Tapes #88 and 89

#88 - 305 to end of Side 2
#89 - 1 to 525 of Side 1

OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 1

Twenty-fifth Meeting, January 8, 1970

Members Present: Chairman John Burns
Mr. Robert Chandler
Mr. Bruce Spaulding
Rep. Tom Young

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

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The meeting was called to order by Chairman John Burns at 7:15 p.m. in Room 319 of the Capitol Building, Salem, Oregon.

Chairman Burns asked that the minutes from the meeting of December 11 be corrected to show that Mr. Spaulding had been excused from the meeting. Mr. Chandler then moved to approve the minutes as corrected. The motion carried unanimously.

OFFENSES AGAINST PRIVACY OF COMMUNICATIONS

Sections 9 through 18. Eavesdropping warrants. Mr. Paillette reported that after the last meeting, Mr. Wallingford had drafted these procedural sections on eavesdropping warrants along the lines of the New York statutes. It had since come to their attention, however, that the Omnibus Crime Control Act of 1968 has mandatory requirements which would make these sections obsolete. He said it was his understanding that each statute must list the specific crime to which it applies. This means, he continued, that it would be necessary to list by name and by section the crimes that will apply. Until there is a code to use as reference, there is presently nothing more to be done on these sections.

Chairman Burns wondered if the subcommittee should make a policy decision with respect to those crimes it wishes to include under the wiretap statutes. Mr. Wallingford replied that New York had listed two and one-half pages of crimes which would cover nearly every type of felony. He pointed out that Chapter 119, Title 18, U.S. Code, limits wiretapping to felony cases by using language which states

that the crime must be one which is punishable by more than one year imprisonment. It would, therefore, appear to exclude misdemeanors.

Mr. Paillette thought the policy decision should be to determine whether there are to be any wiretap provisions in the Oregon statutes. If so, they would have to conform to the federal law in order to be valid. The mechanics of working this into the state law would not be especially difficult, he said, once the policy decision was made. One approach would be to include these procedural sections in a separate bill.

Mr. Chandler was not in favor of putting the wiretap sections in a separate bill to be approved independently of the draft. His fear was that such a bill might not be approved.

Chairman Burns remarked that there appeared to be two alternatives: Sections 9 through 18 could be reserved for expansion until such time as felonies are defined through the grading process and the procedure could then be included, or these sections could be taken from this draft and included with procedural statutes in the future.

Mr. Spaulding indicated that either plan would be agreeable to him. However, Mr. Chandler preferred that the sections be left in this draft and made to conform to the federal law by leaving blanks which could be filled out later when it was determined which crimes would be included. He made a motion to that effect which carried unanimously.

Chairman Burns suggested that a list of all the felonies involved and a copy of the Omnibus Crime Control Act be provided the subcommittee to assist them in examining the revised draft of these sections.

Mr. Paillette observed that it might not be necessary for the subcommittee to reconsider the draft; it could possibly be presented directly to the Commission along with the provisions necessary to comply with federal requirements.

Chairman Burns contemplated that there would be some members of the Commission who would feel very strongly, and with some justification, that gambling should be subject to the law on wiretap, even though it is anticipated that gambling would be a misdemeanor. He said he expected that there would be persons in Multnomah County who would favor including pinball machines under wiretap laws because of their linkage to other criminal activity. Therefore, he was of the opinion that the subcommittee should discuss these sections thoroughly before sending them along to the Commission.

(Rep. Tom Young arrived at this point.)

Mr. Paillette explained that he would like to avoid the situation of final work on the substantive code being delayed while waiting for clarification of this one procedural area.

Mr. Chandler said he had no objection to transferring these sections to the procedural code if they would fit there as well as in this draft.

Chairman Burns was of the opinion that these sections on eavesdropping warrants would have a far better chance for success if they were submitted as part of the substantive code rather than as a separate bill.

OBSCENITY AND RELATED OFFENSES

Chairman Burns said it had been suggested to him by an imminent prosecutor that the present Oregon obscenity statute is about as effective as one could find. Mr. Paillette noted that it had been amended to conform to the requirements of the Roth case.

