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OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 1

Twenty-sixth Meeting, January 22, 1970

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

Staff Present: Mr. Roger D. Wallingford, Research Counsel

Witnesses: Mr. Ed Whalen, representing AFL-CIO
Mr. Duane Himber, 1510 W 2nd Avenue, Eugene
Mr. Reginald S. Williams, attorney, Salem, representing Motion Picture Association of America
Mr. Gordon A. Ramstead, attorney, Eugene, representing Oregon Wholesalers Association

Agenda: Obscenity and Related Offenses; P.D. No. 1 December 1969 (Article 29)

The meeting was called to order by Chairman John Burns at 7:30 p.m. in Room 319 of the Capitol Building, Salem, Oregon. Mr. Spaulding moved to approve the minutes of the last meeting and the motion carried unanimously.

OBSCENITY AND RELATED OFFENSES

Chairman Burns led the discussion of the draft.

Section 6. Defenses. Mr. Spaulding said he thought the last line of subsection (1) was rather confusing because it implies that reasonable effort means something more than merely asking the minor his age, yet it does not indicate exactly what more is required. Rep. Young reminded that under the new definition, a "minor" is an unmarried person less than 18 years of age. Therefore, he wondered if asking the person both his age and his marital status would constitute reasonable effort since that would be slightly more than the minimum effort.

Chairman Burns asked the subcommittee for their opinion of the affirmative defense under this section. He said he was concerned about the element of consistency and was of the opinion that the policy had been to say something was a defense rather than to say it was an affirmative defense. Mr. Chandler recalled that affirmative defenses had been previously used in the proposed code. Chairman Burns asked where the line of demarcation had been drawn.

Mr. Spaulding thought the issue was whether the state would have to disprove the defense if the question were raised by the defendant in a situation which was not an affirmative defense. Rep. Young compared this section to the alibi defense where the defendant must file a notice prior to the trial. He thought perhaps that this was to be the same type of defense. Both he and Chairman Burns were of the opinion that such a statute should be avoided.

Mr. Chandler recalled that in an affirmative defense, the burden is on the defendant to prove by a preponderance of the evidence, e.g., insanity. Chairman Burns read from sections 3 and 4 of the Article on Responsibility; T.D. No. 1:

> "Mental disease or defect excluding responsibility under section 1 of this Article is a defense which the defendant must prove by a preponderance of the evidence.
>
> "No evidence may be introduced by the defendant on the issue of criminal responsibility as defined in section 1 of this Article, unless he gives notice of his intent to do so in the manner provided in section 6 of this Article."

Chairman Burns noted that section 6 then sets out rather detailed requirements. A question arises in the affirmative defense under the Obscenity Article because there is no provision for similar procedural requirements. He warned of trouble in this area unless the section is specific on the procedural requirements of affirmative defenses, since it is an area completely new to Oregon law.

Mr. Spaulding wondered how the state could prove that a particular minor girl, for instance, appeared to the ticket seller to be 18 when in fact she was only 13.

Mr. Chandler observed that section 6 was drafted to provide a defense for the person who has made a reasonable mistake. Mr. Spaulding agreed, but wondered how the state would prove or disprove the defense. Normally, he said, the state proves every element of the crime beyond a reasonable doubt. How can the state prove that the minor appeared to the defendant to be a certain age, he asked.

Rep. Young asked if there was any reason for the language in subsection (1) which states: "the minor was under 18 years of age." He thought since minor had already been defined as an unmarried person under 18 years of age, it was unnecessary to include that part of the definition. Otherwise, he said, it would be better to add that the minor was also unmarried.

Chairman Burns called attention to the fact that Mr. Paillette had based this section on section 235.22 of the New York Revised Penal Law. He thought that if the subcommittee were to make a policy decision in favor of the affirmative defense, the New York language was more realistic because it states:

> "(a) The defendant had reasonable cause to believe that the minor involved was seventeen years old or more; and
>
> "(b) Such minor exhibited to the defendant a draft card, driver's license, birth certificate or other official or apparently official document purporting to establish that such minor was seventeen years old or more."

Mr. Spaulding noted that the difference between the New York approach and that of the draft was the inclusion in the draft of the word "unmarried." Under subsection (1), it would have to appear that the minor was married, he said.

