Act recognized some of the pitfalls in this type of approach and its commentary indicated prosecutors were evenly split on whether this was a good approach. Some of them believed the exclusion of social gambling from the statutory provisions provided a loophole. The proposed draft, however, attempted to bring the law into line with reality. Social gambling, he said, was technically a violation of present law, but was not frowned upon by society nor was it prosecuted.

The policy question to be decided by the Commission under the proposal was whether or not a distinction should and could be made between the friendly, social game and professional gambling.

Mr. Johnson acknowledged that this was a difficult problem but said he felt strongly that an attempt should be made to make the distinction.

Senator Burns admitted that there was a good deal of hypocrisy as far as gambling was concerned but he did not think the distinction could be made in the statute and at the same time continue to effectively prosecute gambling violations.

Mr. Johnson asked if law enforcement had ever been effective in getting at undercover gambling. Senator Burns admitted that it had not. Mr. Johnson commented that the proposed provisions would not turn Oregon into a Las Vegas but would face up to the fact that presently social gambling was not being controlled.

Senator Burns stated that this was an area where the prosecutor's discretion was used to a considerable extent but

contended that if social gambling were legalized, to all intents and purposes, it would not be possible to prosecute any kind of gambling.

Mr. Knight commented that in the area of gambling there was no discretion possible on the part of a prosecutor in view of the statute which said a prosecutor must prosecute.

Mr. Paillette advised that the Michigan commentary pointed out that private, consensual card games and gambling were generally considered by society today to be socially acceptable, if not legally acceptable, and there was no point in preserving the fiction that it was undesirable.

Judge Burns stated that one of the ways of controlling gambling in Portland was by use of the ordinance making it illegal to operate an unlicensed establishment. These places were frequently raided, he said, and if a charge was leveled, it was not gambling but operating an unlicensed establishment. He assumed that if the draft provisions were enacted, the cities could still enforce their laws in this manner.

Section 1 was discussed in connection with the other draft sections. For amendments to subsection (9), see discussion under section 2.

Section 2. Promoting gambling in the second degree. Mr. Paillette explained that gambling in the second degree was committed if the individual "knowingly promotes or profits from unlawful gambling activity." He called attention to the definitions in section 1, subsections (3), (8) and (9) which were used in section 2.

Judge Burns directed attention to the last sentence of section 1 (9), the definition of "promotes gambling activity," and was concerned that the wording of the sentence was such that it might imply an exclusion of everything else in the definition. He suggested that the phrase "in addition" might be inserted so that the sentence would begin: "In addition, a person promotes gambling activity if...."

Mr. Clark asked if "profits from unlawful gambling activity" in section 2 referred to the person who won on the machines or at a card game. Mr. Paillette said it referred to an individual other than a player who accepted or received a share of the proceeds of the gambling activity.

Judge Burns again drew attention to the definition of "promotes gambling activity" in section 1 (9) and expressed concern over the language "having substantial proprietary control" and "other authoritative control" used in the last sentence. Mr. Paillette explained that the definition was intended to include instances such as those where the manager or night clerk of a rooming house or motel allowed a professional game to take place on the premises.

Mr. Johnson asked what was meant by the term "unlawful gambling." Mr. Paillette advised that "unlawful" was defined in subsection (12) of section 1 to mean "not specifically authorized by law." The only type of gambling which would be unlawful would be that which the legislature specifically prohibited.

After considerable discussion, Judge Burns moved to amend the last sentence in subsection (9) of section 1 by deleting "substantial proprietory control or other authoritative control" and inserting "control or right of control." The amended sentence would read:

> "A person promotes gambling activity if, having control or right of control over premises being used with his knowledge for purposes of gambling activity, he permits that activity to occur or continue or makes no effort to prevent its occurrence or continuation."

The motion carried unanimously on a voice vote.

Mr. Chandler moved approval of section 2 as drafted. The motion carried. Voting for the motion: Judge Burns, Chandler, Clark, Knight, Spaulding, Mr. Chairman. Voting no: Senator Burns.

Senator Burns explained that he had voted against approval of section 2 because he felt it liberalized gambling and made it more difficult to enforce gambling laws and to prosecute violations.

<u>Section 3. Promoting gambling in the first degree.</u> Mr. Paillette explained that section 3 incorporated section 2 by reference and added two means of violating the statute.

