See: Commission Minutes
1/10/70, p. 24, Vol. IX, Tape #43

CRIMINAL LAW REVISION COMMISSION

311 Capitol Building
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ARTICLE 26. RIOT, DISORDERLY CONDUCT AND RELATED OFFENSES

Preliminary Draft No. 2; November 1969

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Subcommittee No. 3

ARTICLE 26. RIOT, DISORDERLY CONDUCT AND RELATED OFFENSES

Preliminary Draft No. 2; November 1969

Section 1. Riot, disorderly conduct and related offenses; definitions. As used in this Article, unless the context requires otherwise:

(1) "Abuse" means to deface, damage, defile or otherwise physically mistreat in a manner likely to outrage ordinary public sensibilities.

(2) "Public place" means a place to which the general public has access, and includes, but is not limited to, hallways, lobbies and other parts of apartment houses and hotels not constituting rooms or apartments designed for actual residence, and highways, streets, schools, places of amusement, parks, playgrounds and premises used in connection with public passenger transportation.

COMMENTARY - RIOT, DISORDERLY CONDUCT AND RELATED OFFENSES; DEFINITIONS

A. Summary

Subsection (2) defines "public place" in broad terms in an attempt to avoid the defeat by technicalities of prosecutions for disorderly conduct and related offenses which require that the conduct occur in a "public place." The emphasis is directed to the circumstances attending the prohibited conduct rather than the nature of the place of occurrence in determining the "public" nature of the incident.

Black's Law Dictionary 1394 (1951) gives a comprehensive definition of "public place," the substance of which is reflected by the proposed definition:

> "A place to which the general public has a right to resort; not necessarily a place devoted solely to the uses of the public, but a place which is in point of fact public rather than private, a place visited by many persons and usually accessible to the neighboring public. Also, a place in which the public has an interest as affecting the safety, health, morals, and welfare of a community. A place exposed to the public, and where the public gather together or pass to and fro."

Subsection (1) defines the word "abuse," which is used in connection with sections 8 and 9 of this Article.

B. Derivation

With minor changes, the definition of "public place" is taken from New York Revised Penal Law section 240.00 (1).

The definition of "abuse" is taken from Model Penal Code section 250.9, which defines the synonymous word "desecrates."

C. Relationship to Existing Law

The definitions of"public place" and "abuse"are new to Oregon law.

In Roach v. City of Eugene, 23 Or 376, 31 P 825 (1893), the Court discussed "public place" in connection with public notice posting requirements:

> "A public place is a relative term.... A place where the citizens frequently meet, or resort, or have occasion to be, is construed to be a public place."

TEXT OF REVISIONS OF OTHER STATES

TEXT OF MODEL PENAL CODE

Section 250.9. Desecration of Venerated Objects.

A person commits a misdemeanor if he purposely desecrates any public monument or structure, or place of worship or burial, or if he purposely desecrates the national flag or any other object of veneration by the public or a substantial segment thereof in any public place. "Desecrate" means defacing, damaging, polluting or otherwise physically mistreating in a way that the actor knows will outrage the sensibilities of persons likely to observe or discover his action.

# # #

TEXT OF NEW YORK REVISED PENAL LAW

§ 240.00 Offenses against public order; definitions of terms

The following definitions are applicable to this article:

1. "Public place" means a place to which the public or a substantial group of persons has access, and includes, but is not limited to, highways, transportation facilities, schools, places of amusement, parks, playgrounds, and hallways, lobbies and other portions of apartment houses and hotels not constituting rooms or apartments designed for actual residence.

# # #

TEXT OF MICHIGAN REVISED CRIMINAL CODE

[Definitions]

Sec. 5501. The following definitions apply in this chapter:

(b) "Public place" means a place to which the public or a substantial group of persons has access, and includes but is not limited to highways, transportation facilities, schools, places of amusement, parks, playgrounds and hallways, lobbies and other portions of apartment houses not constituting rooms or apartments designed for actual residence.

# # #

Section 2. Riot. A person commits the crime of riot if while participating with five or more other persons he engages in tumultuous and violent conduct and thereby intentionally or recklessly creates a grave risk of causing public alarm.

Existing Law
ORS
145.020
145.990
166.040
166.050
399.065

COMMENTARY - RIOT

A. Summary

Under the common law a riot involves five necessary elements:

> "There are five necessary elements in a riot: (1) there must be at least three persons; (2) they must have a common purpose; (3) there must be execution or inception of the common purpose; (4) there must be an intent to help one another by force if necessary against any person who may oppose them in the execution of their common purpose; (5) there must be force or violence, not merely used in demolishing, but displayed in such a manner as to alarm at least one person of reasonable firmness and courage." (Kenney's Outlines of Criminal Law, section 437 (17th ed, 1958)).

The proposed section adopts the modern concept of a "riot" by requiring a greater number of rioters and by shifting the emphasis from the commission of some other crime to the "conduct" that creates a risk of causing "public alarm."

It is necessary to prove that the rioters were involved in a common disorder; it is not enough to show that numerous individuals were engaged in similar unrelated activities. Mere presence without taking part by word or deed is not participation. In discussing the legislative policy supporting such a provision, the Model Penal Code commentators based their decision to include it on three grounds:

> (1) "To provide aggravated penalties for disorderly conduct where the number of participants makes the behavior especially alarming;"

(2) "To provide penal sanctions for disobeying police orders directing a disorderly mob to disperse;" and

(3) "To subject to police orders persons present but not shown to be implicated in the disorderly behavior--a kind of expanded 'complicity', necessitated by the fact that police cannot be expected to distinguish participants from non-participants intermingled in a mob." (See, Model Penal Code Commentary, Tent. Draft No. 13, pp. 20-21 (1961)).

The term "tumultuous and violent conduct" is intended to represent much more than mere loud noise or disturbance. The language is designed to imply terroristic mob behavior involving ominous threats of personal injury and property damage:

"The underlying element, essential to constitute statutory crime of 'riot' and distinguishing it from other crimes involving breach of peace, is disturbance of public peace, which implies idea of lawless mob accomplishing or bent on accomplishing some object in violent and turbulent manner creating public alarm or consternation or terrifying or calculated to terrify people." (People v. Edelson, 169 Misc. 386, 7 NYS2d 323 (1938).

It should be noted that most of those participating in large urban riots will be punished for their individual criminal acts rather than for the crime of riot.

Continued justification for making riotous and tumultuous conduct a crime is discussed in 14 Wayne L Rev 1004 (1968):

"....Even acknowledging that many of the conditions that formerly prompted riot legislation do not exist today, it still seems that making riotous and tumultuous conduct a crime has justification; first, to create an offense for situations where, because of the great masses of persons involved, there is a serious threat posed to society; second, to establish an offense similar to conspiracy but which does not necessitate the proof of common intent to commit particular acts; finally, by separating mob behavior (which by its nature is more dangerous) from individual disorderliness the policy considerations underlying the separate provisions are made clear."

B. Derivation

With minor changes, the proposed section is derived from New York Revised Penal Law section 240.05. The language "participating with [five] or more others" was derived from Model Penal Code section 250.1 (1).

C. Relationship to Existing Law

ORS 145.020 Dispersal of unlawful or riotous assemblages.

(1) When three or more persons are unlawfully or riotously assembled...they may be ordered in the name of the State of Oregon to disperse....If they do not immediately disperse, the officer must arrest them.

(2) Any person commanded to aid in the arrest of persons failing to disperse shall be deemed one of the rioters if he fails to give aid.

(3) No officer having notice of such unlawful or riotous assemblage shall neglect to exercise the authority granted by this section.

ORS 145.990: "(1) Violation of subsection (2) of ORS 145.020 is punishable as provided in ORS 166.050.

"(2) Violation of subsection (3) of ORS 145.020 is a misdemeanor."

ORS 166.040: "Riot and unlawful assembly defined.

"(1) Any use of force or violence, or threat to use force or violence, if accompanied by immediate power of execution, by three or more persons acting together, and without authority of law, is riot.

"(2) When three or more persons assemble with intent, or with means and preparation to do an unlawful act, which would be riot if actually committed, but do not act towards the commission thereof; or assemble without authority of law and in a manner adapted to disturb the public peace or excite public alarm; or assemble disguised in a manner adapted to prevent them from being identified, it is an unlawful assembly."

ORS 166.050: "Punishment for participating in riot.

"Any person participating in any riot shall be punished upon conviction as follows:

"(1) In the same manner as a principal in the crime, if a felony or misdemeanor is committed in the course of the riot.

"(2) By imprisonment in the penitentiary for not more than 15 years, if he carried, at the time of the riot, any species of dangerous weapon, or was disguised, or encouraged or solicited other persons, who participated in the riots, to acts of force or violence.

"(3) By imprisonment in the county jail for not less than three months nor more than one year, or by a fine of not less than $50 nor more than $500, in all other cases."

ORS 399.065: "The Governor shall have the power, in case of ...riot, breach of order...to order into active service of the state for such period, to such extent and in such manner as he may deem necessary all or any part of the...militia."

The emphasis of existing law is on conduct preparatory to the commission of a separate offense and individual acts of misconduct committed in group situations. Under the proposed criminal code revision, these offenses will be reached by the provisions on inchoate crimes, parties to crime and other definitive substantive sections. The thrust of the proposed section on riot is directed towards wrongful group action producing public "alarm" and terror.

It is interesting to note that ORS 166.050, which provides penalties for the crime of riot, does not include a penalty provision for unlawful assembly, which is defined in ORS 166.040 (2). This distinction is the basis of the court's decision in State v. Stephanus, 53 Or 135, 99 P 428 (1909), which is discussed in connection with the section on unlawful assembly.

A most comprehensive analysis of ORS 166.040 is found in State v. Mizis, 48 Or 165, 85 P 611, 86 P 361 (1906):

> "To constitute a crime under B. & C. Comp. 1913 [now ORS 166.040], there must be: First, the use of force or violence or threats to use force or violence, accompanied by immediate power of execution; second, such force or violence or threats must be by three or more persons acting together; and, third, they must be acting without authority of law.

"It is, of course, not necessary that the three persons should do the same act in the sense that what one does must be identical with what is done by each of the others to constitute an 'acting together', within the meaning of the statute. It is enough if they have a common purpose to do the act complained of or are engaged in aiding and assisting one another to accomplish such common purpose, although the individual act of each may be separate from that of the other....