Mr. Paillette reported that he had drafted this Article without knowing whether the subcommittee preferred the injunction proceeding such as that set out in Senate Bill 92 and which could be incorporated into this draft. He did not, however, draft along those lines because he had interpreted Oregon cases, particularly, State v. Childs to indicate that those provisions in Senate Bill 92 might not stand up before the courts. It seemed to him, he said, that requiring a prior determination of obscenity would amount to a prior restraint under the Oregon Constitution. He reported that magazine distributors are interested in that approach in order to avoid the possibility of criminal prosecution. It would also have the benefit for them of giving some prior determination of what particular item would be considered obscene. The approach of this draft is limited to two major areas -- one with respect to the dissemination of obscenity to minors and the other, with respect to displaying certain types of material for advertising purposes.

This statute does not deal with adults, he said. If the subcommittee would prefer to have a statute which also would prohibit obscenity for adults, he did not think they could improve upon the present statute since it meets the requirements of the Roth case. Any statute which did not meet those requirements would clearly be unconstitutional, he said. If the subcommittee wished, they could retain the two existing statutes which could then be augmented by the adoption of this draft. This would mean that obscenity in general would be covered, as well as distributing obscene material to minors and the displaying of obscene material.

He observed that the present trend in dealing with obscenity cases generally has been that it is being narrowed down to this kind of an approach. In other words, the court has made it clear with respect to the variable obscenity concept that this is one area on pretty safe ground, i.e., the state's interest in protecting the young people of the state. The Supreme Court has found some overriding considerations in the case of young people that cannot be found in dealing with adults. In Stanley v. Georgia, 89 S Ct 1243 (1969), the statute read:

> "Any person who shall knowingly have possession of any obscene matter shall be punished."

This statute was found unconstitutional because it made the mere private possession of obscene material a crime and thus it violated both the 1st and the 14th Amendments.

In a more recent Massachusettes case involving the film, "I Am Curious (Yellow)", the state supreme court, basing its decision on Stanley v. Georgia, said it did not see any distinction between allowing an adult to have access to certain materials in his home and allowing him to have access to the same type of materials in a public theater. In this case, there was a temporary injunction granted which would have prevented further prosecution and allowed the showing of the film. The court said:

> "The kind of public showing of obscene material that Stanley did leave the states free to prohibit is that which is indiscriminately exposed to minors or unwilling members of the public. It makes no difference that the showing is for monetary gain."

This case points up the fact, Mr. Paillette noted, that the supreme court of still another state has taken a position which, since Stanley v. Georgia, seems to be that if the state is to have some reasonable hope of trying to control the dissemination of obscenity, it will be in the area of dissemination of obscenity to minors or public display of obscenity.

Mr. Paillette explained that although he was not suggesting that the present statute be repealed, he was pointing out that these are areas where, for the purposes of enforcement, the state can attempt something pretty definitive and explicit that meets what one would ordinarily want to have in a criminal statute - language that clearly apprises an individual of what is prohibited and what is not. In any event, that has been the attempt of this draft, he said, based partially upon the approach of Richard Kuh, noted New York prosecutor, in his book, Foolish Figleaves? Pornography in-and-out of court (MacMillan, 1967). Kuh, he noted, has gone one step further by proposing a separate statute with respect to adults but since it seemed that it was no improvement over present Oregon law, Mr. Paillette said he had not incorporated it in this draft. In the

event the Oregon statute is retained but found unconstitutional on a case-by-case basis, he would think the approach suggested by Mr. Kuh is reasonable because it specifies which kind of materials the store owner, bookseller or theater owner cannot show or sell; he does not have to determine whether it appeals to the prurient interest of the minor, whether its dominate theme is such, or whether it has any redeeming social value - all confusing standards, at best.