Mr. Knight noted that the group which gave a door prize would be violating the law if those attending paid something of value for the chance. Mr. Paillette said the proposed draft retained the prize-chance-consideration element.

Chairman Yturri posed a hypothetical situation where a tea was held for a candidate for office. Those attending made contributions of varying amounts and were given a ticket for a door prize. His understanding was that under the draft provisions,

this would be a lottery. Mr. Paillette replied that if the conduct described by Chairman Yturri constituted a lottery, it would be through the provisions of subparagraph (b) of section 3 and would be illegal. The Oregon Constitution specifically prohibited lotteries, he said, and the only way to legalize them was by constitutional amendment.

Mr. Knight observed that the draft repealed ORS 167.515, duty of officers to enforce gambling laws, thus giving back to district attorneys some discretion in prosecuting, for example, a door prize drawing by a woman's club.

Senator Burns noted that since the Constitution stated that a lottery was illegal, it remained for the statute to say who was to be prosecuted for knowingly violating the constitutional provision. As he read the draft provisions, it would be the individual who promoted the lottery who would be prosecuted, not the individuals participating. In the typical situation involving punchboards or other amusement devices in taverns, the devices were owned by someone other than the tavern owner or bartender. When a player was found receiving a pay-off on such a device, he continued, the bartender could not be prosecuted under the draft since he did not profit or promote the gambling activity but he could be prosecuted under existing statutes.

Judge Burns thought this conduct would fall within the definition of "promoting gambling activity" in section 1 (9). Mr. Paillette agreed that the player would not be covered by the draft nor would he be covered under present law.

Mr. Clark moved approval of section 3 as drafted. The motion carried. Voting for the motion: Judge Burns, Chandler, Clark, Johnson, Knight, Spaulding, Mr. Chairman. Voting no: Senator Burns.

Section 4. Possession of gambling records in the second degree. Section 5. Possession of gambling records in the first degree. Section 6. Possession of gambling records; defenses. Mr. Paillette explained that sections 4, 5 and 6 dealt with possession of records relating to illegal lotteries, bookmaking and the numbers rackets. Section 4 set out the basic offense. Section 5 increased the offense for the professional operator. Section 6 provided two defenses. In a prosecution under section 4, he said, or under section 5 (1), it was a defense that the bets or chances were those belonging to the defendant himself. The original draft limited the bets or chances of the defendant to 10, which was New York language, but the subcommittee felt there was no reason for this limit if all bets were those of the defendant.

Mr. Clark asked what the defense situation would be if the individual were a runner and also a better and the records represented his bets or chances as well as those of others. Judge Burns was of the opinion that the defense set out in section 6 would not be available in that instance. Mr. Clark noted, however, that the section did not require the records to be the defendant's to the exclusion of all others.

Mr. Johnson questioned the rationale behind the sanctioning of gambling in a bookmaking operation. Mr. Clark observed that the people who participated were primarily uneducated people who bet their quarters and saw nothing wrong with doing so. Mr. Johnson pointed out that the proposed statute would only make the conduct criminal if it represented bets worth more than $500. He thought an individual in a bookmaking scheme that big was a professional gambler himself. He was not particularly in favor of sanctioning any bookmaking and certainly not the person who bet $500.

Mr. Chandler said that section 4 would cover the player making a small bet, whereas section 5 covered the individual working for the professional who was running the gambling operation. Judge Burns agreed that the player could be reached under section 4 but the player himself had a defense under the provisions of section 6.

Mr. Paillette referred to page 10 of the minutes of Subcommittee No. 2, February 9, 1970, and read from the discussion regarding section 6 (1):

> "Representative Haas noted that under the provisions in section 6 (1) an individual has a defense if the gambling records he possesses reflect his own gambling activities but he loses this defense if the records represent more than 10 bets. [The 10 bet limitation was deleted by subcommittee action.] Mr. O'Dell asked the reason for the arbitrary figure in this area. He thought the result of such a restriction would be that the runner would just deliver the bets whenever he collected nine of them. He favored deleting the language 'in a number not exceeding 10' in subsection (1) of section 6."

Mr. Johnson pointed out that sections 4 and 5 dealt with bookmaking and the numbers game. He could see no reason to permit either side of this type of activity--neither that of the player nor that of the promoter. This type of gambling, he said, was not the same as the neighborhood poker game.

Judge Burns thought the draft policy simply recognized that it was not a crime for the small better to bet on this type of thing simply because it was impossible to prosecute these cases successfully without putting large numbers of police to work on the problem.