"Nor is it necessary that there should be direct and positive proof of a common purpose, or that the parties should deliberate beforehand or exchange views before entering upon the execution of their design. The purpose and intent may be inferred and found by the jury from the circumstances and the acts committed by them....

"'Riot' is a compound offense, to constitute which there must be a joint action of three or more persons. But all who aid, encourage or promote it by words, signs or other acts are principals and jointly guilty of the offense. It is not necessary that a party should commit some personal violence or do some other physical act, but any act of assistance or encouragement is sufficient to make him a principal. If he is busy while the riot is in progress in guiding, directing, inciting or encouraging others to commit acts of violence, he is as guilty as the instrumentalities he puts in motion...." (Accord: State v. Seely, 51 Or 131, 94 P 37 (1908); State v. Allen, 152 Or 422, 53 P2d 1054 (1936)).

The distinction between riot and unlawful assembly was discussed in State v. Stephanus, 53 Or 135, 99 P 428 (1909):

"If parties assemble in a tumultuous manner, and actually execute their purpose with violence, it is 'riot' at common law. 'Unlawful assembly' is a distinct offense at common law, and if persons assemble for a purpose which, if executed, would constitute a riot, but separate without carrying out their purpose, their acts constitute an unlawful assembly."

There is considerable authority holding that the proscribed conduct creating the "alarm" need not itself be unlawful:

18 Or L Rev 254 (1939) Criminal Law--Riot--What Constitutes:

"[A] group of cases sets forth the rule that tumultuous and violent, though not necessarily unlawful, acts which result in fright to persons may constitute a riot. One case, which has been frequently cited with approval,

> held that a riot existed when 8 or 10 disguised men paraded up and down the street at night shooting guns and blowing horns for several hours, terrifying a number of persons. State v. Brazil, Rice 257 (S.C. 1839)....It is sufficient if the action of the parties implicated is so violent and tumultuous as to be likely to cause fright and individuals are frightened. Spring Garden Ins. Co. v. Imperial Tobacco Co., 132 Ky 7, 116 SW 234, 20 LRA (N.S.) 277 (1909)."

In Salem Mfg. Co. v. First American Fire Ins. Co. of N.Y., 111 F2d 797 (9th Cir Or 1940), the Court stated:

> "To constitute a riot it is not necessary that there should be actual fright to the public generally. It is enough if the action of the parties implicated be so violent and tumultuous as to be likely to cause fright, and if individuals are frightened."

The court then quoted with approval International Wire Works v. Hanover Fire Ins. Co., 230 Wis 72, 283 NW 293:

> "The generally understood meaning of the word 'riot' is an assembly of individuals who commit a lawful or unlawful act in a violent or tumultuous manner, to the terror or disturbance of others...."

The proposed section would impose a single penalty provision for the crime of riot. The aggravating factors enhancing the penalty contained in ORS 166.050 would be reached by the various sections on parties to crime, carrying a concealed weapon, assault, criminal solicitation, etc.

TEXT OF REVISIONS OF OTHER STATES

TEXT OF MODEL PENAL CODE

Section 250.1. Riot; Failure to Disperse.

(1) Riot. A person is guilty of riot, a felony of the third degree, if he participates with [two] or more others in a course of disorderly conduct:

(a) with purpose to commit or facilitate the commission of a felony or misdemeanor;

(b) with purpose to prevent or coerce official action; or

(c) when the actor or any other participant to the knowledge of the actor uses or plans to use a firearm or other deadly weapon.

(2) Failure of Disorderly Persons to Disperse Upon Official Order. Where [three] or more persons are participating in a course of disorderly conduct likely to cause substantial harm or serious inconvenience, annoyance or alarm, a peace officer or other public servant engaged in executing or enforcing the law may order the participants and others in the immediate vicinity to disperse. A person who refuses or knowingly fails to obey such an order commits a misdemeanor.

# # #

TEXT OF NEW YORK REVISED PENAL LAW

§ 240.05 Riot in the second degree

A person is guilty of riot in the second degree when, simultaneously with four or more other persons, he engages in tumultuous and violent conduct and thereby intentionally or recklessly causes or creates a grave risk of causing public alarm.

Riot in the second degree is a class A misdemeanor.

§ 240.06 Riot in the first degree

A person is guilty of riot in the first degree when (a) simultaneously with ten or more other persons he engages in tumultuous [1] and violent conduct and thereby intentionally or recklessly causes or creates a grave risk of causing public alarm, and (b) in the course of and as a result of such conduct, a person other than one of the participants suffers physical injury or substantial property damage occurs.

Riot in the first degree is a class E felony.

# # #

TEXT OF MICHIGAN REVISED CRIMINAL CODE

[Definitions]

Sec. 5501. The following definitions apply in this chapter:

(a) To "obstruct" means to render impassable without unreasonable inconvenience or hazard. A gathering of persons to hear a person speak or otherwise communicate does not constitute an obstruction.

(b) "Public place" means a place to which the public or a substantial group of persons has access, and includes but is not limited to highways, transportation facilities, schools, places of amusement, parks, playgrounds and hallways, lobbies and other portions of apartment houses not constituting rooms or apartments designed for actual residence.

(c) "Transportation facility" means any conveyance, premises or place used for or in connection with public passenger transportation, whether by air, railroad, motor vehicle or any other method. It includes aircraft, watercraft, railroad cars, buses and air, boat, railroad and bus terminals and stations and all appurtenances thereto.

# # #

TEXT OF PROPOSED CONNECTICUT PENAL CODE

§ 185. Riot in the first degree

A person is guilty of riot in the first degree when (a) simultaneously with six or more other persons he engages in tumultuous and violent conduct and thereby intentionally or recklessly causes or creates a grave risk of causing public alarm, and (b) in the course of and as a result of such conduct, a person other than one of the participants suffers physical injury or substantial property damage occurs.

Riot in the first degree is class A misdemeanor.

§ 186. Riot in the second degree

A person is guilty of riot in the second degree when, simultaneously with two or more other persons, he engages in tumultuous and violent conduct and thereby intentionally or recklessly causes or creates a grave risk of causing public alarm.

Riot in the second degree is a class B misdemeanor.

# # #

Section 3. Unlawful assembly. A person commits the crime of unlawful assembly if:

Existing Law
ORS
166.040 (2)

(1) He assembles with five or more other persons with the purpose of engaging in conduct constituting a riot; or

(2) Being present at an assembly that either has or develops the purpose of engaging in conduct constituting a riot, he remains there with the intent to advance that purpose.

COMMENTARY - UNLAWFUL ASSEMBLY

A. Summary

The common law crime of "rout", or unlawful assembly, is defined in 1 Russell on Crime, 284 (11th ed, 1958):

> "An unlawful assembly...is a disturbance of the peace by persons assembling together with an intention to do a thing which, if it were executed, would make them riotous, but neither actually executing it nor making a move towards its execution....In substance this means that an assembly is unlawful if it may reasonably be found that it will endanger the public peace...any meeting assembled... under...circumstances...likely to produce danger to the tranquility and peace of the neighborhood is an unlawful assembly....This difference between riot and unlawful assembly is this: if the parties assemble in a tumultuous manner calculated to cause terror, and actually execute their purpose with violence, it is a riot; but if they merely assemble upon a purpose which, if executed, would make them riotous, but do not execute or make any motions to create such purpose and having done nothing, separate without carrying their purpose into effect, it is an unlawful assembly."

The purpose of the section is stated in the Michigan commentary:

> "....[It] is intended to reach those who have assembled for the purpose of rioting or who are on their way to the scene of a riot, but who have not yet begun

> to riot, or who associate with a group of known potential rioters with intent to aid their cause. It thus comprises both unlawful assembly and rout at the common law, and constitutes in effect an expanded concept of attempted riot...." (Michigan Revised Criminal Code, §5515 Committee Commentary, Final Draft 1967).

Michigan Revised Criminal Code §5515 is analyzed in 14 Wayne L Rev 999 (1968):

> "The most limiting factor in this definition of unlawful assembly is that it applies only to assemblies called for the purpose of rioting, or those, originally peaceful in nature, that develop a violent and tumultuous intent....The draftsmen avoided an unjustifiable (and probably unconstitutional) result by focusing on the conduct and intent of those participating in the assembly. Therefore, peaceful assemblies (even where called for an unlawful purpose) which cause an outbreak of violence by those hearing the words spoken or who are opposed to the auspices of the meeting will not render the peaceful members of the assemblage guilty of an unlawful assembly.... It is felt that the proposed unlawful assembly provision will be of only limited efficacy in dealing with the problem of a speaker agitating and inciting a crowd to riotous behavior...."

One alternative to this problem is adoption of an inciting to riot section. Both the recently enacted New York and Connecticut revised criminal codes have such a provision. The same conduct would be criminal solicitation under the Article on Inchoate Crimes.

The constitutional issue involved in imposing criminal sanctions in the area of unlawful assemblies was raised in State v. DeJonge, 152 Or 315, 51 P2d 674 (1936). The defendant was convicted under a state criminal syndicalism law which contained the language, "...or who shall preside at or conduct or assist in conducting any assemblage of persons, or any organization, or any society, or any group which teaches or advocates the doctrine of criminal syndicalism or sabotage is guilty of a felony...." The conviction was affirmed by the Oregon Supreme Court. On appeal to the United States Supreme Court, the conviction was reversed. DeJonge v. State of Oregon, 299 US 352 (1937): Justice Hughes, speaking for the Court, stated:

> "The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental...the right is one that cannot be denied

without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions....

"The rights may be abused by using speech or press or assembly in order to incite violence and crime. The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed....Peaceable assembly for lawful discussion cannot be made a crime....If the persons assembling... have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge."

B. Derivation

With substantial structural changes, the section is derived from Michigan Revised Criminal Code section 5515.

C. Relationship to Existing Law.

ORS 166.040 (2) defines an unlawful assembly. The penalty provisions in ORS 166.050 refer only to the crime of riot.

As noted in 40 Or L Rev 63 (1960):

"....The Oregon Supreme Court has stated that a prohibited act will constitute a crime only if the statute specifies a penalty....In State v. Stephanus, 53 Or 135, 99 P 428 (1909), an 'unlawful assembly', which was defined in a section of the criminal code, but made subject to no penalty, was held not to be a crime. The words contained in the section, the court said, merely defined an 'unlawful assembly'. The statute in question has never been amended and continues to provide simply a definition of an 'unlawful assembly'."