This is the same approach suggested by Senate Bill 92 except that it would be under the civil law, handled as an injunction, with a prior determination of whether the material is or is not obscene. Mr. Paillette was of the opinion that there was little value in the civil approach. For one reason, he said, it would mean that the courts will be overburdened with litigating these cases before it gets to the point where any kind of penal sanctions can be imposed. It would be rather unwieldy as a law enforcement tool. There would still be required an item-by-item determination of whether or not a particular article violated the three criteria set out in the Roth case. Kuh's approach circumvents that process, he said, by excluding all the subjective determinations which are required under Roth. At the same time, he observed, Kuh recognizes that there may be constitutional challenges directed at his approach in that it restricts the dissemination of material that perhaps should not be restricted, e.g., nudity, except for art displays, educational purposes etc. Mr. Paillette concluded that this draft contained a strict approach so far as minors were concerned. If material falls within the definitions in this draft, it would be in violation of the law.

Section 1. Definitions. Mr. Chandler questioned use of the word "depot" in subsection (2). He wondered if the waiting room or newsstand in a public airport would be considered a depot. It was agreed that it would be. It was also pointed out that "public thoroughfare, depot or vehicle means any street, highway, park, depot or transportation platform ...." Mr. Paillette interpreted this to mean that it would include any airplane or air terminal.

In response to a question from Mr. Chandler, Mr. Paillette explained that the definition of "displays publicly" is only important to public displays for advertising purposes as outlined in section 7 and was not intended to apply to in-store displays.

Mr. Spaulding examined the definition of "minor." Would it make any difference, he wondered, if this person under 18 might be married. He recalled that generally it does not matter how young a minor is if he is married. Rep. Young reminded also that under the law, it does

not matter whether the minor is married or not but that if he is under 18, he is considered a minor for the purposes of the liquor laws. Mr. Spaulding said that was the reason for his concern and wondered if the subcommittee wished to be explicit on the question. He suggested that this section should state that a minor means a person who has not reached his 18th birthday, whether or not he is married. Chairman Burns assumed that if that were Mr. Spaulding's intention, the language was all right as drafted. However, Mr. Spaulding contended that the subcommittee could avoid future litigation on this issue if they were willing to say exactly what they mean.

After further discussion, Rep. Young moved that the definition of "minor" be amended by inserting the word "unmarried" before "person." The amendment was approved unanimously.

There followed brief discussion on the definitions of "sells" and "sexual excitement" and the subcommittee agreed that those definitions were satisfactory.

Mr. Spaulding moved to adopt section 1 as amended and the motion carried unanimously. (See page 14 for amendment on definition of "performance.")

Section 2. Selling obscene materials to minors. Chairman Burns pointed out that there was a difference in the culpability element in section 2 and that of sections 4 and 5 (sections 4 and 5 previously amended to include recklessly as noted under those sections). Does having good reason to know rise to a higher level than recklessly, he asked.

Mr. Spaulding favored including the language "knowing, or in the exercise of reasonable care, would have known," since the person perhaps would have known had he taken reasonable steps to inform himself. Not having taken those steps, he would not have had a good reason to know. He said he was thinking of a situation where the defendant should have known but carefully avoided having any reason to know.

Mr. Paillette pointed out that Kuh defines the term, "knowingly" as "having knowledge of the character of any item described...or having failed to exercise reasonable care to ascertain its content" which is quite similar to that language suggested by Mr. Spaulding. He added that the question of knowledge was probably one of the most vital areas in this draft.

In response to a question by Rep. Young on the definition of "knowingly", Chairman Burns read from the Article on Culpability:

" 'Knowingly' or 'with knowledge', when used with respect to conduct or to a circumstance described by a statute defining a crime, means that a person acts with an awareness that his conduct is of a nature so described or that a circumstance so described exists."

Mr. Spaulding said that explained what was meant when the defendant actually knows, but what he was wondering about was the situation where the defendant should have a duty to know.

Rep. Young asked if a person were entitled to be careless with the kind of literature he sold. Mr. Paillette said that these were really hard questions to answer. Although the decision in Smith v. California, 361 US 147 (1959), is somewhat of a guide, the Supreme Court has never really specified what kind of knowledge is required. In Mishkin v. New York, 383 US 502 (1966), the Court, in upholding the New York statute said:

"A reading of the statute...clearly indicates that only those who are in some manner aware of the character of the material they attempt to distribute should be punished. It is not innocent but calculated purveyance of filth which is exorcised.