Mr. Chandler observed that the Commission had consistently made the conduct of the patron, whether it involved sex, obscenity or drugs, less reprehensible than the conduct of the promoter of the evil. This continued the same policy.

Mr. Johnson stated that the Friday night poker game in someone's home was generally considered acceptable. He thought, however, that there was a great social evil in the numbers game and it should be discouraged.

Mr. Clark noted that the issue of involvement of organized crime and the clientele waspresent also when the Commission discussed the organized prostitution ring. It was decided then that the clientele of the prostitution ring should not be prosecuted and the gambling ring was analogous.

Mr. Johnson moved to delete the provisions of subsection (1) of section 6. The motion carried. Voting for the motion: Senator Burns, Chandler, Johnson, Spaulding, Mr. Chairman. Voting against: Judge Burns, Clark.

Senator Burns moved to approve the provisions set out in subsection (2) of section 6. The motion carried unanimously by a voice vote.

Senator Burns moved the approval of sections 4 and 5 as drafted. This motion also carried, with Mr. Johnson voting no.

Section 7. Possession of a gambling device. Mr. Paillette explained that the person committing this offense must have knowledge of the character of the gambling device.

Senator Burns asked what "any other gambling device" would be as referred to in subsection (2). Mr. Paillette directed attention to section 1 (4) which defined a "gambling device" and to subsection (10) which defined a "slot machine."

Senator Burns was of the opinion that pinball machines should be banned the same as slot machines. Mr. Chandler thought a pinball machine would come within the definition of a "gambling device" and, therefore, would be proscribed by the provisions of section 7 (2). Senator Burns said a pinball machine without a payoff slot would be legal under the draft.

Mr. Paillette advised that McKee v. Foster, 219 Or 322, 347 P2d 585 (1959), held that free play pinball machines were not prohibited. The intent of the draft, however, was to prohibit free play pinball machines and other free play devices. A pinball machine not having a free play mechanism would not be illegal.

If a pinball machine, for example, required the player to insert a nickel in order to play it and all he received was the fun and amusement of playing the machine, it would not be prohibited by the draft provisions. If, however, he received a free game by compiling a high score, the device would be illegal.

Mr. Clark agreed with Senator Burns' position that as long as pinball machines were available to the public, they would be used for gambling. If a tavern owner was to be permitted to rent the patron a pinball machine for five cents, the same rationale should extend to slot machines, he said, and expressed the opinion that both pinball machines and slot machines should be banned, per se.

Senator Burns contended that the only effective way to enforce gambling connected with pinball machines was to have an undercover policeman in every tavern. Mr. Spaulding concurred that as long as the machines were available, there would be gambling in connection with them.

Senator Burns moved to amend section 7 so the subsections would read:

"(1) A slot machine; or

"(2) A pinball machine; or

"(3) Any other gambling device, believing that the device is to be used in the advancement of unlawful gambling activity."

No vote was taken on this motion.

Mr. Paillette advised that the intent of the draft and of the subcommittee was to include pinball machines within the proposed definitions. The definitions, he said, were derived from Michigan section 6125 on possession of a gambling device and the Michigan commentary stated:

> "Pinball machines continue to be covered because 'gambling device' [as they defined it, which is the same as the proposed draft defines it] refers to 'gambling activity' ...and gambling activity turns on the possibility of receiving 'something of value' defined...to include free plays."

"Something of value," Mr. Paillette continued, was defined in section 1 in the same way Michigan defined the term. It was intended to include free play devices including free play pinball machines. The effect, then, was to prohibit possession of a pinball machine, since it would come within the provisions of subsection (2) of section 7 prohibiting the possession of "any other gambling device," so long as the pinball machine involved free play or payoffs.

Mr. Spaulding moved to approve section 7 as drafted. The motion carried. Voting for: Senator Burns, Chandler, Clark, Johnson, Knight, Spaulding, Mr. Chairman. Voting against: Judge Burns.

Section 8. Gambling offenses; prima facie proof. Mr. Paillette explained that the purpose of section 8 was to provide a means of establishing that a sporting event actually took place. A published report of its occurrence was prima facie evidence that the event did occur.

Judge Burns moved the adoption of section 8 as drafted. The motion carried unanimously. Voting: Judge Burns, Senator Burns, Chandler, Johnson, Knight, Spaulding, Mr. Chairman.

