Tapes #91 and 92

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OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 2

Twelfth Meeting, February 9, 1970

Minutes

Members Present: Representative Wallace P. Carson, Jr. Chairman
Senator Kenneth A. Jernstedt
Representative Harl H. Haas
Mr. Thomas D. O'Dell, Chief Trial Counsel, Justice Dept. (Representing Atty. Gen. Lee Johnson)

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

Agenda: Gambling Offenses; P.D. No. 1; January 1970 (Article 30)

The meeting was called to order at 1:45 p.m. by Chairman Carson in Room 315, Capitol Building, Salem, Oregon.

Senator Jernstedt moved the minutes of the subcommittee meeting of November 14, 1969, be approved as submitted. The motion was adopted unanimously.

GAMBLING OFFENSES; P.D. NO. 1; JANUARY 1970.

Mr. Paillette reported that the Model Penal Code does not deal with gambling. There is, however, a Model Anti-Gambling Act drafted by the American Bar Association Commission on Organized Crime. It was approved by the ABA in 1952 and is intended to be a model, not a uniform act. It has been approved by the National Conference of Commissioners on Uniform State Laws and is similar to the New York and Michigan approach in that it recommends the generic approach to gambling. This is the same approach the Commission has endeavored to follow in its drafts on other areas of criminal law--to define terms and avoid the itemization of specifics wherever possible to enable the incorporation of a number of single, isolated statutes into fewer, more comprehensive general statutes.

Mr. Paillette explained that there are two very difficult problems in this area, the first of which is the attempt to distinguish between the "professional" gambler and the "casual, social" gambler. Traditionally, the laws in Oregon and most states have not tried to draw a distinction between the two insofar as the definitive statement of the crime is concerned. The practical effect, insofar as the enforcement of the laws is concerned, has been to draw this distinction. This is one of the critical questions the draft tries to resolve. The second problem has to do with the

so-called "free play" pinball machines. Under McKee v. Foster, he continued, the court held that these machines are not prohibited under Oregon law if they are, in effect, "free play." Under the provisions of the proposed draft the free play machine would be treated the same as any other pinball machine and would be prohibited.

Mr. Paillette advised that the commentary to the Model Anti-Gambling Act points out the problem of distinguishing between the social, casual gambler and the professional and provides an option in this area as well as in the area of the free play machines. He read from the Commentary to the Model Anti-Gambling Act noting, also, that it was written by Rufus King, Consultant to the National Conference of Commissioners on Uniform State Laws, formerly Consultant to the Senate Committee to Investigate Organized Crime in Interstate Commerce and of the Subcommittee Investigating Crime and Law Enforcement in the District of Columbia:

> "The Commission has also had great difficulty with this problem of finding a formula which would exclude the social or casual gambler from prosecution and punishment, yet which would not result in opening a large breach in the statute for the benefit of professional gamblers and their patrons. The Commission recognizes that it is unrealistic to promulgate a law literally aimed at making a criminal offense of the friendly election bet, the private, social card game among friends, etc. Nevertheless, it is imperative to confront the professional gambler with a statutory facade that is wholly devoid of loopholes.
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> "It should be noted that the prosecuting attorneys who were asked for comment on prior drafts of the Model Act were also divided in their opinions as to the desirability of making an express exemption for the casual or social gambler. Many prosecutors were flatly opposed to any such exemption because it offered a loophole for the professional gambler.
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> "Many state laws at the present time penalize all forms of gambling without exceptions for the social gambler. [This includes Oregon.] It is doubtful whether the latter has been unduly harassed under such laws.
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> "Because of the sharp division of opinion as to how social, non-professional gambling should be dealt with, Section 3 offers two alternatives. Section 3, without the optional subsection (2), penalizes all gambling, as defined in Section 2 (2), throwing the casual, social gambler into

the same category as the patron of the professional. If the optional subsection is inserted, Section 3 operates to exempt the social gambler from prosecution and punishment, so long as he is not participating in a professional game or play."

The proposed draft, New York and Michigan attempt to draw this distinction, in the statute, between the casual, social gambler and the professional, he said. He thought this approach would probably be the one thing in the draft to be discussed the most.