"The Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity."

On the other hand, in the Smith case, the Court found that the statute was unconstitutional because it imposed a strict liability on the bookseller. The Court said:

"...our holding in Roth does not recognize any state power to restrict the dissemination of books which are not obscene; and we think this ordinance's strict liability feature would tend seriously to have that effect, by penalizing booksellers, even though they had not the slightest notice of the character of the books they sold.... By dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally protected matter. For if the bookseller is criminally liable without knowledge of the content, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature."

The Court went on to say:

"We need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock; whether honest mistake as to whether its contents in fact constituted obscenity need be an excuse; whether there might be circumstances under which the State constitutionally might require that a bookseller investigate further, or might put on him the burden of explaining why he did not, and what such circumstances might be."

Chairman Burns remarked that since the term "knowing or having good reason to know" has been previously used in Oregon statutes, there seemed to be a good reason to employ it in this section. It also seemed to him to be more consistent with language used in criminal statutes than "or in the exercise of reasonable care" which seemed to be more appropriate to civil statutes and which, he feared, would bring this section dangerously close to strict liability. Vote was then taken to approve section 2 and the section was unanimously approved. (For further discussion and later amendments to section 2, see pages 11, 12).

<u>Section 3. Delivering obscene materials to minors</u>. Chairman Burns questioned the language in subsection (2) of section 3 which states that it is a defense to prosecution that a defendant caused to be printed words to the effect that the material could not, under Oregon law, be sold directly to a minor. It seemed to him that it was a defense which would be used in nearly every case.

Mr. Chandler said he did not understand the reason for the last sentence in subsection (2) which states: "This subsection shall not make the carrier's conduct, or that of its agents or employes, criminal." Mr. Paillette explained that the reason for that sentence was that although the seller had printed on the outer wrapper the prohibition of selling the material to a minor, and although it could be clearly seen by the carrier, his delivering of the material would not be criminal. This was to make it clear that although the carrier was notified that the material could not be sold to a minor, he would not be liable simply because he delivered the material.

Rep. Young thought Mr. Chandler's objection to the sentence was that the exclusion of the carrier actually refers to subsection (2) which is itself a defense.

Mr. Paillette explained that his reason for referring to the subsection in that sentence was that the subsection contained the requirement that there must be certain printing on the wrapper to permit the defense.

Mr. Spaulding contended that the mere fact that those words were printed on the package or wrapper does not make the carrier's conduct criminal.

Rep. Young asked if the carrier could be held liable if that sentence were not included. Chairman Burns and Mr. Spaulding agreed that he could not. However, Mr. Paillette thought the carrier would still fall under subsection (1).

Mr. Spaulding then asked if the words, "for a monetary consideration or other valuable commodity or service" would include the carrier's regular wages.

Chairman Burns wondered also whether "person" would include a common carrier or a mailman. Mr. Paillette read from the general definitions:

> " 'Person' means a human being, and where appropriate, a public or private corporation, an unincorporated association, a partnership, a government or a governmental instrumentality."

Mr. Paillette reported that Kuh says:

> "The statute provides for alerting parents by making shippers liable, once they send things to youngsters that are within the statute's interdiction and fail to mark them in substance: 'this package contains material that by law may not be sold directly to a minor.' The intercepting parent would, of course, be free to pass such packages along to his offspring or stop them short. He might even take the trouble to notify the vendor to discontinue future shipments."

In reply to Mr. Spaulding's question about whether the monetary consideration would apply to the carrier's salary, Mr. Paillette did not think the mailman would be liable under subsection (1) because of the language "arranges for or dispatches for delivery." Mr. Spaulding observed that in that case, the last sentence in subsection (2) would not be necessary. Although Mr. Paillette conceded that it probably was not necessary, he thought that what Kuh had in mind was to avoid any possibility of criminal action against people who deliver this material by the argument that it says plainly on the package that it is not to be delivered to a minor and yet the person is delivering it to a minor.

Mr. Spaulding's opinion was that inclusion of the last sentence might carry some implication that the carrier might be liable if the package failed to contain the warning. He asked if there was any provision in this draft for giving obscene material to a minor rather than selling it. He said he was thinking of the situation where the material may be given free in return for future business transactions, e.g., ice cream.