Section 9. Forfeiture of prizes. Mr. Paillette advised that section 9 continued ORS 167.430. Subsection (2) referred to proceedings for the abatement of nuisances.

Judge Burns moved the adoption of section 9 as submitted. The motion carried unanimously. Voting: Judge Burns, Senator Burns, Chandler, Clark, Johnson, Knight, Spaulding, Mr. Chairman.

Section 10. Seizure and destruction of slot machines. Mr. Paillette reported that section 10 was a slightly modified version of ORS 167.540. The subcommittee amended subsection (2) to make it clear that the coins derived from the machines were to be turned over to the county. The revised subsection read:

> "(2) Whenever it appears to the court that the gambling device has been possessed in violation of this Article, the court shall adjudge forfeiture thereof and shall order the sheriff to destroy the device and to deliver any coins taken therefrom to the county treasurer, who shall deposit them to the general fund of the county."

Judge Burns asked if pinball machines could be seized and destroyed under the provisions of subsection (1). He also inquired if "any such gambling device" referred back to the definition of a slot machine in section 1 (10).

Mr. Johnson thought the draft language would confine seizure and destruction to slot machines. He moved to amend the first sentence of section 10 (1) to read:

> "A slot machine as defined in subsection (10) of section 1 or other gambling device as described in subsection (2) of section 7 of this Article is a public nuisance."

Mr. Paillette expressed approval of the motion since the subsection, as drafted, would not apply to "other gambling devices." Mr. Spaulding was of the opinion that Mr. Johnson's proposed amendment should refer to subsection (4) of section 1 rather than to subsection (2) of section 7. Mr. Johnson contended that a "gambling device" as defined in section 1 (4) could include practically anything.

Mr. Blensley questioned the purpose of the language "found in the possession of any person violating the provisions of this Article" in section 10 (1). He asked why it was necessary for the machine to be in someone's possession and suggested this phrase be deleted. Mr. Clark agreed that the state should not be required to prove the machine was in anyone's possession and Mr. Spaulding concurred.

Mr. Chandler moved to strike the language in section 10 (1) as suggested by Mr. Blensley. The amended sentence would read:

> "The sheriff shall summarily seize any such gambling device or operating part thereof and hold it subject to the order of the court having jurisdiction."

Motion carried by a voice vote.

Returning to the discussion of the first sentence of section 10 (1), Chairman Yturri was of the opinion that the definitions in subsections (10) and (11) of section 1 would include pinball machines. Mr. Spaulding concurred and suggested the first sentence of section 10 (1) be amended to read:

> "A slot machine or pinball machine as defined in subsections (10) and (11) of section 1...."

Judge Burns disagreed that the amendment would define a pinball machine. He contended that section 1 (4) plus section 1 (11) were required to define a pinball machine.

Chairman Yturri suggested solving the problem by amending subsection (10) of section 1 by inserting "'or pinball machine'" after "'Slot machine'" and by deleting the number "(11)" so that the present subsection (11) of section 1 would become part of subsection (10).

Mr. Blensley pointed out that subsection (10) of section 1 required that the machine "eject something of value" so the definition would not cover free games. Chairman Yturri noted, however, that subsection (10) also stated: "Nor is it any less a

slot machine because apart from its use or adaptability as such it may also sell or deliver something of value on a basis other than chance."

Mr. Johnson asked how the definition of a "gambling device" was linked with "consideration." Judge Burns replied that subsection (3) of section 1 defined "gambling," in part, as "an agreement or understanding that...someone will receive something of value...." This statement, then, carried over to subsection (11), the definition of "something of value." This brought in free play machines which, coupled with subsection (4), the "gambling device," described a pinball machine with a free play. The pinball machine was included in the provisions of section 1, he said, but it was not separately defined there.

Mr. Paillette explained that the proposed draft did not attempt to equate pinball machines with slot machines nor did it include both within one definition. The definition of a "gambling device" was meant to include pinball machines, he said, and that was the reason subsection (2) was written into section 7. Section 7 would not prohibit mere possession of a pinball machine but stated "believing that the device is to be used in the advancement of unlawful gambling activity." To "gamble" involved receipt of "something of value" and this included a free play.

Mr. Johnson asked where the proposed draft stated that a Friday night poker game was not illegal. Chairman Yturri explained that gambling would be prohibited only when someone profited from the activity and Mr. Spaulding added that only those gambling offenses expressly prohibited would be covered by the draft.