Senator Jernstedt asked how "social" Mr. Paillette considered clubs, fraternal organizations.

Mr. Paillette thought these organizations would be excluded; they would not come within the provisions of the draft so long as the club was not making a profit or taking a percentage.

Mr. O'Dell understood, then, that gambling for charitable purposes would be prohibited and Mr. Paillette concurred.

Section 1. Definitions.

Mr. Paillette explained that 12 terms are defined in the section, some of which do not change the existing law much.

The term "contingent events" used in the definition of "bookmaking" set out in subsection (1) means football games, boxing matches, horseraces, etc. The term "unlawfully" is also used in the subsection and is defined in subsection (12) to mean "not specifically authorized by law." Mr. Paillette pointed out that not all gambling will be illegal under the proposed draft; the legislature can authorize some forms of gambling as long as they do not constitute a lottery prohibited by the Oregon Constitution. ORS chapter 167 contains statutes dealing with lotteries, forbidden games and gambling devices.

Subsection (2) defines a "contest of chance." Mr. Paillette related that the courts have had considerable difficulty in the past in trying to determine whether the contest must be one of pure chance or pure skill or whether the two can intermingle. There is a split of authority around the country, he continued, as to whether a game is a lottery if there is any form of chance connected with it. Some courts have used the "dominant chance approach." If chance is the main element, even though there may be an element of skill involved in the game, it is still prohibited. Oregon has followed the "dominant chance approach" and the draft would continue Oregon law in this respect.

Subsection (5) defines "lottery" or "policy" and retains the "prize-chance-consideration test" which has traditionally been employed in Oregon.

Representative Haas understood games such as those conducted by service stations, which stipulate that a purchase is unnecessary, would be excluded from the draft provisions.

Mr. Paillette said the draft would not prohibit these games because the customer is not paying for the chance when he pays for his gasoline. This would not be contra to what has been the law in Oregon with respect to these games. While it may be felt desirable to prohibit this type of game, he felt it should be done through consumer protection statutes rather than through the gambling statutes.

Mr. O'Dell recalled that in Safeway v. Aschenbrenner it was held specifically that this kind of game is not a lottery. There is no requirement that the person put forth any of his own money.

The definition of "mutual" or "the numbers game" in sub (6) contains the language "...upon the basis of the outcome of a future contingent event otherwise unrelated to the particular scheme" which is used to get at the scheme where the winning number depends on the total number of stocks traded on the market that day or on how the horses run in three races that afternoon, etc. While Mr. Paillette did not think this practice is presently a great problem in Oregon, he thought the code should be equipped to deal with this kind of situation.

Subsections (8) and (9) define "profits from gambling activity" and "promotes gambling activity" and these definitions are very critical to the statement of the crime itself. These are really the two ways in which someone can run afoul of some of the sections in the draft.

Subsection (10) defines the term "slot machine." The definition would cover machines that are basically gambling devices, but that, incidentally deliver gum balls or little plastic trinkets or tokens.

Representative Haas understood this definition would also cover the "claw" machine often seen at carnivals. He asked if these machines are illegal in Oregon at present. Mr. O'Dell thought they would be. Senator Jernstedt asked about the legality of games involving pitching pennies or dimes. Mr. Paillette thought the "dominant chance theory" would have to be applied. Mr. O'Dell commented that these games are illegal but are usually condoned. Most district attorneys have looked upon this type of game as de minimis, although he recalled this is what created problems

for District Attorney Langley. He happened to walk through an area where some gambling was going on for a charitable purpose and it was later found out that he had done so and had not prosecuted. As a result, he was suspended from practice for two years.

Chairman Carson asked the special evil attributed to slot machines; how does this form of gambling differ from horseracing, etc.; why has it been determined that the pinball machine of a bygone era is bad but that the occasional, high-stake card game at the golf club or lodge is all right.

Mr. O'Dell replied that special legislation has been passed allowing the Multnomah Kennel Club and various other racetracks and county subdivisions to have this type of gambling at their fairs.