This statutory flaw was construed in 30 Atty Gen Rep 419 (1960-62):

"....There is no penalty assigned by the statutes to acts described in ORS 166.040 (2). ORS 166.050 assigns penalties for riot as defined by ORS 166.040 (1). And, ORS 145.020 provides certain penalties for failure to assist police officers in dispersal of unlawful assemblies,

> or for the refusal to disperse upon properly being ordered to do so by enforcement officers. But...there is no penalty assigned to acts not amounting to riot but which do become unlawful assembly. It is therefore my view that ORS 166.040 (2) does not in itself describe a crime, either a misdemeanor or a felony."

The proposed section would therefore be new to Oregon law, inasmuch as existing law defines an "unlawful assembly" but provides no penalty.

TEXT OF REVISIONS OF OTHER STATES

TEXT OF NEW YORK REVISED PENAL LAW

§ 240.10 Unlawful assembly

A person is guilty of unlawful assembly when he assembles with four or more other persons for the purpose of engaging or preparing to engage with them in tumultuous and violent conduct likely to cause public alarm, or when, being present at an assembly which either has or develops such purpose, he remains there with intent to advance that purpose.

Unlawful assembly is a class B misdemeanor.

# # #

TEXT OF MICHIGAN REVISED CRIMINAL CODE

[Unlawful Assembly]

Sec. 5515. (1) A person commits the crime of unlawful assembly if he assembles with 5 or more other persons for the purpose of engaging in conduct constituting the crime of riot or if, being present at an assembly that either has or develops such a purpose, he remains there with intent to advance that purpose.

(2) Unlawful assembly is a Class A misdemeanor.

# # #

TEXT OF PROPOSED CONNECTICUT PENAL CODE

§ 187. Unlawful assembly

A person is guilty of unlawful assembly when he assembles with two or more other persons for the purpose of engaging in conduct constituting the crime of riot, or when, being present at an assembly which either has or develops such a purpose, he remains there with intent to advance that purpose.

Unlawful assembly is a class B misdemeanor.

# # #

Section 4. Disorderly conduct. A person commits the crime of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:

(1) Engages in fighting or in violent, tumultuous or threatening behavior; or

(2) Makes unreasonable noise; or

(3) Uses abusive or obscene language, or makes an obscene gesture, in a public place; or

(4) Disturbs any lawful assembly of persons without lawful authority; or

(5) Obstructs vehicular or pedestrian traffic on a public way; or

(6) Congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse; or

(7) Creates a hazardous or physically offensive condition by any act that serves no legitimate purpose.

Existing Law
ORS
166.010
166.020
166.030
166.060
166.110
166.120
166.130
166.140
166.150
166.160
166.610
166.630
483.990 (1)
161.310
164.440
164.450
164.452
164.510
164.520
164.530
166.560
166.640
33.010

COMMENTARY - DISORDERLY CONDUCT

A. Summary

This section is designed to replace much of the existing law presently classified as vagrancy and disturbing the peace. Some of that coverage is allocated to sections on loitering and harassment. Matters relating to prostitution have been incorporated into Article __, Prostitution and Related Offenses. Vagrancy as a substantive offense has been deleted. The existing provisions that, in effect, create "status" offenses are hopelessly archaic and most likely unconstitutional. This section is directed at conduct causing what the common law termed a breach

of the peace. Before the specified conduct may be viewed as "disorderly", the actor must intend to cause, or recklessly create a risk of, public inconvenience, annoyance or alarm. A strict liability offense is thereby avoided.

The legislative trend in this area of the law is exhaustively reviewed in an article entitled "Disorderly Conduct Statutes in Our Changing Society", 9 William & Mary L Rev 349 (1967):

> "....At common law, under breach of the peace, it was a crime to do what we punish under disorderly conduct statutes such as making loud and unseemly noises, disturbing the peace and quiet of a neighborhood, collecting a noisy crowd, disturbing a meeting or religious worship. The disorderly conduct statutes have expanded these traditional elements of the crime to include many things....Most statutes and definitions vary, but essentially require words or acts which tend to disturb the peace or endanger the morals, safety or health of the community....
>
> "If conduct is protected by the 1st amendment to the Federal Constitution--freedom of speech, religion, press and assembly--it cannot be the basis of a conviction for disorderly conduct....If 1st amendment protections are not applicable, then judges should require due process specificity, allow convictions only for conduct which really disturbs and amounts to a breach of the peace, and guard against backing up the personal feelings of the police or giving vent to their own notions of what is offensive and disquieting....
>
> "The various state legislatures could very easily enumerate that conduct which in its wisdom should be criminal, such as failure to obey a lawful command of a police officer fairly made to prevent a breach of the peace, or directing intemperate and insulting language to an officer whether members of the public are present or not. Convictions under a disorderly conduct statute for loitering on corners is a dangerous area in view of constitutional safeguards, but it is better for the statute to spell out what constitutes loitering than to leave it to the whim of the police on the beat. Other areas of difficulty include providing what conduct during demonstrations is criminal....
>
> "Until this is done, our courts of limited jurisdiction should interpret the disorderly conduct statutes with a view towards due process specificity and avoid making the courts a mirror of the judge's supersensitive prejudices and hypercritical thinking...."

For a comprehensive review of the law of disorderly conduct see 12 Am Jur 2d, Breach of Peace, §30. An excellent analysis of the Michigan Revised Criminal Code section on disorderly conduct, which is identical to the one here proposed, may be found in 14 Wayne L Rev 986 (1968).

Subsection (1) is directed at public conduct within the traditional common law concept of breach of the peace.

Subsection (2) prohibits making "unreasonable" noise. The application of this provision depends upon the circumstances under which the challenged activity is performed. Noise eminently reasonable under certain circumstances may be highly unreasonable under other circumstances, e.g., daytime v. night-time, quiet residential area v. industrial area.

Subsection (3) is directed at the unfocused use of abusive or obscene language or gestures in public places. If used with the intent to harass a particular person it would constitute the crime of harassment.

Subsection (4) prohibits interference with lawful meetings or assemblages.

Subsection (5) covers the intentional obstruction of vehicular or pedestrian traffic. It is not intended to prohibit persons gathering to hear a speech or otherwise communicate.

Subsection (6) proscribes the failure to disperse in response to a lawful order from the police.

Subsection (7) is a dragnet provision designed to reach activity that constitutes a public nuisance but that is not specifically proscribed under the other subsections. The provision is necessitated by the impossibility of itemizing every kind of act properly punishable as disorderly conduct. One example found in existing law is the use of stink bombs in public places.

B. Derivation

The proposed section is almost identical to New York Revised Penal Law section 240.20 and Michigan Revised Criminal Code section 5525.

C. Relationship to Existing Law

ORS 166.010: Dueling or challenging another to duel. Felony, 10 years imprisonment.

ORS 166.020: Accepting or carrying challenge; aiding in duel. Felony, 5 years.

ORS 166.030: Using contemptuous language concerning another who refused to duel. Felony, 2 years.

ORS 166.060: "Vagrancy. (1) The following described persons are guilty of vagrancy and shall be punished upon conviction by imprisonment in the county jail for a period not exceeding six months, or by a fine of not more than $100, or both:

"(a) Every person without visible means of living, who has the physical ability to work, and who does not for the space of 10 days seek employment, nor labor when employment is offered him.

"(b) Every beggar who solicits alms as a business.

"(c) Every idle or dissolute person, or associate of known thieves, who wanders about the streets or highways at late or unusual hours of the night, or who lodges in any barn, shed, shop, outhouse, vessel, car or place other than such as is kept for lodging purposes, without the permission of the owner or party entitled to the possession thereof.

"(d) Every common prostitute.

"(e) Any person who is not enrolled as a student or who is not employed by the public or private school and who, without a lawful purpose therefor, wilfully loiters about any public or private school building or the public premises adjacent thereto.

"(f) Any person who conducts himself in a violent, riotous or disorderly manner, or who uses abusive, obscene or profane language in a public place or upon any public highway, or in a house or place whereby the peace or quiet of the neighborhood or vicinity may be disturbed.

"(2) Circuit, district and justice courts have concurrent jurisdiction over actions brought under this section."

ORS 166.110: Riding or driving animals recklessly. $50 fine.

ORS 166.120: Disturbing religious meetings. 6 months, $200 fine.

ORS 166.130: Disturbing public meeting or assembly. 3 months, $100 fine.

ORS 166.140: Use of stink bombs. 2 years, $1,000 fine.

ORS 166.150: Permitting vicious animals to be at large. $50 fine.

ORS 166.160: Intoxicated while in public. 50 days, $100 fine.

ORS 166.610: Obstruction of highway by herder. $200 fine.

ORS 166.630: Throwing debris and discharging firearms on highway or railroad right of way.

ORS 483.990 (1): Penalty provision for violation of ORS 166.630: 10 days, $100 fine.
Second conviction, 20 days, $200 fine.
Third conviction, 6 months, $500 fine.

ORS 161.310: Punishment for gross injury to another's person or property and offenses against public peace, health or morals. 6 months, $200 fine.

ORS 164.440: Dumping rubbish on private land or public way. 30 days, $100 fine.

ORS 164.450: Defacing building or contents. 6 months, $250 fine.

ORS 164.452: Defacing school property. $20 fine.

ORS 164.510: Obstructing road, canal, bridge, railroad. 2 years, $1,000 fine.

ORS 164.520: Operating hand car on railroad track. 50 days, $100 fine.

ORS 164.530: Throwing or shooting at motor or railroad vehicle. 2 years, $500 fine.

ORS 166.560: Abandoning refrigerators in places accessible to children. Misdemeanor.

ORS 166.640: Tampering with railroad property. 10 years.

ORS 33.010: Contempt. 6 months.

There are few reported cases dealing with disorderly conduct offenses.

ORS 161.310, commonly referred to as the "Nuisance Act", has a long and varied judicial history. Since State v. Bergman, 6 Or 341 (1877), involving a slaughter-house, this criminal statute has been used to prosecute for acts which "grossly disturbs the public peace or outrages the public decency and is injurious to public morals". See: State v. Ayers, 49 Or 61, 88 P 653 (1907), Horse gaming pools. Multnomah County Fair Ass'n v. Langley, 140 Or 172, 13 P2d 354 (1932), Horse racing

lottery. State v. Elliott, 204 Or 460, 277 P2d 754 (1955), Abortion mill. Wilson v. Parent, 228 Or 354, 365 P2d 72 (1961), Vile and obscene language and gestures. State v. Dewey, 206 Or 496, 292 P2d 799 (1956), Abortion mill.