Chairman Burns mentioned a case in which some men in Portland enticed high school boys into their homosexual ring by first giving them obscene material and showing obscene films. The men then used the recordings and movies of the homosexual activity as a means to blackmail the boys into continuing the relationships. Although there were no sales involved in that case, the motivations were criminal.

Mr. Spaulding anticipated that there could be a greater harm as a result of cases in which no monetary consideration was involved. This type of conduct is generally used to arrange the circumstances for commission of some other conduct, he said. He suggested that this might be an area that should be covered.

Mr. Paillette did not think it would present the threat to society that it would if the conduct were of a business nature. He asked if the subcommittee did not think that obscene material was being sold more often than it was being given away. Mr. Chandler agreed, but pointed out that his concern was that the result of the give-away type of material is often more dangerous to the minor involved than that which is sold and which, in many cases, is discarded after the minor has seen it. The potential for deep and harmful emotional involvement is much greater in the first instance, he thought.

(Note: Section 3 was discussed at length later in the meeting but for purposes of clarity, that discussion is included here.)

Mr. Spaulding noted that the conduct proscribed in this section is arranging for or dispatching for delivery but questioned whether it was adequately described in the title by the word "delivering." Chairman Burns also pointed out that the actual deliveryman would not be covered under this language if the material comes from out of state. It was further concluded that the deliveryman would not be covered in any case, no matter where the material originated.

Chairman Burns agreed that it would not reach the deliveryman but added that he thought it was the person who arranged for or dispatched the material that this drafted attempted to reach. Mr. Spaulding was

of the opinion that the draft should also cover the deliveryman who, although he does not arrange for or dispatch for delivery, actually hands the material to the minor. Mr. Paillette stated that that action would be covered in section 2.

Mr. Spaulding asked why the words "within this state" were used. Mr. Paillette answered that it was designed to reach the mail order business within the state.

Mr. Spaulding also questioned the wisdom of including the phrase "for a monetary consideration or other valuable commodity or service", based upon his earlier objection to that requirement (see page 10 of these minutes). Chairman Burns questioned the subcommittee on their opinion of the policy enunciated in this draft of confining this conduct to situations involving monetary consideration. Mr. Chandler was not in favor of limiting this conduct in such a way and Mr. Spaulding also voiced his disapproval. If the monetary consideration requirement were left out, he said, this statute would reach everyone who would otherwise be included. It would have the added benefit of reaching the person who created a problem by simply giving this type of material to minors. At any rate, he said, he did not see why the prosecution should be burdened with the necessity of proving that as an element of the crime, there was a valuable consideration involved. He did not think this added anything of value to the section.

The subcommittee concluded that this problem could be solved by including this conduct under section 2 by changing the title to "Furnishing obscene materials to minors." Chairman Burns noted that this change would perhaps necessitate a substitution in the definitions by deleting selling and inserting furnishing, which could be defined by saying,"furnishing means the selling, giving or loaning , etc."

Assuming that the phrase regarding a monetary consideration is deleted, Chairman Burns said, did the subcommittee wish to add an element of culpability to the crime by adding "knowingly" before "arranges for" in the fourth line.

In further discussion on the word "delivering" in the title of section 3, the words "disseminating, furnishing, distributing and promoting were all considered. Mr. Spaulding then moved to amend section 3 by changing"delivering" to"dispatching" in both the title and the second line. The motion carried unanimously.

Rep. Young asked if the words "customer or prospective customer" implied that the transaction involved some monetary consideration. Mr. Chandler suggested that "recipient or prospective recipient" would be more appropriate.

Vote was then taken on each of the following amendments in turn and each was approved unanimously:

1. Delete the last sentence of section 3.

2. In lines two and three, delete "for a monetary consideration or other valuable commodity or service,".

3. In line six of subsection (2), delete "directly".

4. In line four after "he", insert "knowingly".

5. In line two of subsection (2), delete "customer or prospective customer" and insert "recipient or prospective recipient".