Mr. Paillette added that a card game at a lodge or parimutual betting at a horserace under Oregon's system is a much different situation than that involving slot machines or pinball machines which have traditionally been controlled by racketeers. He reported that Rufus King had pointed out that $7 billion dollars a year changes hands through slot machines and numbers games in this country. The revenue from this gambling goes to underwrite all of the other illegal activities conducted by organized crime. A slot machine, he continued, can be controlled so that the chance of winning is infinitesimal. Where there is a large volume of profit, there is organized crime.

Representative Haas observed that there are really only two choices--one is to legalize, license and rigidly control and the other alternative is to go the route set out in the proposed draft. A value judgment must be made of the cost to the public of the former.

Chairman Carson asked the status of games such as "Foosball" and shuffleboard, etc. He thought these games generated about as much gambling activity as pinball machines. Mr. O'Dell observed that in these particular instances the management would not participate in the profits of the game. Mr. Paillette agreed, adding, for example, that if two individuals pay to play shuffleboard, what they do between themselves as to gambling would be their business under the draft provisions. Mr. O'Dell wondered if this might not be exempted, anyway, under the "skill" concept.

Mr. O'Dell observed that the committee was not going to resolve the conflict between state legalized gambling and control of certain areas and the other matters which have traditionally been prohibited within the state. He could recall no circumstance

under present statutes where a regular Wednesday night poker game in a private home had been infiltrated and broken up; when this is done the games involve professionals.

Chairman Carson cited a situation where an individual for a nickel received five balls he could push around to watch a board light up. He received nothing other than the chance to exercise his skill. He asked if this would be prohibited by the draft provisions even though the machine might be "readily adaptable or convertible."

Mr. Paillette did not think this would be prohibited as long as the player received nothing other than the chance to play. The definition of "something of value" in subsection (11) includes free plays because as a practical matter the free games are not really "free"--they are usually convertible to cash and unless it is possible to catch the individual in the act of receiving the redemption, there is nothing that can be done to control this. This does overrule McKee v. Foster and changes Oregon law. Replying to a question put by Senator Jernstedt, Mr. Paillette stated that the draft would continue to prohibit punchboards.

Mr. Paillette thought the draft approach was a more honest approach in that it does attempt to distinguish between the social gambler and the professional but he again noted the inherent danger in trying to do this--a loophole may be left, giving the professional gambler something he "can hang his hat on."

Mr. O'Dell observed that the term "casual gambler" usually referred to cards played in fraternal organizations or the private home. Allowing this on a casual or social basis is opening a hole "big enough to drive a truck through" because it is so easy to have a friend visiting from out of state. The draft sets no limit on stakes, etc., and he felt the provision would simply open up gambling. From a practical, prosecution standpoint, it would be difficult to prove a game is not "social."

Mr. Paillette read the definition of "something of value" set out in subsection (11) and advised that this is the language which would overrule McKee v. Foster.

Representative Haas asked if the "no free play route" were to be adopted if it is known how many pinball operators would be affected.

Mr. O'Dell said it has been substantially reduced in many counties by enforcement of the present law. It exists in various degrees around the state depending upon the feelings of the law enforcement agencies. He did not believe, however, that in Oregon it is a very big business.

Mr. Paillette noted that the Model Anti-Gambling Act contains a section entitled "Gambling; [Exemption]; Professional Gambling". He read from this section (section 3):

> "(1) Whoever engages in gambling, or solicits or induces another to engage in gambling shall be fined or imprisoned, or both."

Subsection (2), optional, reads:

> "[(2) Natural persons shall be exempt from prosecution and punishment under subsection (1) for any game, wager or transaction which is incidental to a bonafide social relationship, is participated in by natural persons only, and in which no person is participating, directly or indirectly, in professional gambling.]"

Representative Haas referred to subsection (8), the definition of "profits from gambling activity" and subsection (9), the definition of "promotes gambling activity" and noted that both refer to a person "other than as a player". He understood from this that the sole proprietor of a small place who promoted gambling activity and functioned as a player also would be "all right" under the draft provisions.