The constitutionality of ORS 161.310 was questioned in State v. Franzone, 243 Or 597, 415 P2d 16 (1966), wherein the Court stated:

> "We regard the question of the constitutionality of ORS 161.310 as still an open one, particularly in view of recent decisions of the Supreme Court of the United States."

Since the lower court decision was reversed on other grounds, the Supreme Court did not reach the constitutional issue.

TEXT OF REVISIONS OF OTHER STATES

TEXT OF MODEL PENAL CODE

Section 250.2. Disorderly Conduct.

(1) Offense Defined. A person is guilty of disorderly conduct if, with purpose to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:

(a) engages in fighting or threatening, or in violent or tumultuous behavior; or

(b) makes unreasonable noise or offensively coarse utterance, gesture or display, or addresses abusive language to any person present; or

(c) creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor.

"Public" means affecting or likely to affect persons in a place to which the public or a substantial group has access; among the places included are highways, transport facilities, schools, prisons, apartment houses, places of business or amusement, or any neighborhood.

(2) Grading. An offense under this section is a petty misdemeanor if the actor's purpose is to cause substantial harm or serious inconvenience, or if he persists in disorderly conduct after reasonable warning or request to desist. Otherwise disorderly conduct is a violation.

# # #

TEXT OF ILLINOIS CRIMINAL CODE OF 1961

§ 26—1. Elements of the Offense

(a) A person commits disorderly conduct when he knowingly:

(1) Does any act in such unreasonable manner as to alarm or disturb another and to provoke a breach of the peace; or

(2) With intent to annoy another, makes a telephone call, whether or not conversation thereby ensues; or

(3) Transmits in any manner to the fire department of any city, town or village a false alarm of fire, knowing at the time of such transmission that there is no reasonable ground for believing that such fire exists; or

(4) Transmits in any manner to another a false alarm to the effect that a bomb or other explosive of any nature is concealed in such place that its explosion would endanger human life, knowing at the time of such transmission that there is no reasonable ground for believing that such a bomb or explosive is concealed in such place; or

(5) Transmits in any manner to any peace officer, public officer or public employee a report to the effect that an offense has been committed, knowing at the time of such transmission that there is no reasonable ground for believing that such an offense has been committed.

(b) Penalty.

A person convicted of a violation of Subsection 26–1(a) (1) or (a) (2) shall be fined not to exceed $500. A person convicted of a violation of Subsection 26–1(a) (3), (a) (4) or (a) (5) shall be fined not to exceed $500 or imprisoned in a penal institution other than the penitentiary not to exceed 6 months, or both.

# # #

TEXT OF NEW YORK REVISED PENAL LAW

§ 240.20 Disorderly conduct

A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof:

1. He engages in fighting or in violent, tumultuous or threatening behavior; or

2. He makes unreasonable noise; or

3. In a public place, he uses abusive or obscene language, or makes an obscene gesture; or

4. Without lawful authority, he disturbs any lawful assembly or meeting of persons; or

5. He obstructs vehicular or pedestrian traffic; or

6. He congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse; or

7. He creates a hazardous or physically offensive condition by any act which serves no legitimate purpose.

Disorderly conduct is a violation.

# # #

TEXT OF MICHIGAN REVISED CRIMINAL CODE

[Disorderly Conduct]

Sec. 5525. (1) A person commits the crime of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:

(a) Engages in fighting or in violent, tumultuous or threatening behavior; or

(b) Makes unreasonable noise; or

(c) In a public place uses abusive or obscene language, or makes an obscene gesture; or

(d) Without lawful authority, disturbs any lawful assembly or meeting of persons; or

(e) Obstructs vehicular or pedestrian traffic; or

(f) Congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse; or

(g) Creates a hazardous or physically offensive condition by any act that serves no legitimate purpose.

(2) Disorderly conduct is a Class C misdemeanor.

# # #

TEXT OF PROPOSED CONNECTICUT PENAL CODE

§ 191. Breach of peace

A person is guilty of breach of the peace when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof:

1. he engages in fighting or in violent, tumultuous or threatening behavior, in a public place; or

2. he assaults or strikes another; or

3. he threatens to commit any crime against another person or his property; or

4. he publicly exhibits, distributes, posts up or advertises any offensive, indecent or abusive matter concerning any person; or

5. in a public place, he uses abusive or obscene language or makes an obscene gesture; or

6. he creates a public, hazardous or physically offensive condition by any act which he is not licensed or privileged to do.

Breach of peace is a class B misdemeanor.

§ 192. Disorderly conduct

A person is guilty of disorderly conduct when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof:

1. he engages in fighting or in violent, tumultuous or threatening behavior; or

2. by offensive or disorderly conduct, he annoys or interferes with another person; or

3. he makes unreasonable noise; or

4. without lawful authority, he disturbs any lawful assembly or meeting of persons; or

5. he obstructs vehicular or pedestrian traffic; or

6. he congregates with other persons in a public place and refuses to comply with a reasonable official request or order to disperse.

Disorderly conduct is a class C misdemeanor.

# # #

Section 5. Public intoxication. A person commits the crime of public intoxication if he appears in any public place under the influence of alcohol, narcotics or a dangerous drug to the degree that he may endanger himself or other persons or property, or annoy persons in his vicinity.

Existing Law
ORS
166.160
136.400
493.160
493.990
Ch. 471

COMMENTARY - PUBLIC INTOXICATION

A. Summary

The subject of public intoxication as a criminal offense, particularly as it relates to chronic alcoholism, has been an issue of increasing concern in recent years. A number of legal authorities have attempted to bring into sharp focus the failures and inadequacies of past and present legislation dealing with drunkenness as a crime:

The Challenge of Crime in a Free Society, President's Commission on Law Enforcement 235 (1967):

> "The criminal justice system appears ineffective to deter drunkenness or to meet the problems of the chronic alcoholic offender. What the system usually does accomplish is to remove the drunk from the public view, detoxify him, and provide him with food, shelter, emergency medical service, and a brief period of forced sobriety. As presently constituted, the system is not in a position to meet his underlying medical and social problems....
>
> "Including drunkenness within the system of criminal justice seriously burdens and distorts its operation. Because the police often do not arrest the intoxicated person who has a home, there is in arrest practices an inherent discrimination against the homeless and the poor....
>
> "The Commission seriously doubts that drunkenness alone (as distinguished from disorderly conduct) should continue to be treated as a crime. Most of the experts with whom the Commission discussed this matter, including many in law enforcement, thought that it should not be a crime. The application of disorderly conduct statutes would be sufficient to protect the public against criminal behavior stemming from intoxication."

Bloch-Geis, Man, Crime & Society, 346 (2 ed, 1964):

"The Uniform Crime Reports of the FBI clearly show the predominant position that drunkenness plays in criminal behavior in this country. In 1960, for instance, 1,412,167 arrests out of a total of 3,959,559 were for drunkenness. This figure is more than three times higher than that for the next nearest offense--disorderly conduct--and disorderly conduct itself more often than not involves intoxication....In Los Angeles, for instance, there are approximately 100,000 arrests each year for drunkenness, but this figure represents only 16,000 different individuals. In New York...intoxicated persons are not arrested unless they behave in a disorderly or dangerous manner. Drunkenness is considered a public health and not a criminal matter. Justice John M. Murtagh of New York has defended his city's procedure on the ground that there is ' no moral reason ' to arrest drunken persons and that ' putting them in jail does not solve a blessed thing ', but only 'makes certain their further degradation'. "

Barnes-Teeters, New Horizons in Criminology, 89 (3rd ed, 1959):

"....It has taken years to educate the public that the alcoholic suffers from a medical illness since, in the not too distant past, he was regarded as a 'common drunk' and eligible only for abuse and the common jail. ...A veritable army of human beings charged with intoxication passes through our police stations, courts, and jails every year...many of them are alcoholics... nothing but the most scientific and prolonged treatment can cure them...they (and the common drunks) benefit little from the penal and correctional treatment they receive and are more likely to be harmed by it....Chronic alcoholism, then, is much more of a social problem than it is a correctional problem....It should at least be obvious...that the problem of chronic drunkenness is a knotty one, to which science offers no clearcut solution. Yet, it is equally obvious that punitive methods have distinctly failed."

19 S.C.L.Rev 316 (1967):

"Let us examine for a moment whether there is any valid public policy reason why a legislature should brand an intoxicated person who is causing no public disturbance a criminal. We must face reality....Public intoxication laws.. have never been, and never will be, enforced uniformly upon the public as a whole....Police do not pick up intoxicated party-goers emerging from elegant dinner parties or our suburban country clubs....There are as

> many intoxicated people on the streets of the exclusive residential areas of our cities as there are in the Skid Row areas, yet very few of the prosperous drunks are arrested. Public intoxication statutes are enforced against the poor and, in practice, the homeless men....
>
> "Should we, as a supposedly civilized nation, enact criminal laws aimed solely at a very small, virtually defenseless, esthetically unacceptable segment of our population, with the intent of simply sweeping them off the streets and into oblivion?....
>
> "Public intoxication statutes now on the books have no redeeming social purpose, regardless of the issue of alcoholism, and they should not be retained....Disorderly conduct statutes are quite sufficient to protect the public from harm, and these statutes should both be retained and fully enforced....
>
> "The two Crime Commissions appointed by the President have recommended that the present public intoxication statute be amended to require disorderly conduct in addition to drunkenness....The President's Commission on Crime in the District of Columbia has explicitly recognized that the usual manifestations of drunkenness, such as staggering, or falling down, or noisiness, do not constitute any threat of actual harm to the public and should not be considered illegal disorderly conduct."

A chronic alcoholic may not be convicted of public intoxication. Easter v. District of Columbia, 361 F.2d 50 (D.C. Cir. 1966): Driver v. Hinnant, 356 F2d 761 (4th Cir. 1966).

The proposed section does not make public intoxication a strict liability offense. An intoxicated person could be charged only if his condition endangered himself or other persons or property, or if he conducted himself in a manner annoying to those around him. It would seem that every imaginable instance of such prohibited conduct would be a violation of the disorderly conduct section. In view of this duplication of coverage it may be advisable to delete the section on public intoxication and handle those problems under the disorderly conduct statute. This, of course, would not prevent the application of public intoxication ordinances by city municipalities. (See Woods v. Town of Prineville, 19 Or 198 (1890)).