Rep. Young pointed out that the word "sold" in subsection (2) (referring to that language which would be on the wrapper of the package) should be changed in view of the amendment regarding the monetary consideration. Mr. Spaulding thought that the word "sold" referred to that part of the law in section 2 and therefore would be applicable in this section. However, it was pointed out that the title to section 2 no longer included the word "selling" but had been changed to "furnishing" (see page 11 of these minutes).

Mr. Paillette wondered if there really was a problem with free obscene material being sent to the minor through the mail. Subcommittee members were of the opinion that free material was being sent quite regularly through the mail. They also agreed that most of this obscene material came from out of state.

Mr. Spaulding pointed out that what the subcommittee was attempting to prohibit was allowing a similar business to get started in Oregon. The subcommittee agreed that the free distribution of obscene material through the mail was conduct that clearly should be prohibited. Rep. Young added that in many cases, the free material was one way of inducing the minor to start reading such material and eventually buying it.

<u>Section 4. Exhibiting an obscene performance to a minor</u>. In examining the meaning of the word "audience" the consensus of the subcommittee was that the word indicated one or more persons.

Rep. Young asked if nudity, under the language of the section, was eliminated with respect to participants and on-lookers and Mr. Paillette agreed that it was.

Chairman Burns remarked that the section might be clarified from a structural standpoint to say:

> "...if, for a monetary consideration or other valuable commodity or service, he knowingly: (a) exhibits...(b) sells... or (c) admits...."

This section, he observed, covers three specific acts outlined above, coupled with the element described as "knowingly" and the fact that the minor is not accompanied by a parent.

Mr. Paillette said he had attempted to break this section into subparagraphs but had encountered difficulty because of the fact that the three types of conduct all relate to a performance and in turn the performance has to depict or reveal nudity, etc.

Chairman Burns raised the question of an inconsistency because both "exhibits" and "admits" refer to a minor who is unaccompanied by his parent or lawful guardian, whereas "sells" has no such requirement. Mr. Paillette replied that it was his intention that the requirement would also apply to "sells."

Chairman Burns asked the subcommittee how they felt about the concept of neutralizing this conduct if the child is accompanied by his parent or lawful guardian. The subcommittee concurred with that policy.

Mr. Wallingford presented the following suggestion:

> "(1) A person commits the crime of exhibiting an obscene performance to a minor...if for a monetary consideration... he knowingly:
>
> "(a) Exhibits to a minor...; or
>
> "(b) Sells to a minor...; or
>
> "(c) Admits a minor to any performance as defined in subsection (2).
>
> "(2) Performance as used in subsection (1)means....."

Chairman Burns was of the opinion that the section could be further shortened by referring to the parent or lawful guardian either in the definitional section or in section 4 after the word "minor", e.g., "if the minor is unaccompanied by his parent or lawful guardian and if for a monetary consideration or other valuable commodity or service...."

It could be taken a step further, Mr. Paillette said, by defining in subsection (6) of section 1 an obscene performance rather than performance, with the new definition to include that part of section 4 which describes such a performance in addition to the present definition of performance. Section 4 would then state that a person commits the crime if he does any one of the three types of conduct described in exhibiting an obscene performance. In this draft, he noted, performance is not used in any way other than as an obscene performance.

Mr. Spaulding wondered if it would be necessary to make it unlawful to sell a ticket to a minor if it is also unlawful to admit him. Rep. Young added that if a person is to exhibit something, he must first admit someone. He asked if the ticket seller who is under 18 could be prosecuted.

Chairman Burns said he thought the ticket seller probably would not be prosecuted. The attempt of this draft, he reminded, was to get at the profiteers and full time promoters behind the performance.

Rep. Young asked about a person who was projecting the picture. Chairman Burns reminded that there was a law passed in 1969 to exclude projectionists from criminal sanctions. In response to a question from Rep. Young, Mr. Paillette said that that statute could be retained if the Commission desired it to be.