Mr. Paillette disagreed; the owner would be gambling but he would also be profiting from and promoting gambling. Subsection (7) defines a "player" as "a person who engages in any form of gambling solely as a contestant...." If the person does anything else, he is no longer classed as a "player".

Representative Haas expressed concern about "opening up" this type of activity.

Mr. O'Dell recalled a problem created in a Portland park a few years ago when it was made practically unusuable by the public because of the large number of people gathering there to shoot craps. Under the draft language he thought all of these persons would have been "players" and he noted there is no language in the proposed draft restricting the locus of the social gambling activity. The Portland activity was prosecuted because the persons were playing a "forbidden game." The draft, he said, would open up this type of activity. Mr. O'Dell was of the opinion that a policy decision of this type should be made by the whole Commission.

Mr. Paillette thought the activity could be controlled through use of other statutes in the code--perhaps under disorderly conduct. While he recognized the draft approach to social gambling contained

some inherent dangers, he felt that the proposed criminal code so far was fundamentally an honest code--it did not attempt to state one thing while knowing in practice it would be another. It has been recognized that having a crime which is not enforced on the books creates disrespect for the law.

Representative Haas cited a situation where a couple of people from out of state set up a game in their Portland hotel room and invite people from various areas to play poker. He did not think this activity would be covered by the proposed draft and wondered if it was desirable to regulate it. Mr. O'Dell was not sure this type of game could not be regulated under the draft provisions in that the instigators would be profiting from the activity.

Representative Haas moved the adoption of section 1 and the motion carried unanimously. Those voting: Jernstedt, Haas, O'Dell, Chairman Carson.

Chairman Carson expressed the desire that Mr. O'Dell be present when the Gambling Offenses Article is considered by the Commission, even if Attorney General Johnson is able to be present, so that the Commission can have the benefit of his thoughts on the draft. Mr. Paillette will advise Mr. O'Dell of the date and time of the Commission meeting.

Mr. O'Dell commented that he voted for the adoption of section 1 because he felt it an honest approach to an existing situation and would enable the full Commission to consider the proposal. He noted that he would want to give additional thought to the question of legalizing casual gambling before making a final decision in this regard.

Section 2. Promoting gambling in the second degree.

Mr. Paillette read the draft section and stated that the extensive definition section (section 1) makes it possible to have a short definition of the crime.

Senator Jernstedt moved the adoption of section 2 as drafted. The motion carried unanimously. Those voting: Jernstedt, Haas, O'Dell, Chairman Carson.

Section 3. Promoting gambling in the first degree.

Mr. Paillette explained that the section continues the attempt to distinguish between the casual and the professional gambler. The individual commits the crime if he violates section 2 (knowingly promotes or profits from unlawful gambling activity) on a larger scale. He acknowledged that the money amounts set out in the section are arbitrary. They were derived from the Michigan code which in turn was based on New York's definition.

Representative Haas moved the adoption of section 3 as drafted. The motion carried unanimously. Those voting: Jernstedt, Haas, O'Dell, Chairman Carson.

Mr. Paillette drew attention to the draft commentary on page 8 which states that: "The individual citizen who places a bet is not criminal." He asked if the members thought there would be value in trying to distinguish between the bettor placing a bet with a friend and the bettor placing a bet with a person he knows to be a professional participating in an illegal lottery or activity of some sort. The draft approach does not make this distinction. The Model Anti-Gambling Act attempts to make this distinction, although it is very difficult to draw such a line--to show "knowledge" on the part of the bettor.

Representative Haas was of the opinion that this would become "a crime by reputation." An act which is not a crime with one person becomes criminal if it is transacted with an individual whose reputation is such that he is considered "professional."

Mr. Paillette stated that the underlying purpose of the proposed draft is to get at the professional who exploits the popular urge to gamble. This purpose was acceptable to the subcommittee.

Mr. Paillette pointed out that a number of existing statutes relating to lotteries and other forms of gambling are set out on pages 9-10 of the draft, along with the Article from the Oregon Constitution dealing with lotteries. He stated that it was not his intent to have the draft repeal any of the statutes outside of those in ORS chapter 167. Some internal reference changes might possibly be necessary in some of the other statutes to make them correspond to the new criminal code.

