

See: Minutes of Subcommittee No. 2
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Tapes #84 and 85

CRIMINAL LAW REVISION COMMISSION
311 Capitol Building
Salem, Oregon

ARTICLE 13. SEXUAL OFFENSES

Preliminary Draft No. 2; August 1969

Reporter: Donald L. Paillette

Subcommittee No. 2

ARTICLE 13 . SEXUAL OFFENSES

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Section 1. Sexual offenses; definitions. As used in this Article, unless the context requires otherwise:

(1) "Deviate sexual intercourse" means sexual conduct between persons not married to each other consisting of contact between the sex organs of one person and the mouth or anus of another.

(2) "Female" means a female person who is not married to the actor. Spouses living apart under a decree of separation from bed and board are not married to one another for purposes of this definition.

(3) "Forcible compulsion" means physical force that overcomes earnest resistance; or a threat, express or implied, that places a person in fear of immediate death or serious physical injury to himself or another person, or in fear that he or another person will immediately be kidnapped.

(4) "Mentally defective" means that a person suffers from a mental disease or defect that renders him incapable of appraising the nature of his conduct.

(5) "Mentally incapacitated" means that a person is rendered incapable of appraising or controlling his conduct at the time of the alleged offense because of the influence of a narcotic or other intoxicating substance administered to him without his consent or because of any other act committed upon him without his consent.

(6) "Physically helpless" means that a person is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

(7) "Sexual contact" means any touching of the sexual or other intimate parts of a person not married to the actor for the purpose of arousing or gratifying the sexual desire of either party.

(8) "Sexual intercourse" has its ordinary meaning and occurs upon any penetration, however slight; emission is not required.

Section 2. Lack of consent. (1) Whether or not specifically stated, it is an element of every offense defined in this Article that the sexual act was committed without consent of the victim.

(2) A person is considered incapable of consenting to a sexual act if he is:

- (a) Less than 16 years of age; or
- (b) Mentally defective; or
- (c) Mentally incapacitated; or
- (d) Physically helpless.

Section 3. Ignorance or mistake as a defense. (1) In any prosecution under this Article in which the criminality of conduct depends on a child's being below the age of 12, it is no defense that the actor did not know the child's age or that he reasonably believed the child to be older than the age of 12.

(2) When criminality depends on the child's being below a specified age other than 12, it is a defense for the actor to prove by a preponderance of the evidence that he reasonably believed the child to be above the specified age at the time of the alleged offense.

(3) In any prosecution under this Article in which the victim's lack of consent is based solely upon his incapacity to consent because he is mentally defective, mentally incapacitated or physically helpless, it is a defense for the actor to prove by a preponderance of the evidence that at the time of the alleged offense he did not know of the facts or conditions responsible for the victim's incapacity to consent.

Section 4. Relationship of parties as a defense. In any prosecution under this Article it is a defense for the actor to prove by a preponderance of the evidence that he and the victim were, at the time of the alleged offense, living together by mutual consent in a relationship of cohabitation as man and wife, regardless of the legal status of their relationship.

Section 5. Defendant's age as a defense. In any prosecution under sections 6, 7, 9 and 10 of this Article in which the victim's lack of consent was due solely to incapacity to consent by reason of being less than a specified age, it is a defense that the actor was less than three years older than the victim at the time of the alleged offense.

Section 6. Rape in the third degree. A male commits the crime of rape in the third degree if he has sexual intercourse with a female less than 16 years of age.

Section 7. Rape in the second degree. A male who has sexual intercourse with a female commits the crime of rape in the second degree if:

- (1) The female is incapable of consent by reason of mental defect, mental incapacitation or physical helplessness; or
- (2) The female is less than 14 years of age.

Section 8. Rape in the first degree. A person who has sexual intercourse with a female commits the crime of rape in the first degree if:

- (1) The female is subjected to forcible compulsion by the male; or
- (2) The female is less than 12 years of age; or
- (3) The female is less than 16 years of age and is the male's sister, of the whole or half-blood, his daughter or his wife's daughter.

Section 9. Sodomy in the third degree. A person commits the crime of sodomy in the third degree if he engages in deviate sexual intercourse with another person less than 16 years of age or causes that person to engage in deviate sexual intercourse.

Section 10. Sodomy in the second degree. A person who engages in deviate sexual intercourse with another person or causes another to engage in deviate sexual intercourse commits the crime of sodomy in the second degree if:

- (1) The victim is incapable of consent by reason of mental defect, mental incapacitation or physical helplessness; or
- (2) The victim is less than 14 years of age.