B. Derivation

The proposed section is taken from New York Revised Penal Law section 240.40.

C. Relationship to Existing Law

ORS 166.160: "Intoxicated while in public place. Any person who enters or is found in a state of intoxication upon any railway engine, railway car, railway train, aircraft, boat, landing wharf or depot of any common carrier or on any highway or street, or in any public place or building, or any person who creates, while in a state of intoxication, any disturbance of the public in any private business or place, shall be punished upon conviction by a fine of not less than $5 nor more than $100, or by imprisonment in the county jail for a period not exceeding 50 days, or both."

ORS 136.400: Intoxication as a defense.

ORS 493.160: Prohibited operation of aircraft.
(1) While under influence of alcohol or drugs.

ORS 493.990 (2): Penalty provision for violation of ORS 493.160. $500 fine, 6 months imprisonment, or both.

ORS chapter 471: Control of alcoholic liquors.

There are no reported Oregon cases dealing with public intoxication.

TEXT OF REVISIONS OF OTHER STATES

TEXT OF MODEL PENAL CODE

Section 250.5. Public Drunkenness; Drug Incapacitation.

A person is guilty of an offense if he appears in any public place manifestly under the influence of alcohol, narcotics or other drug, not therapeutically administered, to the degree that he may endanger himself or other persons or property, or annoy persons in his vicinity. An offense under this Section constitutes a petty misdemeanor if the actor has been convicted hereunder twice before within a period of one year. Otherwise the offense constitutes a violation.

# # #

TEXT OF NEW YORK REVISED PENAL LAW

§ 240.40 Public intoxication

A person is guilty of public intoxication when he appears in a public place under the influence of alcohol, narcotics or other drug to the degree that he may endanger himself or other persons or property, or annoy persons in his vicinity.

Public intoxication is a violation.

# # #

TEXT OF MICHIGAN REVISED CRIMINAL CODE

[Public Intoxication]

Sec. 5545. (1) A person commits the crime of public intoxication if he appears in a public place under the influence of alcohol, narcotics or other drug to the degree that he may endanger himself or other persons or property, or annoy persons in his vicinity.

(2) Public intoxication is a violation.

# # #

TEXT OF PROPOSED CONNECTICUT PENAL CODE

§ 194. Intoxication

1. A person is guilty of intoxication when he is under the influence of alcohol, narcotic drug or controlled drug as defined in section 19–443, or other substance, to the degree that he may endanger himself or other persons or property, or annoy persons in his vicinity.

2. The court in its discretion may commit to the custody and control of the Department of Mental Health or to any appropriate facility within that department for not less than thirty (30) days nor more than twelve (12) months, or until discharged within that period by the Commissioner of Mental Health:

(a) any person charged under this section who requests such commitment, if the court finds that there is reasonable ground to believe such a person is an alcoholic. If such request is granted before conviction, the criminal proceeding shall be dismissed.

(b) any person found guilty under this section who has been convicted previously, under this section or under section 53–246, at least twice in the last preceding six months or four times in the last preceding year.

3. The defendant shall be advised of his rights under subsection 2 hereof by the court before being put to plea.

4. Notwithstanding the provisions of subsection 1 hereof, in lieu of arrest, a police officer in his discretion may escort an intoxicated person to a civil facility for the care of alcoholics.

Intoxication is a class C misdemeanor.

# # #

Existing Law
ORS 166.060
162.550

Section 6. Loitering. A person commits the crime of loitering if he:

(1) Loiters or remains in or near a school building or grounds, not having any reason or relationship involving custody of or responsibility for a student, and not having written permission from anyone authorized to grant the same; or

(2) Loiters or prowls in a public place without apparent reason and under circumstances which warrant justifiable alarm for the safety of persons or property in the vicinity, and, upon inquiry by a peace officer, refuses to identify himself and give a reasonably credible account of his presence and purposes.

COMMENTARY - LOITERING

A. Summary

This section penalizes what, in effect, is "suspicious loitering." The history of Anglo-American law provides an ancient basis for offenses of this nature, commonly termed "vagrancy." The historical rationale for vagrancy legislation was based upon the need to control the labor market. In time, they became devices to control what was felt to be potential criminals. The most critical aspect of vagrancy legislation is its effect of creating a "status" of criminality based upon no specific misbehavior at all.

Loitering statutes have traditionally been designed to enable the police to arrest and detain persons suspected of having committed or being about to commit a crime. The Model Penal Code Commentary (Tentative Draft No. 13, p. 64, 1961) discusses and analyzes five alternative responses that may be devised to deal with the "suspicious loiterer":

(1) Loitering or wandering "without lawful business" or "at unusual hours" may be made an offense, thus laying the basis for arrest and conviction without proof of any criminal act or purpose.

This is criticized as authorizing conviction of persons without proof of anti-social behavior or inclination.

(2) The suspicious situation may be treated as laying the basis for police inquiries to which the actor must respond.

Two problems are noted in connection with this approach:

(a) It does not exclude the possibility that a person may be convicted without proof of anti-social behavior, since failure to identify or to give credible account of one's behavior leads to criminal liability, without necessity on the part of the prosecution to prove any criminal purpose.

(b) A plausible lie about one's purposes or identity will exclude liability, while an implausible truth does not.

(3) The suspicious situation may be treated as a proper occasion for brief detention to facilitate police interrogation, not involving charge of crime.

This is criticized as involving a very controversial and possibly unconstitutional change in the law of arrest, rather than a definition of a substantive offense.

(4) The situation might be one in which the police could be authorized to order the suspect to "move on", i.e., to depart from the place where his presence causes alarm.

The Commentary notes that this provision hardly solves the problem of the individual who is bent on crime, and confers a disturbingly unbounded discretion upon the police.

(5) The police might expect merely to make inquiry of suspicious persons, most of whom would of course answer questions voluntarily. Where the answer does not dissipate suspicion, the officer would make such observations as would facilitate identification of the suspect in case an offense is committed in the neighborhood.

The Commentary finds this alternative most consistent with its ideas of the proper role of the police and with general principles of penal law, but recognizes that it would involve a total abandonment of the traditional vagrancy concept, a departure that would encounter serious resistance.

The Model Penal Code section 250.6 is designed to provide the least objectionable form of alternative (2) for those jurisdictions not prepared to depart entirely from the vagrancy concept. This approach is reflected in subsection (3) of the proposed section.

The New York Revised Penal Law section 240.35 has eight subsections. Michigan Revised Criminal Code section 5540 has seven subsections. Connecticut Revised Penal Code section 195 is limited to loitering in or about school grounds.

The Oregon vagrancy statute, ORS 166.060, has six subsections:

(a) Every person without visible means of support.
(b) Every beggar who solicits alms.
(c) Every idle or dissolute person who wanders late at night.
(d) Every common prostitute.
(e) Any person who loiters about school buildings; and
(f) Any person who conducts himself violently, riotously or disorderly.

Subsection (f) is incorporated into the disorderly conduct section. Subsection (d) is covered in Article _____, Prostitution and Related Offenses. As for begging, covered in subsection (b), the Model Penal Code Commentary rejects such coverage:

> "Municipalities may properly regulate the use of sidewalks to safeguard against annoying and importunate mendicants and merchants; but such legislation does not belong in the penal code." (Tentative Draft No. 13, p. 65, 1961).

Subsections (a) and (c), in light of the modern decisions, are probably unconstitutional.

We are therefore left only with the merit of subsection (e) to consider in drafting a loitering statute based on existing law.

The need for, and validity of, loitering legislation has been under fine scrutiny by legal commentators in recent years:

> 104 U of Pa L Rev (II) 603 (1956): Article by Caleb Foote on "Vagrancy-Type Laws and its Administration":
>
> "One cannot escape the conclusion that the administration of vagrancy-type laws serves as an escape hatch to avoid the rigidity imposed by real or imaginary defects in criminal law and procedure...If it is necessary to ease the prosecution's burden of proof or to legalize arrests for mere suspicion, then the grave policy and constitutional problems posed by such suggestions should be faced...The economic purposes which once gave vagrancy a function no longer exist ...To try to utilize a feudal statute as a weapon against modern crime and as a means of liberalizing the restrictions of criminal law and procedure is both inefficient and an invitation to abuses...."
>
> 35 Tenn L Rev 617 (1968):
>
> "Constitutional invalidation of 'loitering' laws have been grounded on the vagueness of the statutory language defining the offense. A criminal statute must provide adequate warning of the prohibited conduct and provide adequate standards for adjudication...."
>
> "The most frequently applied test of uncertainty requires that the language not be so uncertain 'that men of common intelligence must necessarily guess at its meaning and differ as to its application.' (Connally v. General Construction Co., 269 U.S. 385, (1933)).

"The very nature of the threatening activity -- loitering -- requires some vagueness of its definitive terms if the administration of the law is to effect the protection of the general welfare sought by the regulation. If this is an acceptable situation in our legal system, then it would seem preferable that, where the prohibited conduct is vaguely defined, the boundaries of its operation be statutorily constricted by limitation to specific places...The criticism of the loitering laws...seems well-founded...The Model Penal Code of the A.L.I. is not completely satisfactory in this respect; however, it does contain a desirable description of the administrative procedure to be followed."

In City of Seattle v. Drew, 423 P2d 522 (Wash. 1967), appellant was convicted under City of Seattle Code 12.11.290, which reads:

"It shall be unlawful for any person wandering or loitering abroad, or abroad under other suspicious circumstances, from one-half hour after sunset to one-half hour before sunrise, to fail to give a satisfactory account of himself upon the demand of any police officer."

The Washington Supreme Court held this ordinance unconstitutional, stating in its opinion:

"To be consistent with due process, a penal statute...must contain ascertainable standards of guilt, so that men of reasonable understanding are not required to guess at the meaning of the enactment...A law that fails to give fair notice of what acts will be punished is violative of due process...It is fundamental that no ordinance may unreasonably or unnecessarily interfere with a person's freedom, whether it be to move about or to stand still. The right to be left alone is inviolate; interference with that right is to be tolerated only if it is necessary to protect the right and the welfare of others.

"The Seattle ordinance imposes sanctions upon conduct that may not manifest an unlawful purpose, and, therefore, is violative of due process of law. The language of the ordinance is too broad; it is vague. A citizen cannot determine its meaning so that he may regulate his conduct. There is nothing in the ordinance that would enable him to know the dividing line between innocent loitering (for example, window shopping) and criminal loitering....