Chairman Burns referred to subsection (2) in which the minor was accompanied by an adult and noted that adult had not been defined. Would adult mean an 18 years old person, he asked.

Mr. Chandler emphasized that New York had much the same problem in their section 235.22. Aside from the age difference of 17, New York requires that the defendant had reasonable cause to believe and that the minor exhibited identification to help establish that impression. These two requirements, he thought, were what was meant by the sentence in subsection (1) of section 6 which states: "Reasonable effort shall not consist of merely asking the minor his age."

Chairman Burns asked if these elements would be an affirmative defense to criminal prosecution for unlawful sale of liquor to a minor. It was pointed out that there is no defense to the unlawful sale of liquor to a minor; there is strict liability.

Mr. Chandler wondered how the New York statute would affect the situation where the defendant testified that the minor appeared to be 18 years of age and that he had shown a draft card to substantiate that belief. Would it be necessary to display the draft card in this case, he asked.

Chairman Burns thought the defense would have to file some kind of notice of an affirmative pleading to require the state to disprove that in its case in chief. Otherwise, the defense would be entitled to a directed verdict, he added. This puts an increased burden on the state. It is one thing for the state to be required to prove its case by permitting it to get past the motion for a directed verdict and then letting the defendant come forward with his evidence, leaving it up to the jury for the ultimate decision. But to prevent that case from ever getting to the jury would seem to be unfair, he said.

Mr. Wallingford came in at this point in the meeting and Chairman Burns asked him if he could shed any light on the reason why this section provided for an affirmative defense, which, he assumed, would require the state to overcome in its case in chief.

Mr. Spaulding remarked that making this an affirmative defense does not require the state to overcome it. Neither did he think the defendant would be required to give notice if he were to plead it. It would be a complete defense and would be a jury question.

In response to a question from Mr. Chandler on the procedure for a directed judgment for acquittal, Mr. Spaulding replied that when there has been no substantial evidence to establish or tend to establish a basis from which the jury could find against the defendant on one of the material elements of the crime, then there should be a directed judgment for acquittal.

Chairman Burns said he would prefer language to the effect that, "It is an affirmative defense for the defendant to prove that from the minor's appearance the defendant had reason to believe that the individual in question was not a minor." However, he was reluctant to approve the policy of the affirmative defense outlined in this section.

Mr. Spaulding said he would not be entirely opposed to conforming this crime to the liquor law and making it a strict liability if the defendant guesses wrong. The jury will take it into consideration if there is a logical defense, he argued. Although Chairman Burns was inclined to go along with Mr. Spaulding's preference, he proposed that action on this section be delayed until Mr. Paillette could be present to explain his views to the subcommittee. The other four subsections seemed to be legitimate, he said, if the policy was to sanction the affirmative defense.

Section 7. Publicly displaying nudity or sex for advertising purposes. Chairman Burns observed that this section has no parallel in existing Oregon law. He also questioned whether it would be constitutional.

Rep. Young mentioned a recent television advertisement which depicts a nude man, woman and child. Would that come under this statute, he asked. Chairman Burns thought it would because of the definition of "advertising purposes." Sections 2 through 5 of this Article are directed at preventing dissemination of obscene material to minors, he said, but this section goes even further in stating that the material need not be obscene; it is directed toward nudity being displayed before anyone.

Mr. Chandler said he was persuaded of the value of this section by Richard Kuh's comments on page 33 of the draft commentary which indicate that removing the advertising feature of nudity and sex quiets the cry of advocates for censorship and permits the satisfaction of appetites for those who desire to view such material privately.

In reply to a question posed by Chairman Burns on the constitutional issue, Mr. Spaulding raised the issue of equal protection. If nudity can be displayed for other purposes besides advertising, he advised, there may be an argument that displaying nudity for advertising deserves equal protection. Nudity could be displayed in a library, museum or school without violating this section providing there was no intent to advertise. Chairman Burns noted that section 8 provides a defense in those cases.

Section 8. Defenses. Rep. Young wondered if commercial venture would include a local service club sponsoring an auction of old paintings with all proceeds to go to a hospital for the blind.