Mr. Johnson stated that the only place where gambling was specifically outlawed was in section 2. Since "unlawful gambling activity" was "not specifically authorized by law," he asked what effect section 2 would have on a private poker game in someone's home.

Mr. Paillette explained that the activity would not be illegal unless someone promoted or profited from the game, as defined in section 1 (8) and (9). The definitions excluded the player who participated on equal terms with everyone else if he was not profiting or promoting the activity.

Representative Carson arrived at this point.

Judge Burns noted there still remained the problem of putting suitable language into section 10 so as to provide for the destruction of devices other than slot machines. He suggested the Commission make a policy decision on the matter and allow the staff to work out the wording. He was of the opinion that un-

lawful devices should be subject to destruction the same as slot machines and this should extend to devices which may in the future become unlawful.

Judge Burns moved that the staff be directed to draft appropriate language to equate slot machines and unlawful pinball machines under section 10. The motion carried unanimously on a voice vote.

Chairman Yturri directed the staff to clarify the points raised by Mr. Johnson and said he agreed that the draft was not completely clear as to the types of gambling which were outlawed. Mr. Johnson again explained that his chief concern was with the provisions of section 2 which said that a person committed the crime if he "profits from unlawful gambling activity." The term "profits from gambling activity" was defined in section 1 (8) to mean "a person other than the player." The person at whom the section was directed, he said, was not the player but the one who profited from the unlawful gambling activity. He therefore contended that there was a drafting defect when section 2 said, in effect, that the player was involved in "unlawful" gambling activity. Mr. Chandler suggested that deletion of "unlawful" in section 2 might correct the problem to which Mr. Johnson referred.

Judge Burns noted that section 10 provided that only the sheriff had a duty to seize gambling devices. He suggested that when the section was redrafted, it should provide that any law enforcement officer had the duty to seize the contraband and deliver it to the sheriff rather than reporting its location to the sheriff and waiting for him to pick it up. He agreed that the handling and destruction of the devices should be centered in the office of the sheriff but if a city or state police officer came across an unlawful device, he should also have a duty to seize it.

Judge Burns moved the adoption of section 10 with the understanding that the staff would proceed as instructed. Motion carried unanimously by a voice vote.

Section 1. Mr. Chandler moved the adoption of section 1 subject to staff changes. This motion also carried unanimously by a voice vote.

Discussion of Letter from Christian Science Committee on Publications re Provisions in Article on Offenses Against the Family.

Senator Burns reported receiving a letter from Mr. Robert B. Hazlett, representing the Christian Science Committee on Publications, expressing concern over certain provisions in the Article on Offenses Against the Family. The Committee was fearful that under the child neglect statute or the contributing to the dependency of a minor statute the Christian Science parent who did

not give medical treatment to a child would be subject to prosecution. This question came up in New York and a specific statute giving immunity to Christian Science parents was enacted.

Senator Burns related that both he and Mr. Paillette had talked with Mr. Hazlett about the problem and since the Oregon Article was not the same as that of New York, they were of the opinion that the draft approved by the Commission today, would not subject a Christian Science parent to prosecution.

Mr. Spaulding said he did not see anything in section 8, endangering the welfare of a minor, which would subject them to prosecution and he thought this would be where such a provision would have been placed. Senator Burns agreed that it would be this section and noted that such an exception would have been needed if the statute on contributing to dependency had been perpetuated.

Mr. Paillette reported that the New York statute on endangering the welfare of a child provided that one of the means of violating the statute was to fail or refuse to provide proper medical care. The proposed Oregon statute on endangering did not contain this language. He thought the only place where the question might arise would be under the proposed nonsupport provisions which referred to failure to provide medical attention since the definition of "support" in section 1 included "medical attention."

Mr. Knight asked about the possibility of a manslaughter charge when the death of a child resulted from lack of medical care. Senator Burns said this would go to another Article and Mr. Paillette did not believe the New York exemption extended beyond the statute on endangering the welfare of a child.

Mr. Chandler commented that it seemed to him that the problem was something that neither the members of the Commission nor the staff had had much chance to think about. He suggested placing it on the agenda when the Commission met again. The staff could then have a report ready as to what the liabilities were under the New York statutes.