Section 11. Sodomy in the first degree. A person who engages in deviate sexual intercourse with another person or causes another to engage in deviate sexual intercourse commits the crime of sodomy in the first degree if:

- (1) The victim is subjected to forcible compulsion by the actor; or
- (2) The victim is less than 12 years of age; or
- (3) The victim is less than 16 years of age and is the actor's brother or sister, of the whole or half-blood, his son or daughter or his spouse's son or daughter.

Section 12. Sexual abuse in the second degree. (1) A person commits the crime of sexual abuse in the second degree if he subjects another person to sexual contact; and

- (a) The victim does not consent to the sexual contact; or
- (b) The victim is incapable of consent by reason of being mentally defective, mentally incapacitated or physically helpless.

(2) In any prosecution under subsection (1) of this section it is a defense for the actor to prove by a preponderance of the evidence that:

- (a) The victim's lack of consent was due solely to incapacity to consent by reason of being less than 16 years of age; and
- (b) The victim was more than 14 years of age; and
- (c) The actor was less than four years older than the victim.

Section 13. Sexual abuse in the first degree. A person commits the crime of sexual abuse in the first degree when he subjects another person to sexual contact; and

- (1) The victim is less than 12 years of age; or
- (2) The victim is subjected to forcible compulsion by the actor.

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AMENDMENTS TO
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ARTICLE 13. SEXUAL OFFENSES

Amendments to:

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Section ____ . Lewd solicitation. A person commits the crime of lewd solicitation if while in a public place he solicits another person to engage in deviate sexual intercourse.

COMMENTARY - LEWD SOLICITATION

A. Summary

Accepting the premise that open and aggressive solicitation by homosexuals may be grossly offensive to other persons availing themselves of public facilities, a legitimate public interest arises in discouraging such conduct aside from the propriety or impropriety of the sexual conduct represented by the solicitation.

In affirming a conviction for a barroom proposition for a homosexual act, the California Court of Appeal, Fourth District, Second Division (People v. Mesa, 9/16/68) held:

"It is manifest the legislature believed that subjection in public to homosexual advances or observation in public of a homosexual proposition would engender outrage in the vast majority of people...."

The Court then held that no matter how private a homosexual propositioner intends his act to be, when he solicits a prospective partner in a public place, he is liable for punishment under the California vagrancy statute.

The section is intended to discourage indiscriminate public seeking for deviate sexual intercourse. It is not intended to reach purely private conversations between persons having an established intimacy, even if conducted in a public place and related to deviate sexual intercourse.

There is no requirement that the solicited conduct be for hire. That form of conduct is covered by the Article on Prostitution.

B. Derivation

The section is taken from Model Penal Code section 251.3.

C. Relationship to Existing Law

There is no specific Oregon statute comparable to the proposed section. Similar conduct could be punished under ORS 166.060 (f) as vagrancy or ORS 161.310 as conduct grossly disturbing public morals.

Section ____ . Public indecency. A person commits the crime of public indecency if while in, or in view of, a public place he performs:

- (1) An act of sexual intercourse; or
- (2) An act of deviate sexual intercourse;

or

(3) An act of exposing his genitals with the intent of arousing the sexual desire of himself or another person.

Existing Law
ORS
167.145
167.015
161.310

COMMENTARY - PUBLIC INDECENCY

A. Summary

Indecent or lewd exposure of the person to the public view is a common law misdemeanor. (See 4 Bl. Comm. 64). It has been made a specific offense under many state statutes:

"It is unlawful for any person to expose or or exhibit his sexual organs in any public place, or on the private premises of another, or so near thereto as to be seen from such private premises, in a vulgar and indecent manner...." F.S.A. (Fla.) 800.03.

Subsections (1) and (2) proscribe the performance of certain sexual activity in a public place. There is no mens rea requirement here; the commission of the act in public for whatever reason constitutes the offense.

Subsection (3) requires an intent to arouse the sexual desire of the actor or another. An accidental or negligent exposure would not be culpable in the absence of a provable "lewd predisposition".

B. Derivation

The section is taken from Connecticut Revised Penal Code section 196.

C. Relationship to Existing Law

ORS 167.145 Indecent exposure. 1 year, \$500 fine.

ORS 167.015 Lewd cohabitation. 6 months, \$300 fine.

ORS 161.310 Offenses against public peace, health or morals. 6 months, \$200 fine.

State v. Naylor, 68 Or 139, 136 P 889 (1913), involved a prosecution under ORS 167.015, the lewd cohabitation statute. The Court held that "lewd and lascivious cohabitation means a living together in a state of fornication or adultery". Since the Sexual Offenses Article has dispensed with crimes involving private sexual activity between consenting adults, it would be inconsistent to retain a lewd cohabitation statute.