"The Seattle ordinance makes no distinction between conduct calculated to harm and that which is essentially innocent... We believe the best considered comment laying down certain guidelines is found in the Model Penal Code, Proposed Official Draft 250.6 of the American Law Institute (1962)."

We will now examine the proposed section in light of these observations.

Subsection (1) continues the coverage provided in subsection (e) of ORS 166.060, Oregon's present vagrancy statute.

Subsection (2) attempts to incorporate the essential elements of Model Penal Code section 250.6. This is a new and controversial offense.

The New York and Michigan sections include the following loitering offenses not made a part of the proposed section:

(1) Begging in public places.
(2) Loitering in a public place for purposes of gambling.
(3) Loitering in a public place for purposes of engaging in or soliciting deviate sexual intercourse.
(4) Loitering in a transportation facility.
(5) Loitering in a place for the purpose of unlawfully possessing or using drugs.

The reasons for the exclusion of these loitering offenses are varied:

(1) This type activity should properly be a concern of municipal legislation and state regulatory determination outside the penal code.

(2) Gambling offenses will be covered by Article _____, Gambling and related offenses.

(3) This type of conduct is covered by the Articles on Prostitution and Sexual Offenses.

(4) There would appear to be no justifiable basis for this provision, unless the conduct violates other sections of the criminal or regulatory codes, in which case it may be prosecuted under the appropriate statute.

(5) Unlawful conduct involving the use or possession of drugs will be covered by the Article on Narcotics and Dangerous Drugs.

A more fundamental problem inherent in these provisions is the attempt to create "status" offenses by punishing conduct on the basis of an inferred "purpose" to commit an unlawful act. Even if present, a subjectively restrained unlawful purpose should not be grounds for criminal prosecution where no acts are manifested in furtherance of that purpose. If steps are taken in furtherance of an unlawful purpose, such conduct may be punished under the applicable penal statute.

B. Derivation

Subsection (1) is taken from New York Revised Penal Law section 240.35 (5).

Subsection (2) is derived from Model Penal Code section 250.6 and New York Revised Penal Law section 240.35 (6).

C. Relationship to Existing Law

ORS 166.060: Vagrancy

ORS 162.550: Unlawful disguise.

In City of Portland v. Goodwin, 187 Or 409, 210 P2d 577 (1949), the Supreme Court of Oregon held as constitutional the following City of Portland ordinance:

> "Between the hours of 1:00 and 5:00 o'clock A.M., Pacific Standard time, it shall be unlawful for any person to roam or be upon any street, alley or public place without having and disclosing a lawful purpose."

The same ordinance again came under constitutional attack in City of Portland v. James, 86 Adv Sh 1287, 1289-1292 (1968), wherein it was held to be violative of due process. Speaking for the Court, Justice O'Connell states:

> "It seems apparent to us that the ordinance is a part and parcel of the general scheme underlying the various vagrancy laws, the design of which is to give a police officer the right to arrest persons whose appearance or actions arouse the officer's suspicion that the suspect has been or is likely to be involved in some transgression of law not then specifically identifiable by the officer. In short, the ordinance is designed to permit 'arrests on suspicion'.
>
> "Designed as it is the ordinance is void for vagueness.... It purports to make criminal the mere presence of a person on the streets when a police officer has the suspicion that the suspect does not have a lawful purpose in being there. This criterion for arrest is too vague to provide a standard adequate for the protection of constitutional rights.
>
> "It is not our intention to say that the police may not stop and question persons who arouse a reasonable suspicion that they are connected with criminal activity. Nor do we express any opinion as to the validity of an ordinance cast in language similar to that used in the Model Penal Code permitting, under proper safeguards, the arrest of persons who loiter or prowl under circumstances creating a justifiable alarm for the safety of persons or property.
>
> "The principal evil of such vague legislation is that it invites arbitrary and discriminatory enforcement.... An arrest is valid only if it is based upon probable cause. To sustain this ordinance in question would be to allow a crime to be defined so as to render the requirement of probable cause to effect a valid arrest an illusory protection...The interest of freedom of movement on the streets and the attendant interests of privacy and human dignity deserve the most careful constitutional protection...."

Recent state court decisions involving loitering legislation support the view that if the statute clearly defines the circumstances under which loitering creates "justifiable public danger or alarm," its constitutional validity will be upheld. The following cases involved "suspicious loitering" or loitering in or about a school:

Anderson v. Shaver, 290 F Supp 920 (D.C.N.M. 1968)

New Mexico Criminal Code section 24 (E) reads:

> "Vagrancy. Vagrancy shall consist of either, E. Loitering about or on any public, private, or parochial school, college, seminary grounds, or buildings, either on foot or in any vehicle, without lawful business there."

Defendants were convicted under section E of the vagrancy statute on the basis of their distribution of anti-draft literature in front of high school. They petitioned U.S. District Court for declaratory relief on the ground that the New Mexico vagrancy law as applied was unconstitutional. In affirming the conviction, the Court stated:

> "The present ordinance has...clarity and certainty in that it defines what kind of loitering is forbidden, i.e., that done 'without lawful business there.' The term 'lawful business' has, in turn, been held to be sufficiently certain to apprise the individual of what is prohibited."

State v. Wiggins, 158 SE2d 37 (N.C. 1967): Defendants were convicted for "knowingly and wilfully" violating N.C. G.S. 14-273, by unlawfully interrupting and disturbing the Southwestern High School...by picketing in front of the school.

N.C. G.S. 14-273 reads:

> "If any person shall wilfully interrupt or disturb any public or private school...either within or without the place where such...school is held... shall be guilty of a misdemeanor...."

In affirming the conviction, the Court discussed the applicable statute in constitutional terms:

"Giving the words of N.C.G.S. 14-273 their plain and ordinary meaning, it is apparent that the elements of the offense punishable under this statute are: (1) Some act or course of conduct by the defendant, within or without the school, (2) An actual, material interference with, frustration of or confusion in, part or all of the program of a public or private school... resulting from such act or conduct, and (3) The purpose or intent on the part of the defendant that his act or conduct have that effect.

"Freedom of speech and protest against the administration of public affairs, including public schools, is a fundamental right.... It has, however, never been doubted that this is not an absolute freedom or that the State, [in the] interest in the education of its children, may not impose reasonable restraints of time and place upon the exercise of both speech and movement.... The Fourteenth Amendment...grants the defendants no license wilfully to disturb the operation of a public or private school.... Unquestionably the hours and place of public discussion can be controlled by the State in the protection of its legitimate and vital public interest in the efficient operation of schools.... It is...irrelevant that the defendants marched silently, were not on the school grounds, and neither threatened nor provoked violence...."

In re Huddleson, 229 CA2d 618, 40 Cal Rptr 581 (1964): The Court in this case upheld the constitutionality of Cal Penal Code section 647a, subdivision (2), which reads:

"Every person who loiters about any school or public place at or near which children attend or normally congregate is a vagrant."

The Court discussed their interpretation of what constitutes "criminal"loitering:

"As used in the statute...the term 'loiter' was intended to have a restricted rather than a general meaning and that as so employed it has here...'a sinister or wrongful as well as a reasonable definite implication.' We are of the opinion that the word 'loiter' was intended to proscribe lingering

> about school and public places for the purpose or with the intent of effectuating some criminal act. It is only when the 'loitering' is of such nature that from the totality of the person's actions and in the light of the prevailing circumstances, it may be reasonably concluded that it is being engaged in 'for the purpose of committing a crime'... that such conduct falls within the statute."

People v. Johnson, 161 NE2d 9 (Ct of App N Y 1959) upheld New York Penal Law section 722-b, now repealed, which read:

> "Loitering in school buildings. Any person not the parent or legal guardian of a pupil in regular attendance at said school who loiters in or about any school building or grounds without written permission from the principal, custodian or other person in charge thereof, or in violation of posted rules or regulations governing the use thereof, shall be guilty of disorderly conduct."

The Court commented:

> "A school is in a sense public in that it is endowed and operated by the taxpayer's money, but it is not public in the sense that any member of the public may use it for his own personal purpose, and is justifiably the proper body for proscribed acts such as loitering. A school building being of such a restricted public nature, the attack upon section 722-b on constitutional grounds is wholly without merit.... Nor is there any merit to defendant's contention that the statute was not intended to make criminal an otherwise innocent activity.... Loitering in school buildings, or on school grounds, is not an innocent activity.... The nature of the activity carried on in a school building incident to the teaching and protection of children compels restriction against persons loitering in and about the building and grounds wherein the activities are carried on.... Here the statute makes definite and certain that one does not qualify as an implied invitee or licensee who needs written permission to frequent a school else he is a trespasser and may be punished for loitering."

The same statute was the subject of People v. Sprowal, 268 NYS2d 444 (1966), where two defendants were convicted for distributing leaflets near a high school. In affirming the conviction of the defendant standing directly in front of the high school, and reversing the conviction of the other defendant who was some 300 feet from edge of school property, the Court held:

> "When those sought to be safeguarded are the youth of the community, any conflict arising between the remedy provided by the Legislature and First Amendment freedoms must be resolved in favor of the statute designed to insulate students from the dangers and evils enumerated.... The measure of control which the state may exercise for the protection of school students is of much wider scope than that which might be exercised for the community at large...."

The "reasonably credible account" requirement in subsection (2) has been discussed in two recent cases:

State v. Zito, 248 A2d (N J 1968); 254 A2d 769 (N J 1969) discusses the "good account" provision of the New Jersey disorderly conduct statute:

> "Plainly, the failure to give a satisfactory explanation to a police officer may be a failure to give a good account of oneself, but such fact alone will not be sufficient to support a conviction.
>
> "As stated in State v. Salerno, 142 A2d 636 (1951):
>
> "Usually provisions for a good account are associated with conduct or circumstances in themselves offensive or suggestive of an intent to commit a crime....
>
> "We are satisfied that a failure to give a good account may not itself be punished or be made an essential element of a crime....A failure to give a good account may not serve as affirmative proof of presence for an unlawful purpose. The central purpose of our statute being to reach presence at a place for an unlawful purpose rather than to punish silence, we think it fair to say the Legislature intended by the good account provision to assure the suspect a chance to explain away the circumstances which appear inculpatory.