Mr. Spaulding understood from Mr. Paillette's comments that the only place there might be a problem would be under the nonsupport statute involving a general prosecution for nonsupport. This would include something in addition to failure to provide medical attention since "support" was defined as including, "but is not limited to, necessary and proper shelter, food, clothing, medical attention and education." Therefore, he said, no exemption was required. Chairman Yturri and Mr. Paillette concurred. Senator Burns also agreed, adding that the man-

slaughter question raised by Mr. Knight should be researched. Mr. Paillette said he would check the New York statutes to see if there was an exemption. Chairman Yturri asked that he do so and if research indicated an exemption provision was needed in the proposed code, it would be brought up at the next Commission meeting.

Firearms Control; Preliminary Draft No. 1; March 1970.

Judge Burns reported that while Subcommittee No. 3 had wrestled diligently with the problem of gun control at its meeting of March 27th, no progress was made in drafting an Article. The subcommittee ran into a number of very difficult problems involving the effective institution of a permit and registration procedure for handguns currently owned and the ancillary issues associated with this, including Fifth Amendment problems. There were also similar questions with respect to the licensing of long guns which were seemingly insoluble..

Judge Burns briefed the Commission members on the drafting problems involved in drawing up a Gun Control Article. He commended the staff and said it was clear from comparing the draft with that of HB 1546, the bill introduced in the 1969 session of the legislature and recommended by the Kennedy Action Corps as model legislation, that HB 1546 had not foreseen some of the difficult problems.

Judge Burns advised that the subcommittee had, as yet, no draft for Commission consideration and he was not at all sure they could come up with one. Massachusetts and New Jersey, he said, had extremely complicated statutes and even there some of the problems were not solved.

Mr. Paillette reported that since the March 27 meeting of Subcommittee No. 3, additional research material had been obtained which had not yet been studied by the staff. The proposed Article, within the framework of the Commission directive, attempted to provide for the registration of all handguns and for the licensing of all gun owners. In order to apprise the Commission of some of the questions and problems discussed, copies of the minutes of the subcommittee meeting were made available for members. Mr. Paillette said that more time was necessary in order to try to resolve some of the problems raised in subcommittee.

Mr. Paillette stated that he realized the Commission had already made a policy decision to incorporate gun control within the proposed criminal code but because the area was being considered at such a late date and the rest of the substantive code was essentially completed, except for the grading provisions, he

wondered if the Commission would consider handling gun control as a separate proposal. This approach would enable the Commission to continue with the balance of the code and allow time to prepare acceptable gun control legislation.

In order not to impede staff progress toward the printing deadline for the substantive code, Senator Burns suggested including in the printed code a blank Article reserved for firearms so that those reading the code would know the Firearms Article would be added. The printed code could contain a statement of Commission policy in regard to firearms.

Chairman Yturri noted there was not unanimous support by Commission members for the policy decision adopted at the Commission meeting of March 19th. Some members felt the Commission should take no action regarding firearms control and leave the question to the legislature. He thought a determination should be made as to whether the majority of the Commission felt this way before additional consideration was given the problem.

Mr. Johnson thought this was one matter that could justifiably be treated separately. Without question, he said, firearms control would involve setting up some sort of administrative framework and this would necessitate referral to the Ways and Means Committee.

Mr. Chandler moved to reaffirm the Commission's previous policy. No vote was taken on this motion.

Mr. Spaulding asked why it was necessary for the Commission to write a Firearms Article and suggested they simply issue a recommendation to the legislature. Senator Burns was of the opinion that the Commission would be better able to draw up such an Article than would the legislature. Mr. Johnson did not favor a policy statement; the Commission should make a specific recommendation, he said. Judge Burns noted that if the legislature agreed with the Commission policy, it would be necessary for someone to draft a measure and he believed the Commission should do it.

Mr. Paillette observed that the provisions regarding firearms control would of necessity involve the State Police in a substantial way. Some very heavy administrative burdens would be imposed on that department and it would be advisable to discuss some of the problems with representatives of the Department of State Police.

Senator Burns said it seemed to him, within the concept of a comprehensively revised criminal code, that the Commission should meet the problem of firearms control.

Judge Burns assumed the Commission would meet again in two or three weeks to consider the grading provisions and suggested the best solution would probably be for the subcommittee to continue working on the problem of firearms control and report its progress to the Commission at its next meeting.

Mr. Spaulding moved to adopt the approach outlined by Judge Burns. The motion carried unanimously by a voice vote.

The meeting was adjourned at 5:30 p.m.

Respectfully submitted,

Mildred Carpenter, Clerk
Criminal Law Revision Commission