WITNESSES

Although Chairman Burns explained that the subcommittee did not customarily invite witnesses to testify during its hearings, he made an exception at this time to hear from several persons who wanted to present their views on this Article.

Mr. Ed Whalen testified with respect to sections 4 and 5. He recalled that during the last session of the Legislature, because of arrests of motion picture operators and other employes of certain motion picture houses in the metropolitan area, laws had been passed to exclude those persons, the argument being that they had no control, and the choice was not theirs, over material that had been exhibited in the theaters. (The Legislature also chose to exclude the cashier or ticket seller.) Although none of these persons were ever convicted, the attendant publicity caused them a great deal of embarrassment and thus, they were wronged when in fact, they were not guilty of any crime.

In explaining progress of the legislation through the House and the Senate, Mr. Whalen reported that there was a Senate amendment which made the manager of the theater the responsible person. He stated that this legislation was presently being used as a model in other states which have not yet adopted this type of immunity for the employe. He informed the subcommittee that while the group he represents does not advocate showing any type of obscene movie, it is their position that where obscene material is shown by choice of the manager or owner, the employe should not in any way be considered as having participated in the showing. His main concern, he stressed, was for the continued employment of the individuals he represents.

Chairman Burns reported that on page 14 of the minutes of January 8, it was noted that Rep. Young had referred to this legislation and was told that it could be retained in the proposed draft.

Mr. Whalen suggested that section 4 could include a reference to chapter 169 of the Oregon Laws of 1969 and read from that Act:

> "Section 1. (1) As used in this section, 'employe' means any person regularly employed by the owner or operator of a motion picture theater if he has no financial interest other than salary or wages in the ownership or operation of the motion picture theater, no financial interest in or control over the selection of the motion pictures shown in the theater, and is working within the motion picture theater where he is regularly employed but does not include a manager of the motion picture theater.

"(2) No employe is liable to prosecution under ORS 167.151 or under any city or home-rule county ordinance for exhibiting or possessing with intent to exhibit any obscene motion picture provided the employe is acting within the scope of his regular employment at a showing open to the public."

Mr. Whalen explained that while under subsection (2), a person is granted immunity for showing a picture in the course of his regular employment, he is not protected while showing an obscene picture in some private lodge, for instance, in his spare time. He pointed out that including this chapter in the proposed draft might raise a conflict because of the reference to the seller who, under existing law, is exempt but who, under the proposed draft, is being asked to act as a censor by prohibiting the admission of the minor to the theater. He advised the subcommittee that the seller might never have seen the picture in question and yet he is the one who made the sale to the minor. In this case, the seller is being asked to make a judgment decision on something he has not even viewed.

Mr. Chandler added that he was also being asked to take the responsibility for the owner or the manager. Chairman Burns observed that in many cases, the owner lived out of state and it was difficult to reach him because of the culpability requirement and therefore, "recklessly" had been added to "knowingly" in order to attempt to solve that problem.

Mr. Duane Himber, a magazine paperback distributor from Eugene, was the next person to testify. He stated that he represented all the magazine distributors in Oregon. He said that his group was eager to see the subcommittee prepare obscenity legislation that magazine distributors could understand and abide with. He stated that he supplied 175 newsstands in the Eugene area but that he did not distribute the most obscene type of magazines to those newsstands. He thought most of this type of material came from out of state. He indicated that he favored the approach of an injunctive proceeding rather than a criminal proceeding in dealing with obscenity.

Mr. Spaulding observed that this would involve bringing an injunction against nearly every magazine for a determination of whether or not it was obscene. Rep. Young added that with respect to "Playboy" magazine, for instance, it could involve bringing an injunction for every issue. Mr. Spaulding also pointed out that the court who ordered the injunction would be subject to appeal to the supreme court and that it could take a year to resolve the issue.

Mr. Himber conceded that that was technically correct. However, he said, although "Playboy" publishers would no doubt defend against the injunction, most of the more obscene magazines would not be defended -- particularly after two or more injunctions -- and they would, therefore, be put out of business. His point was that the civil remedy would accomplish the same objective the subcommittee was attempting to accomplish by this draft.