Section 4. Possession of gambling records in the second degree.

Mr. Paillette related that present statutes prohibit the use of gambling devices but do not prohibit the possession. Possession, however, is prima facie evidence of use. He read the provisions of section 4 and pointed out the statements are very broad.

Representative Haas understood the section's provisions were necessary where a prosecutor cannot obtain evidence for a charge of gambling. Mr. O'Dell commented that the provision would catch the "bagman." He thought the statute was a legitimate one and that its "broadness" was better than trying to restrict it by itemization.

Representative Haas referred to the language "...he possesses any writing, paper, instrument or article..." found in section 4 and noted this could be a paper and pencil. He asked if the present statute is this broad.

Mr. Paillette replied that the proposal is a little different from anything presently in the statutes. In fact, possession of lottery tickets was the only possession-type statute he found in the gambling area. The section was difficult to draft, he reported, because there are so many different ways by which to conduct a lottery or a gambling operation.

Senator Jernstedt moved the approval of section 4 as drafted. The motion carried. Those voting for: Jernstedt, O'Dell, Chairman Carson. Voting against: Haas.

Section 5. Possession of gambling records in the first degree.

Mr. Paillette explained that this section enhances the crime set out in section 4 because of the volume involved.

Senator Jernstedt moved the approval of section 5 as drafted. This motion also carried. Voting for: Jernstedt, O'Dell, Chairman Carson. Voting against: Haas.

Section 6. Possession of gambling records; defenses.

Representative Haas asked if the section provided a mens rea, particularly subsection (2).

Mr. Paillette agreed that an intent would have to be proved. Under the "knowledge" requirement in sections 4 and 5, it would be necessary to show the individual knowingly possessed the gambling records.

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. 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. Representative Haas favored this amendment, also.

The subcommittee recessed at 3:05 p.m., reconvening at 3:30 p.m.

Mr. Paillette reported that Michigan and New York had used the figure of 10 bets, feeling that if an individual possessed records for more than 10, he was in a commercial category.

Mr. O'Dell moved to delete the language "in a number not exceeding 10" contained in subsection (1) of section 6. The subsection would read:

"In any prosecution under section 4 or subsection (1) of section 5...it is a defense if the writing, paper, instrument or article possessed by the defendant constituted, reflected or represented plays, bets or chances of the defendant himself."

The motion carried unanimously on a voice vote.

Senator Jernstedt moved the adoption of section 6 as amended. The motion carried unanimously. Those voting: Jernstedt, Haas, O'Dell, Chairman Carson.

Section 7. Possession of a gambling device.

Mr. Paillette explained that subsection (1) prohibits the possession of a slot machine. To prosecute under subsection (2), however, it would be necessary to show additional knowledge on the part of the defendant because it could involve many different devices used for gambling.

Mr. O'Dell cited a case where an individual had an antique slot machine in his home. Its presence was reported and the machine was confiscated and destroyed. The district attorney was under mandatory obligation to do this. He wondered if it would be possible to make an exception for this type of machine without making a loophole in the law.

Mr. Paillette thought it might be possible to write in an affirmative defense of some type similar to that which exempts antique firearms (ORS 166.460). He noted the adopted definition of a slot machine, however, includes a machine even though "it is not in working order." Chairman Carson commented that such instances would be very rare and providing an exemption could lead to more complications. Mr. O'Dell tended to agree with this view, noting that the problem arose because in this instance there was no prosecutorial discretion provided for.

Representative Haas moved the approval of section 7 as drafted. The motion passed unanimously. Voting for: Jernstedt, Haas, O'Dell, Chairman Carson.

Section 8. Gambling offenses; prima facie proof.

Mr. Paillette explained that a published report of a sporting event in a newspaper, magazine or other publication of general circulation or evidence that a description of some aspect of the event was written, printed or otherwise noted at the place in which a violation of this Article is alleged to have been committed

is prima facie evidence that the event did occur. This avoids the necessity of putting a witness on the stand to prove that a horserace, football game or other event took place. It would be particularly helpful where the charge against a defendant involved an event which took place out of state. The language "evidence that a description of some aspect of the event was written...or otherwise noted at the place..." appearing in subsection (2) refers to such things as posted race results--something which might not involve a newspaper or publication of general circulation.