> "To summarize, we hold (1) that the statutory offense consists solely of presence at a place for an unlawful purpose, (2) that the failure, refusal, or inability to give the officer a good account is not part of the offense, (3) that the statute requires, as a condition for prosecution, that the officer offer the suspect a chance to explain away circumstances which indicate presence for an unlawful purpose, unless the court finds that the circumstances prevented the officer or made it plainly unnecessary.
>
> "We stress, that an arrest cannot be made because a person refused or failed to give a good account. An arrest can be made only if in the total circumstances there is probable cause to believe that individual was present at the place for an unlawful purpose, i.e., to commit a crime...."

In People v. Schanbarger, 300 NYS2d 100, 248 NE2d 16 (1969), defendant was accosted by a peace officer while walking on a public highway at 3:00 a.m.,in an area where there had been a number of recent burglaries. He refused to answer the officer's questions and was arrested for loitering under New York Revised Penal Law, s 240.35 (6):

> Conviction reversed: "It is unnecessary to deal with the constitutional argument. Clauses in subsection (6) are conjunctive, rather than disjunctive, and in order to sustain conviction, each of the conjunctive elements must be proved beyond a reasonable doubt. The information in this case nowhere states that the circumstances were such that the trooper was justified in suspecting that the defendant might be engaged or was about to engage in crime. The defendant was convicted for his failure to answer the trooper's questions....His failure to answer cannot constitute a criminal act under subsection (6) of section 240.35."

In applying the same standards to the proposed loitering provision in subsection (2), we would hold that: "A person cannot be arrested merely because upon inquiry by a peace officer he refused to identify himself and give a reasonably credible account of his presence and purpose. An arrest can be made only if under the total circumstances his conduct warrants justifiable alarm for the safety of persons or property in the vicinity."

TEXT OF REVISIONS OF OTHER STATES

TEXT OF MODEL PENAL CODE

Section 250.6. Loitering or Prowling.

A person commits a violation if he loiters or prowls in a place, at a time, or in a manner not usual for law-abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity. Among the circumstances which may be considered in determining whether such alarm is warranted is the fact that the actor takes flight upon appearance of a peace officer, refuses to identify himself, or manifestly endeavors to conceal himself or any object. Unless flight by the actor or other circumstance makes it impracticable, a peace officer shall prior to any arrest for an offense under this section afford the actor an opportunity to dispel any alarm which would otherwise be warranted, by requesting him to identify himself and explain his presence and conduct. No person shall be convicted of an offense under this Section if the peace officer did not comply with the preceding sentence, or if it appears at trial that the explanation given by the actor was true and, if believed by the peace officer at the time, would have dispelled the alarm.

# # #

TEXT OF NEW YORK REVISED PENAL LAW

§ 240.35 Loitering

A person is guilty of loitering when he:

1. Loiters, remains or wanders about in a public place for the purpose of begging; or

2. Loiters or remains in a public place for the purpose of gambling with cards, dice or other gambling paraphernalia; or

3. Loiters or remains in a public place for the purpose of engaging, or soliciting another person to engage, in deviate sexual intercourse or other sexual behavior of a deviate nature; or

4. Being masked or in any manner disguised by unusual or unnatural attire or facial alteration, loiters, remains or congregates in a public place with other persons so masked or disguised, or knowingly permits or aids persons so masked or disguised to congregate in a public place; except that such conduct is not unlawful when it occurs in connection with a masquerade party or like entertainment if, when such entertainment is held in a city which has promulgated regulations in connection with such affairs, permission is first obtained from the police or other appropriate authorities; or

5. Loiters or remains in or about a school, college or university building or grounds, not having any reason or relationship involving custody of or responsibility for a pupil or student, or any other specific, legitimate reason for being there, and not having written permission from anyone authorized to grant the same; or

6. Loiters, remains or wanders in or about a place without apparent reason and under circumstances which justify suspicion that he may be engaged or about to engage in crime, and, upon inquiry by a peace officer, refuses to identify himself or fails to give a reasonably credible account of his conduct and purposes; or

7. Loiters or remains in any transportation facility, unless specifically authorized to do so, for the purpose of soliciting or engaging in any business, trade or commercial transactions involving the sale of merchandise or services, or for the purpose of entertaining persons by singing, dancing or playing any musical instrument; or

8. Loiters or remains in any transportation facility, or is found sleeping therein, and is unable to give a satisfactory explanation of his presence; or

9. Loiters or remains in any place with one or more persons for the purpose of unlawfully using or possessing a dangerous drug, as defined in section 220.00.

# # #

TEXT OF MICHIGAN REVISED CRIMINAL CODE

[Loitering]

Sec. 5540. (1) A person commits the crime of loitering if he:

(a) Loiters, remains or wanders about in a public place for the purpose of begging; or

(b) Loiters or remains in a public place for the purpose of gambling with cards, dice or other gambling paraphernalia; or

(c) Loiters or remains in a public place for the purpose of engaging or soliciting another person to engage in prostitution, deviate sexual intercourse or other sexual behavior of a deviate nature; or

(d) Being masked or in any manner disguised by unusual or unnatural attire, loiters, remains or congregates in a public place with other persons so masked or disguised, or knowingly permits or aids persons so masked or disguised to congregate in a public place; or

(e) Loiters or remains in or about a school building or grounds, not having any reason or relationship involving custody of or responsibility for a pupil or any other specific, legitimate reason for being there, and not having written permission from a school administrator; or

(f) Loiters or remains in any transportation facility, unless specifically authorized to do so, for the purpose of soliciting or engaging in any business, trade or commercial transactions involving the sale of merchandise or services, or for the purpose of entertaining persons by singing, dancing, or playing any musical instrument; or

(g) Loiters or remains in any place with one or more persons for the purpose of unlawfully using or possessing a dangerous drug.

(2) A person does not commit a crime under subparagraph (1) (d) if he is going to and from a masquerade party, or is participating in a public parade or presentation of an educational, religious, or historical character or in an event as defined in section 4220(2).

(3) "Deviate sexual intercourse" in subparagraph (1) (c) is defined as in section 2301(b).

(4) "Dangerous drug" in subparagraph (1) (g) means any narcotic drug, barbiturate or amphetamine.

(5) Loitering is a violation.

# # #

TEXT OF PROPOSED CONNECTICUT PENAL CODE

§ 195. Loitering in or about school grounds

A person is guilty of loitering on school grounds when he loiters or remains in or about a school building or grounds, not having any reason or relationship involving custody of or responsibility for a pupil or any other license or privilege to be there.

Loitering in or about school grounds is a class C misdemeanor.

# # #

Section 7. Harassment. A person commits the crime of harassment if, with intent to harass, annoy or alarm another person, he:

Existing Law
ORS 166.030
163.260
161.310
165.550

(1) Subjects another to offensive physical contact; or

(2) Publicly insults another by abusive or obscene words or gestures in a manner likely to provoke a violent or disorderly response; or

(3) Communicates with a person, anonymously or otherwise, by telephone, mail or other form of written communication, in a manner likely to cause annoyance or alarm; or

(4) Engages in a course of conduct that alarms or seriously annoys another person and which serves no legitimate purpose.

COMMENTARY - HARASSMENT

A. Summary

A special provision for certain private annoyances is required since section 6, disorderly conduct, is limited to disturbances of general or public impact. The harassment section is intended to reach "disorderly conduct" of a nature that alarms or annoys an individual rather than the general public.

Subsection (1) is designed to cover what is presently called "simple assault." The revised crimes of assault, in Article _____, require a physical injury or serious bodily injury. Petty batteries not producing injury would not constitute a criminal assault. If committed with the intent to "harass, annoy or alarm" they would be subject to prosecution under this section on harassment.

Subsection (2) is similar to subsection (3) of the disorderly conduct statute. That statute is geared to protect the public from such anti-social conduct. Subsection (2) makes the same conduct punishable if directed at a specific individual with the required intent.

Subsection (3) subjects the actor to criminal liability if he uses the telephone or other medium of communication in a manner likely to cause annoyance or alarm and does so with that intent.

Subsection (4) is a dragnet provision comparable to subsection (7) of the disorderly conduct statute. It is necessary to reach the myriad forms of intentional acts of harassment that cannot be specifically noted.

B. Derivation

Subsection (1) is a condensed version of New York Revised Penal Law Section 240.25 (1).

Subsection (2) is a modified version of Model Penal Code Section 250.4 (2).

Subsection (3) is derived from New York Revised Penal Law Section 240.30 (1).

Subsection (4) is taken from New York Revised Penal Law Section 240.25 (5).

C. Relationship to Existing Law

The proposed section on harassment is new to Oregon law. Some of the coverage included in the section is reflected in existing statutes:

ORS 166.030: Using contemptuous language concerning another who refused to duel.

ORS 163.260: Assault and battery while unarmed.

ORS 161.310: Gross injury to another's person or property and offenses against public peace, health or morals.

ORS 165.550: Objectionable telephone calls. Subsection (3): Any offense committed by use of the telephone as set out in this section may be deemed to be committed either at the place from which the telephone call was made or at the place where the telephone call was received.

For purposes of avoiding problems of venue, it may be advantageous to incorporate subsection (3) of ORS 165.550 into the proposed section.

TEXT OF REVISIONS OF OTHER STATES

TEXT OF MODEL PENAL CODE

Section 250.4. Harassment.

A person commits a petty misdemeanor if, with purpose to harass another, he:

(1) makes a telephone call without purpose of legitimate communication; or

(2) insults, taunts or challenges another in a manner likely to provoke violent or disorderly response; or

(3) makes repeated communications anonymously or at extremely inconvenient hours, or in offensively coarse language; or

(4) subjects another to an offensive touching; or

(5) engages in any other course of alarming conduct serving no legitimate purpose of the actor.

