

OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 1

Twenty-seventh Meeting, February 17, 1970

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

Members Excused: Mr. Robert Chandler

Staff Present: Mr. Donald L. Paillette, Project Director

Agenda: Obscenity and Related Offenses; P.D. No. 2;  
February 1970 (Article 29)

The meeting was conducted by a telephone conference at 11:35 a.m. Rep. Young moved to approve the minutes from the meeting of January 22. The motion was adopted.

OBSCENITY AND RELATED OFFENSES

Section 1. Definitions. Mr. Paillette pointed out that subsections (1) and (2) were much the same as those in Preliminary Draft No. 1. Subsection (1) was changed slightly, he said, by inserting "commercial sale" for "sale commercially," "commercial offering" for "offering commercially" and "commercial exhibition" for "exhibiting commercially." Chairman Burns and Rep. Young both agreed that the new language was preferable. Subsections (1) and (2) were then approved.

Mr. Paillette noted that subsections (3) and (4) had been redrafted to reflect the amendments adopted by the subcommittee. These two subsections were also approved. Chairman Burns observed that the definition of "nudity" in subsection (5) seemed to be consistent with the amendments and suggestions made at the last meeting of the subcommittee. Mr. Paillette called attention to the last sentence in subsection (5) which states:

"For purposes of this definition, a female breast is considered uncovered if the nipple only or the nipple and the areola only are covered."

He explained that the definition is an attempt to state clearly that even though a woman were wearing pasties, she would still be considered nude for the purposes of the Article.

Chairman Burns recalled that the subcommittee had intended that if either the nipple or the areola were uncovered, it would be considered nudity; otherwise it would not. Rep. Young agreed that that was the subcommittee's intent as expressed in the last meeting.

Mr. Paillette pointed out that under Richard Kuh's approach (see commentary P.D. No. 1), nudity would include the female breast covered only with pasties. Considering that this definition was drafted with respect to material being distributed to minors, and not a performance in a night club before an adult audience, he felt that there was justification for following Kuh's definition.

Rep. Young wondered if it would not be more realistic to say the "human female breast below a point immediately above the top of the areola" rather than "nipple." Thus, any part of the breast below that would be considered nudity. The subcommittee voted to make this change.

Mr. Paillette questioned the subcommittee on whether they wished to exclude the word "buttocks" in subsection (10) since the word had been deleted from the definitions of "nudity" and "obscenities." He noted, however, that subsection (10) refers to "sexual conduct...in an act of apparent sexual stimulation or gratification" and therefore, it might be appropriate to include the word "buttocks."

Rep. Young moved to approve subsection (10) as drafted and the motion carried unanimously. Chairman Burns then moved to approve section 1 as amended and that motion also carried unanimously.

Chairman Burns said he was continually disturbed by some of the broad terms in this draft such as the definition of "obscenities." He expected some of the language would be attacked in the future and asked that the commentary show that in those cases, it was the subcommittee's intent that it would be a question for the trier of fact.

Section 2. Furnishing obscene materials to minors. Rep. Young established that the obscene motion picture and the obscene sound track would both be covered -- the first under subsection (1) and the second under subsection (2). Mr. Paillette agreed and the subcommittee voted unanimously to approve section 2.

Section 3. Sending obscene materials to minors. Chairman Burns stated that page 11 of the minutes from the meeting of January 8 shows the subcommittee amended section 3 by changing the word "delivering" to "dispatching" rather than "sending." Mr. Paillette explained that he had used the word "sending" in the proposed amendments to Preliminary Draft No. 1 which were prepared for the January 22 meeting. Several terms had been discussed in the meeting of January 8, he said, and it seemed to him that "sending" made better sense than "dispatching" and that was the reason for his using that term in the proposed amendments. There was no objection and Rep. Young moved to approve section 3 as amended. The motion carried unanimously.

Section 4. Exhibiting an obscene performance to a minor. Mr. Paillette explained that subsections (2) and (3) contain the exemption for the employe discussed in previous meetings. Rep. Young observed that the objections raised by Mr. Ed Whalen in the meeting of January 22 were now covered by this draft.

Chairman Burns was of the opinion that this section was clearer than the earlier draft. The subcommittee voted unanimously to approve section 4.

Section 5. Displaying obscene materials to minors. Mr. Paillette said he had redrafted section 5 to include the "owner, operator or manager of a business" in accordance with the wishes of the subcommittee. Chairman Burns suggested adding "or acting in a managerial capacity" after the word "business." There is a possibility, he warned, that the acting manager might be eliminated from the purview of this statute and he urged the subcommittee to make clear their intention in this respect.

Mr. Paillette said he was concerned with getting at the right individual -- for instance, the employe who does not care enough to try to prevent dissemination of materials to minors, even when the real owner is trying to comply with the statute. However, excluding the employe in section 4 but not in section 5 might result in an equal protection problem. Of course, he noted, one could argue that the employe was acting in a managerial capacity while the real manager was away.