Mr. O'Dell moved the adoption of section 8 as drafted. The motion carried unanimously. Those voting: Jernstedt, Haas, O'Dell, Chairman Carson.

Section 9. Forfeiture of prizes.

Mr. Paillette advised that this section is a restatement of present law. He referred to ORS 167.430 and read:

> "(1) All sums of money and every other valuable thing drawn as a prize in any lottery or pretended lottery, by any person within this state, are forfeited to the use of the state, and may be sued for and recovered by a civil action."

Mr. O'Dell moved the adoption of section 9 as drafted and the motion carried unanimously. Those voting: Jernstedt, Haas, O'Dell, Chairman Carson.

Section 10. Recovery of gambling fines.

Mr. Paillette advised that this section, also, restates present law--ORS 167.530. He drew attention to a typographical error in the third line--the language should be "...an action at law" not "an actor at law...." He asked if it was the subcommittee's desire that these funds continue to go into the county treasury.

Mr. O'Dell suggested that perhaps the fund should be handled in a manner similar to the way it is handled under the liquor statutes.

Mr. Paillette did not think the amount of money involved was very large but he was hesitant to change the distribution from the counties. He directed attention to optional section 13, Disposal of fines and jurisdiction of courts, set out on page 28, noting it directs that "one-half of any fine imposed in any conviction under this Article shall be paid...into the treasury of the county wherein the confiscation was secured for the benefit

of the school fund." This provision is presently contained in ORS 167.550, having to do with fines relating to slot machines. He questioned the need for both section 10 and optional section 13 and suggested combining the provisions of the two sections. This would do away with the distinction between slot machine fines and gambling fines.

Representative Haas was inclined to amend section 10 and delete the optional section 13 but asked if this procedure would result in the giving up of anything since it would eliminate subsection (2) of optional section 13. This reads:

> "Justice courts have concurrent jurisdiction with circuit courts in all proceedings under section 7 or 10 of this Article."

Mr. Paillette advised that sections 7 and 10 refer to slot machines.

Chairman Carson asked how funds from gambling fines and forfeitures would be handled if neither section 10 or 13 were adopted. Mr. Paillette thought they would then be handled like any other fine imposed in a criminal case. Representative Haas thought this action might result in a little political interplay. Mr. O'Dell did not think the amount recovered under this section would amount to much. Representative Haas asked if the counties would receive the money if sections 10 and 13 were deleted.

Mr. Paillette referred to ORS 156.650 and read:

> "Except as otherwise provided in ORS 484.250, but notwithstanding any other provision of law, one-half of all fines and forfeited bail collected by the clerk of a district court in criminal cases in the district court shall be paid to the State Treasurer, who shall place the money to the credit of the General Fund available for general governmental expenses, and the other half of such fines and forfeited bail shall be paid to the county treasurer, who shall place the money to the credit of the general fund of the county."

ORS 30.450 reads:

> "Fines and forfeitures not specially granted or otherwise appropriated by law, when recovered, shall be paid into the treasury of the proper county."

Mr. O'Dell moved to delete sections 10 and 13 and to instruct the staff to draft one section covering the general recovery of gambling fines which would put the money in the treasury of the county where the case is tried. The motion carried unanimously on a voice vote.

Mr. Paillette observed that this provision really belongs in the procedural code rather than in the substantive code. Since it is part of the substantive gambling code, he had left it there, thinking that when the procedural code is revised, the provision can be changed over if it is felt desirable.

Mr. Paillette referred to subsection (2) of optional section 13 and asked what the subcommittee wanted to do regarding this jurisdictional matter. (Subsection set out on page 13.)

Representative Haas understood that if the subsection were deleted, justice courts would not have concurrent jurisdiction in those cases. Mr. Paillette said this would be true. The subcommittee favored deletion of this subsection and understood this was accomplished by the adoption of Mr. O'Dell's earlier motion re sections 10 and 13.