Mr. Paillette read his redraft of section 4:

"A person commits the crime of exhibiting an obscene performance to a minor if, for a monetary consideration or other valuable commodity or service, he knowingly:

"(1) Exhibits an obscene performance to a minor who is unaccompanied by his parent or lawful guardian; or

"(2) Sells an admission ticket or other means to gain entrance to an obscene performance to a minor who is unaccompanied by his parent or lawful guardian; or

"(3) Admits a minor who is unaccompanied by his parent or lawful guardian to premises whereon there is exhibited an obscene performance."

Chairman Burns thought that language could be improved upon by using "unaccompanied by his parent or lawful guardian" only once rather than three times. Rep. Young inquired whether that phrase could not be inserted after minor in the second line by adding "who is unaccompanied...." Mr. Spaulding thought the problem could be solved by adding a paragraph saying that it is a defense that the minor was accompanied by his parent or lawful guardian.

Chairman Burns commented that either suggestion would improve the section. The question then would be, does the defendant have to plead it.

Mr. Paillette pointed out that the way it had been drafted originally, it would have to be an element of the crime and the state would have to plead and prove that the minor was unaccompanied by his parent or lawful guardian. With Mr. Spaulding's suggestion, the burden would be on the defendant to prove that the minor was unaccompanied. Mr. Spaulding thought perhaps the burden rightfully belonged on the defendant. Mr. Paillette said he thought the burden should be on the defendant if there were reasonable grounds to believe that the minor was accompanied by his parent or lawful guardian and if it later developed that he was not. This situation was covered in section 6 under defenses. He added that if the subcommittee wanted to make it a defense, it could be moved over to section 6 rather than put in section 4. However, he said, there was a good argument to be made for putting the burden on the state. He did not think it would be unreasonable to impose that burden on the state if, in fact, the minor was not accompanied by his parent or guardian. But if the defendant had reasonable grounds to believe that the minor was accompanied by his parent or guardian and if, in fact, he was not, then put the burden on the defendant to show that he had reasonable grounds. If this element is put in the statute as part of the crime, then it will put people on notice of what the crime amounts to and let them know what is not a crime.

Mr. Spaulding did not see how the policeman would know which minors were accompanied by their parents and which were not. Mr. Paillette assumed they would have to ask since that is what the ticket seller would have to do.

Chairman Burns observed that if it is to be a crime to exhibit, sell or admit, with the requirement that the minor must come forward to show that the parent or lawful guardian was with him, it seemed to be more in the pursuit of a just result than to require the state to prove negative evidence in each case and commit the defendant to work away at establishing a reasonable doubt.

Mr. Wallingford thought that where the defendant was the operator of a motion picture theater and where the police made the arrest, the police would be in a better position to know who was there. The police would have to charge that a certain minor was given admission. The theater owner would probably have no knowledge of the names of the minors or the names of their parents because of the sheer numbers of persons admitted on any given night. The police would need that information in order to make the arrest and it would seem that they would have more information than the defendant. Therefore, it would indicate that perhaps the state should have to plead the proof. Other than what the state tells him, the defendant would have no knowledge of names of those minors who were actually in his theater. He would not know who it was he should not have sold the ticket to.

Chairman Burns thought this was a good point. He agreed that the prosecutor is going to be in a better position to know that the minor was unaccompanied by his parent than is the ticket seller. Although he was reluctant to impose the requirement on the state to negate the evidence, he said he would go along with Mr. Wallingford. Mr. Paillette thought that in most cases, the parent would want to cooperate with the state. If they were not with their minor child, they would probably be agreeable to testifying. In reviewing the suggestions for adding the phrase "unaccompanied by his parent or lawful guardian" to section 4, Chairman Burns was of the opinion that it was better inserted after the word "minor" in the second line of the section than as a separate defense in section 6. This suggestion was presented to the subcommittee as a motion to amend section 4, along with the basic form of Mr. Paillette's redrafted section 4 (see pages 14 and 15 of these minutes).