Mr. Wallingford explained that in drafting this Article, Mr. Paillette had studied a number of proposals on injunctive procedure and had come to the conclusion that under the Oregon Constitution, they would be declared unconstitutional because they would be considered a prior restraint; that while it might be an effective approach in some states, it would not be in Oregon.

Mr. Reginald Williams testified on behalf of the Motion Picture Association of America. He commented that he had submitted a copy of this draft to the chief attorney for the Motion Picture Associaton and he expected comments from him which he would, in turn, pass along to Mr. Paillette. He took issue with Mr. Chandler's earlier statement that he was persuaded by Richard Kuh's comments on page 33 of the draft commentary. That philosophy would have the effect, he thought, of requiring adults to search for sort of a speakeasy in order to obtain literature in which they were interested and to which they would be entitled.

He also referred to subsection (2) of section 8 and wondered if the fact that an object of art was displayed in a bona fide art museum would mean that it was all right to display the same thing or copies of it elsewhere for purposes of advertisement.

Mr. Chandler, reflecting on testimony presented so far, said it seemed to him that the courts had been moving toward a rather strict interpretation of the manufacturer's liability. He wondered if this section was not directed toward the liability on the part of the exhibitor or seller as well as the manufacturer. Chairman Burns agreed that some of these sections were definitely framed in terms of the seller's liability.

Mr. Gordon A. Ramstead, an attorney from Eugene, spoke briefly. He said he represented Mr. Himber and his group of distributors. He wondered if perhaps magazines and books could not be labeled in much the same way as the motion picture industry had labeled its movies. He did not think it was right to put legitimate business out of operation in order to prevent minors from seeing or reading something obscene. It was his opinion that clerks in stores should be protected as well as ticket sellers, operators and other employes.

Mr. Chandler agreed that they should. He explained that his question on a seller's or exhibitor's liability was directed at the proprietor such as the approach in the proposed code that deals with corporations. It is the proprietor, not the employe, who is liable under that statute. The criminal action must be directed toward someone who has authority or ability to stop such criminal practices.

(The subcommittee took a short recess at this point.)

Chairman Burns said it seemed to him that one of the biggest problems in this draft is with the definition of nudity. In re-examination of that definition, he said, it appeared that it would include the nipple of the female breast even if it were covered with pasties. It would be considered nudity if only the immediately adjacent area were covered. He thought perhaps nudity should be redefined so that if the nipple were uncovered, it would constitute nudity but if the nipple were covered, it would not.

Rep. Young thought perhaps the definition could include the medical term for the rosy area immediately around the nipple. In response to a question from him, the subcommittee agreed that they would consider that area or the nipple nude if exposed.

Another concern voiced by Rep. Young was about the word "buttocks." It was pointed out that the word referred only to post-pubertal buttocks, not those of children. After further discussion, it was determined that the words "male or female" were unnecessary because the word "human" described genitals. Rep. Young moved to delete the words "male or female" in the second line of subsection (4) of section 1. The motion carried unanimously.

Mr. Chandler moved to delete "or buttocks" in the second line of the same subsection. That motion also passed unanimously.

Chairman Burns suggested adding the words "post-pubertal" in the third line of subsection (4) before the word "human." The suggestion was adopted by unanimous consent of the subcommittee.

It was suggested that Mr. Paillette redraft that portion of the sentence that describes the breast by using more brief and concise terms (perhaps the medical term) to describe the rose colored area around the nipple.

Chairman Burns asked for a consensus on the subcommittee's opinion of Mr. Whalen's suggestion to exclude the ticket seller from criminal sanction. The subcommittee agreed that it was a logical approach to exclude the employe while directing the criminal action toward someone who either owns, manages or exercises a discretionary function over what is to be shown or sold, or someone who has a financial interest in the business. Chairman Burns noted that this approach would necessitate the redrafting of sections 4 and 5 to conform with the wishes of the subcommittee.

The subcommittee voted on a motion by Mr. Spaulding to delete "buttocks," in the third line of subsection (5). The motion carried unanimously.

The subcommittee adjourned at 10:00 p.m.

Respectfully submitted,

Connie Wood, Secretary
Criminal Law Revision Commission