Section 11. Seizure and destruction of slot machines.

Mr. Paillette explained that this section covered the seizure and destruction of slot machines and that the language is a modified version of ORS 167.540.

Chairman Carson asked if the provisions are necessary. Mr. O'Dell thought some provision for disposition of the machines necessary in that they cannot be legally possessed.

Mr. O'Dell moved to amend subsection (2) of section 11 by inserting the words "of the county" after the word "fund". The subsection would then read: "...who shall deposit them to the general fund of the county." The motion was unanimously adopted on a voice vote.

Mr. O'Dell noted there are many instances where when slot machines are seized and ordered destroyed by the courts, the expensive and useful electrical components have been given to highschool electronic classes and other such schools. He assumed this practice could be continued under the draft provisions. Mr. Paillette thought this would be permissible under the draft provisions in that to "destroy" does not necessarily mean to "break up." It would mean to destroy the machine as a gambling device. He thought the distribution of parts in the manner described by Mr. O'Dell should be left to the discretion of the sheriff, however.

Representative Haas moved the adoption of section 11 as amended and the motion carried unanimously. Those voting: Jernstedt, Haas, O'Dell, Chairman Carson.

Section 12. (Optional). Failing to enforce gambling laws.

Mr. Paillette explained that he had cast the present statute (ORS 167.515) in terms of a crime so that the offense would be consistent with the proposed code's form and style. It is basically the same as present law.

Mr. O'Dell was concerned about the provision in that every district attorney is aware that certain forms of gambling take place in his county. He thought that somehow there should be a stronger "intent requirement" on the part of the district attorney--a stronger scienter or mens rea. He contended that a district attorney by his oath of office is required to do what is set out in section 12. Failure to do so can hold him up to removal from office by the voters.

Representative Haas asked if Mr. O'Dell thought the use of the term "probable cause" was better than using the term "reasonable cause." Mr. O'Dell did not know that there is really a distinction although there have been cases which have attempted to distinguish between the terms.

Mr. Paillette was of the opinion that optional section 12 was unnecessary in that this conduct would be covered under the Article on Abuse of Public Office or elsewhere in the code. If the district attorney or peace officer were participating, he could be charged as a principal to the crime--for bribery or for whatever substantive crime applied. The district attorney is presently under oath to prosecute under the laws.

Mr. O'Dell thought there are adequate sanctions for the district attorney and the peace officer under statutes now in existence. The proposed section, he said, is no more than another legislative warning for him to follow his oath of office. It could be abused and, he thought, has been abused.

Mr. Paillette referred to the draft on Abuse of Public Office, P.D. No. 2, and read:

> "Official misconduct in the second degree. A public servant [which would clearly cover a district attorney or a peace officer] commits the crime of official misconduct in the second degree if he knowingly violates any statute or lawfully adopted rule or regulation relating to his office.
>
> "Official misconduct in the first degree. A public servant commits the crime of official misconduct in the

first degree if with intent to obtain a benefit for himself or to harm another:

"(1) He knowingly fails to perform a duty imposed upon him by law or one clearly inherent in the nature of his office; or

"(2) He knowingly performs an act constituting an unauthorized exercise of his official duties."

Mr. O'Dell moved to delete optional section 12 on the grounds that the conduct is adequately covered elsewhere in the code. Mr. Paillette suggested inserting something into the commentary explaining why the provision was not retained. Representative Haas thought the provision should be brought to the attention of the Commission for consideration. Chairman Carson agreed that the Commission should take a look at the provision but favored having the subcommittee take a stand on the matter.

Mr. O'Dell's motion to delete optional section 12 carried unanimously. Those voting: Jernstedt, Haas, O'Dell, Chairman Carson.

Mr. Paillette advised the subcommittee members that this was the last Article to be considered by them under the substantive code. An ad hoc committee made up of the chairmen of the subcommittees will consider the penalty sections to be inserted in the substantive code.

The meeting was adjourned at 4:15 p.m.

Respectfully submitted,

Maxine Bartruff, Clerk
Criminal Law Revision Commission