Rep. Young inquired about the hypothetical situation where the theater owner instructed his ticket seller not to sell tickets to minors and then proceeded to go to Las Vegas,during which time a minor was unlawfully admitted. Could the owner be charged under this draft, he asked. The subcommittee generally agreed that he could not because of the element of culpability indicated by the word "knowingly." Mr. Spaulding brought up still another point. What if that same owner made a trip to Las Vegas three times in a row and each time in his absence, a minor was unlawfully admitted to his theater. Suppose further, that even

though the owner admonished his ticket seller against this practice, it continued a dozen times or more. It was thought that in that case, it would be a question for the jury. Mr. Paillette doubted, however, that it would be a question under the culpability element of "knowingly." He thought perhaps it would require "recklessly."

The subcommittee voted unanimously to approve section 4 as amended.

With respect to the word "knowingly," Mr. Spaulding wondered how a theater manager or owner would know if a particular minor was being admitted. Mr. Chandler's interpretation was that the state would be required to prove that a particular minor was there at the time and because the defendant was in charge of the operation, he must have known that that minor, or any other minor would have been admitted. Mr. Spaulding pointed out that the owner would not necessarily be in the theater and the admitting would have to be done by employes. He wondered how anyone could convict him under the words "knowingly admits a minor."

Mr. Paillette compared this situation with the crime of selling liquor to a minor. He referred to the commentary on page 31:

> "There are no comparable provisions in existing Oregon law. Insofar as the Article would prohibit the sale of certain types of items to 'minors' it is analogous to ORS 471.410 which prohibits giving or selling alcoholic liquor to persons under 21 years of age.
>
> "Knowledge that the person to whom the liquor is furnished is under 21 is not an element of the crime. State v. Raper, 174 Or 252, 149 P2d 165 (1944), held that sale of liquor to a minor is a crime irrespective of the seller's motive or knowledge of the buyer's age."

Chairman Burns concluded that the only way the state could prosecute the owner under this situation would be to insert "recklessly" along with "knowingly" in section 4. He wondered if this would impose too great a burden on the employe. Mr. Paillette replied that he did not think it would be unreasonable. It would still be necessary to show a reckless disregard on the part of the defendant and it would still be a step away from strict liability, he said. Mr. Spaulding agreed but added that it did, however, impose a duty on his part to show what is taking place in his theater. It was agreed that this element would cover the owner who just happened to be out of town when the crime was committed. It was then moved to amend section 4 as approved by inserting the words "or recklessly" before the colon. The motion carried unanimously.

Mr. Spaulding contended that recklessly applied to the wrong element if it applied to "admits" in subsection (3). It was then suggested that "admits" be deleted and "permits the admission of" be inserted in its place. The subcommittee generally approved this change.

Section 5. Displaying obscene materials to a minor. In discussion of section 5, Chairman Burns asked if there were any problem with respect to the word "retail" since so many businesses are now considered "wholesale." Rep. Young noted that Baker had an exclusive wholesale distributorship for all magazines in the nine western states. He suggested that perhaps "business establishment" might be preferable to "retail establishment." He then moved to delete "retail" and insert "business." The motion carried unanimously.

Chairman Burns favored adding "or recklessly" in section 5 in order to be consistent with section 4. Rep. Young wondered how the word "recklessly" would affect the warehouse situation where young kids are often at work packaging magazines and where they would possibly be exposed to obscene pictures, posters and advertisements connected with the promotion and distribution of such magazines. Mr. Paillette replied that this requirement might necessitate a change in employment practices in that situation. He stated that he could not see why the same type of culpability element should not apply to this section on displaying as applied to the section on performances.

Chairman Burns asked that the record show that minors working in a warehouse such as the one just described where obscene material might be just lying around would not fall under the strict definition of displaying obscene materials in a busines establishment indicated in section 5. He then moved to insert the words "or recklessly" after "knowingly" in section 5 and the motion carried unanimously.

Mr. Spaulding was of the opinion that the last line of the first paragraph of section 5 could be improved by inserting the words "so permitted to be" before the word "present" to cover the case where a minor would be permitted to enter the premises and then the minor proceeded to go into another room where he would not be permitted to be. The subcommittee generally conceded this to be a good point and agreed to the amendment. Vote was then taken to approve section 5 as amended and that motion carried unanimously.

The meeting adjourned at 11:00 p.m.

Respectfully submitted,

Connie Wood, Secretary
Criminal Law Revision Commission