Chairman Burns asked Mr. Paillette if he thought the proposed amendment was perhaps not needed. Mr. Paillette replied that there was some question in his mind about the ultimate result of the amendment.

Chairman Burns suggested that the amendment be approved and submitted to the Commission. Rep. Young moved to approve section 5 as amended. The motion passed unanimously.

Section 6. Defenses. To clarify for the subcommittee the distinction between an "affirmative defense" and a "defense," and where the burden of proof falls in each case, Mr. Paillette read from his proposed amendment to the Preliminary Article:

"Section 5. Defenses; burden of proof. (1) When a 'defense', other than an 'affirmative defense' as defined in subsection (2) of this section, is raised at a trial, the state has the burden of disproving the defense beyond a reasonable doubt.

"(2) When a defense, declared to be an 'affirmative defense' by this code, is raised at a trial, the defendant has the burden of proving the defense by a preponderance of the evidence."

Chairman Burns observed that section 6 would then mean that the defendant would have to show by a preponderance of the evidence that he had no reason to suspect that the minor was under 18 years of age. This brought up the question of whether this description of "minor" should not be changed to conform with the new definition which states that a minor means "an unmarried person who has not reached his 18th birthday." He said that section 6 was courting trouble and suggested that it could be eliminated completely, thus leaving the question of defense to the jury.

It was noted that there had previously been some discussion on treating these offenses as a strict liability such as the present liquor law violations. Rep. Young said he thought the question of defense would be a jury question in any kind of trial.

Chairman Burns thought the state would have to prove that the defendant acted knowingly in any case, which presented the possibility that the defendant might not be culpable.

Mr. Spaulding was not sure that the state would have to prove the defendant acted knowingly in the case of a liquor violation since it was his understanding that a person sells at his own risk. He wondered if this would be the same type of liability. Chairman Burns assured him that it would not because of the requirements set forth in the Culpability Article.

Mr. Paillette stated that to make this crime a strict liability one, the statute would have to expressly provide for it. It was concluded therefore, that the minutes should show that the subcommittee did not intend these sections to impose strict liability.

Mr. Paillette agreed that subsections (1) and (2) which deal with the "reasonable mistake" situation could be eliminated. However, he felt the other subsections (3), (4) and (5) should be retained. In those cases, the defendant would be in a position to know the facts of the situation and if he came within any of those three subsections he should not be guilty.

The subcommittee voted to delete subsections (1) and (2) of section 6. They then approved section 6 as amended.

Section 7. Publicly displaying nudity or sex for advertising purposes. Chairman Burns said he anticipated problems with section 7 but acknowledged that the subcommittee had previously indicated their approval. Rep. Young confirmed this intention on the part of the subcommittee and it was therefore agreed to approve section 7.

Section 8. Defenses. Rep. Young asked if the language in subsection (2), "visible in a normal display setting," was not modifying the test set out in the section. What would constitute a normal display setting, he asked. Mr. Paillette replied that this language was from Kuh and would include such things as a window display setting that was visible to passersby.

Chairman Burns thought it would also include a display such as the one found in the capitol coffee shop where pictures are sometimes displayed on the walls. He assumed that this could be called a normal display setting.

Mr. Spaulding agreed that displays of this type would be lawful provided they were "exhibited by a bona fide art, antique or similar gallery or exhibition." Both Mr. Spaulding and Rep. Young said they had no objection to section 8 and it was then approved.

Mr. Paillette queried the subcommittee on whether they wished to make a policy statement on Senate Bill 92 and the injunction procedure approach to obscenity in response to those persons who have urged the adoption of the civil injunction procedure.

Mr. Spaulding was of the opinion that SB 92 was a totally impractical approach to the problem. Chairman Burns and Rep. Young both agreed with him and Chairman Burns stated for the record that the subcommittee had decided not to go the injunctive route.

Mr. Paillette also requested the intention of the subcommittee with respect to two present statutes: ORS 167.151 which deals with disseminating obscene matter, and ORS 167.152 which deals with tie-in sales of indecent or obscene publications. He asked if the subcommittee wished to retain those two statutes, which applied to adults as well as minors, or whether they felt they should be repealed since the proposed draft is aimed at minors rather than adults.

Chairman Burns said he was satisfied that the proposed draft, as it relates to minors, is a very good statute and he could see no reason for retaining the two existing statutes.

Mr. Paillette pointed out that the proposed draft would cover situations involving minors as well as public nuisances and reminded that these were the only two areas he considered to be on reasonably safe constitutional grounds in drafting obscenity legislation.

Rep. Young asked if repealing ORS 167.151 would leave any loopholes. Mr. Paillette noted that it included the classic Roth test and that it covered dissemination of obscene materials to adults which the present draft does not but he anticipated no other problem if the statute were to be repealed. The subcommittee then recommended that both ORS 167.151 and ORS 167.152 be repealed.

The meeting adjourned at 12:20 p.m.

Respectfully submitted,

Connie Wood, Secretary  
Criminal Law Revision Commission