# # #

TEXT OF NEW YORK REVISED PENAL LAW

§ 240.25 Harassment

A person is guilty of harassment when, with intent to harass, annoy or alarm another person:

1. He strikes, shoves, kicks or otherwise subjects him to physical contact, or attempts or threatens to do the same; or

2. In a public place, he uses abusive or obscene language, or makes an obscene gesture; or

3. He follows a person in or about a public place or places; or

4. As a student in school, college or other institution of learning, he engages in conduct commonly called hazing; or

5. He engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose.

§ 240.30 Aggravated harassment

A person is guilty of aggravated harassment when, with intent to harass, annoy or alarm another person, he:

1. Communicates with a person, anonymously or otherwise, by telephone, or by telegraph, mail or any other form of written communication, in a manner likely to cause annoyance or alarm; or

2. Makes a telephone call, whether or not a conversation ensues, with no purpose of legitimate communication.

# # #

TEXT OF MICHIGAN REVISED CRIMINAL CODE

[Harassing Communications]

Sec. 5535. (1) A person commits the crime of harassing communications if, with intent to harass or alarm another person, he:

(a) Communicates with a person, anonymously or otherwise, by telephone, or by telegraph, mail or any other form of written communication, in a manner likely to harass or cause alarm; or

(b) Makes a telephone call, whether or not a conversation ensues, with no purpose of legitimate communication.

(2) Harassing communications is a Class B misdemeanor.

[Harassment]

Sec. 5530. (1) A person commits the crime of harassment if, with intent to harass, annoy or alarm another person, he:

(a) Strikes, shoves, kicks or otherwise touches a person or subjects him to physical contact; or

(b) In a public place uses abusive or obscene language, or makes an obscene gesture; or

(c) Follows a person in or about a public place or places; or

(d) Engages in a course of conduct or repeatedly commits acts that alarm or seriously annoy another person and that serve no legitimate purpose.

(2) Harassment is a Class C misdemeanor.

# # #

TEXT OF PROPOSED CONNECTICUT PENAL CODE

§ 193. Harassment

A person is guilty of harassment when:

1. by telephone, he addresses another in or uses indecent or obscene language; or

2. with intent to harass, annoy or alarm another person, he communicates with a person, anonymously or otherwise by telephone, mail or any other form of written communication, in a manner likely to cause annoyance or alarm; or

3. with intent to harass, annoy or alarm another person, he makes a telephone call, whether or not a conversation ensues, in a manner likely to cause annoyance or alarm.

For purposes of this section such offense may be deemed to have been committed either at the place where the telephone call was made, or at the place where it was received. The court may order any person convicted under this section to be examined by one or more psychiatrists.

Harassment is a class C misdemeanor.

# # #

Section 8. Abuse of venerated objects. A person commits the crime of abuse of venerated objects if he intentionally abuses a public monument or structure, a place of worship or burial, or the national or state flag.

Existing Law
ORS 162.710
162.720
162.730
164.450
164.580
164.590

COMMENTARY - ABUSE OF VENERATED OBJECTS

A. Summary

The proposed section dealing with criminal mischief penalizes intentional interference with or damage to the property of another. This section recognizes that there exists a special species of public property that may be desecrated without appreciable damage. The usual object and result of such conduct is an affront to public sensibilities. Examples are painting a swastika on a church, overturning cemetery headstones, and burning a flag at a public demonstration. Large segments of the public feel strongly about the way these patriotic and religious symbols are treated.

The proposed section is designed to discourage that kind of conduct. Its purpose is to protect the public sensibility from conduct that may or may not fall technically within the section on criminal mischief.

B. Derivation

The section is taken, with substantial change, from Michigan Revised Criminal Code section 5555.

C. Relationship to Existing Law

There are nine Oregon criminal statutes dealing with criminal mischief to property. Six other statutes reach damage to or interference with particular kinds of property of a public nature:

ORS 162.710: Meaning of "flag".
ORS 162.720: Punishment for desecration of United States flag.
ORS 162.730: Acts not considered desecration of United States flag.
ORS 164.450: Defacing building or contents.
ORS 164.580: Defacing, destroying or removing property in cemetery.
ORS 164.590: Building road through cemetery.

There are no reported Oregon cases involving these statutes.

TEXT OF REVISIONS OF OTHER STATES

TEXT OF MODEL PENAL CODE

Section 250.9. Desecration of Venerated Objects.

A person commits a misdemeanor if he purposely desecrates any public monument or structure, or place of worship or burial, or if he purposely desecrates the national flag or any other object of veneration by the public or a substantial segment thereof in any public place. "Desecrate" means defacing, damaging, polluting or otherwise physically mistreating in a way that the actor knows will outrage the sensibilities of persons likely to observe or discover his action.

# # #

TEXT OF MICHIGAN REVISED CRIMINAL CODE

[Desecration of Venerated Objects]

Sec. 5555. (1) A person commits the crime of desecration of venerated objects if he intentionally:

(a) Desecrates any public monument or structure or place of worship or burial; or

(b) Desecrates in a public place the national or state flag or any other object of veneration by the public or a substantial segment thereof; or

(c) Performs in public the national or state anthem except as an entire and separate composition or number and without embellishments of national or other melodies.

(2) Desecration of venerated objects is a Class C misdemeanor.

Existing Law

ORS 164.570
Ch 97

Section 9. Abuse of corpse. A person commits the crime of abuse of corpse if, except as otherwise authorized by law, he intentionally:

(1) Abuses a corpse; or

(2) Disinters, removes or carries away a corpse.

COMMENTARY - ABUSE OF CORPSE

A. Summary

Section 9 deals with conduct with a corpse that shocks the sensibilities of surviving kin and the public at large. The term "defile" in the definition of "abuse" in section 1 would reach sexual misconduct with a corpse, known generally as necrophilism.

The term, "except as otherwise authorized by law" is intended to exempt from criminal liability certain lawful activities involving corpses, e.g., scientific research, cremation, autopsies.

B. Derivation

The section is derived from Michigan Revised Criminal Code section 5560, with the exception of subsection (2), which is a restatement of ORS 164.570.

C. Relationship to Existing Law

ORS 164.570: Disinterment or removal of body. Punishable as a felony or misdemeanor.

ORS Chapter 97: Property Rights in Human Bodies.

TEXT OF REVISIONS OF OTHER STATES

TEXT OF MODEL PENAL CODE

Section 250.10. Abuse of Corpse.

Except as authorized by law, a person who treats a corpse in a way that he knows would outrage ordinary family sensibilities commits a misdemeanor.

# # #

TEXT OF MICHIGAN REVISED CRIMINAL CODE

[Abuse of Corpse]

Sec. 5560. (1) A person commits the crime of abuse of a corpse if, except as otherwise authorized by law, he treats a corpse in a way that he knows would outrage ordinary family sensibilities.

(2) Abuse of a corpse is a Class A misdemeanor.

# # #

Section 10. Cruelty to animals. A person commits the crime of cruelty to animals if, except as otherwise authorized by law, he intentionally or recklessly:

(1) Subjects any animal under human custody or control to cruel mistreatment; or

(2) Subjects any animal under his custody or control to cruel neglect; or

(3) Kills without legal privilege any animal under the custody or control of another.

Existing Law
ORS 141.070
164.710
164.720
167.740
167.745
165.420
603.310
609.150
Ch. 610
770.210
770.220

COMMENTARY - CRUELTY TO ANIMALS

A. Summary

Section 10 is designed to consolidate the proliferation of existing penal provisions dealing with cruelty to animals. The section states, in effect, that a person cannot:

(1) Cruelly mistreat any animal; or

(2) Cruelly neglect his own animal; or

(3) Kill any animal belonging to another.

The term "custody or control" as used excludes wild animals in their natural state. The security of these animals is regulated by the game laws. No attempt has been made to define "animal." The usual application of the term in cruelty to animal legislation includes domestic and pet animals and birds.

Bestiality is defined to mean "a sexual connection between a human being and a brute of the opposite sex." (Black's Law Dict (4 ed 1957)).At common law and under ORS 164.040, bestiality is considered a form of sodomy. Sodomy, as defined in the Sexual Offenses Article, no longer includes sexual activity between a human being and an animal. It is intended that this form of misconduct be covered by subsection (1) of section 10.

The phrase "except as otherwise authorized by law" is intended to exempt professionally accepted practices involving the use of animals such as experiments by veterinarians or scientific research. It would also exempt the legalized destruction of certain animals by meat packers and humane societies.

B. Derivation

The section is derived from Michigan Revised Criminal Code section 5565.

C. Relationship to Existing Law

There are a number of existing penal statutes that would be repealed by the proposed section; a few others deal with specific problems involving animals and should be retained:

ORS 141.070: Issuance of search warrant on complaint of cruelty to animals.

ORS 164.710: Killing, wounding or poisoning animals. 1 year, $1,000 fine.

ORS 164.720: Attempting to poison domestic animals. 1 year, $1,000 fine.

ORS 167.740: Cruelty to animals. 60 days, $100 fine.

ORS 167.745: Abandonment of domestic animals. $500 fine.

ORS 165.420: Abandonment of animals by bailees. 1 year, $300 fine.

ORS 483.614: Driver's duty to help animals. 483.991 (12) makes this a misdemeanor.

ORS 603.310: Inhumane slaughter prohibited. 1 year, $500 fine.

ORS 609.150: Right to kill dog that kills or injures livestock.

Chapter 610: Predatory animals; Bounties.

ORS 770.210: Definitions. "Animal" includes all brute creatures.

ORS 770.220: Maximum consecutive hours of confinement for animals in transit. $500 fine.

There are three reported Oregon cases involving the cruelty to animals statutes:

State v. Goodall, 82 Or 329, 160 P 595 (1916), defendant convicted of cruelly tormenting and torturing a cow.

State v. Goodall, 90 Or 485, 175 P 857 (1919), defendant convicted of cruelly torturing and tormenting a horse by riding it when it had deep, ulcerated sore on its back, and by supplying it with insufficient food.

State v. Klein, 98 Or 116, 193 P 208 (1920), defendant acquitted of "wanton and malicious" killing of cow that was attempting to break into his hay corral. "If the defendant shot the cow because she was trying to break into his hay corral, it cannot be said to have been without cause, or a wanton act."

TEXT OF REVISIONS OF OTHER STATES

TEXT OF MODEL PENAL CODE

Section 250.11. Cruelty to Animals.

A person commits a misdemeanor if he purposely or recklessly:

(1) subjects any animal to cruel mistreatment; or

(2) subjects any animal in his custody to cruel neglect; or

(3) kills or injures any animal belonging to another without legal privilege or consent of the owner.

Subsections (1) and (2) shall not be deemed applicable to accepted veterinary practices and activities carried on for scientific research.

# # #

TEXT OF MICHIGAN REVISED CRIMINAL CODE

[Cruelty to Animals]

Sec. 5565. (1) A person commits the crime of cruelty to animals if, except as otherwise authorized by law, he intentionally or recklessly:

(a) Subjects any animal to cruel mistreatment; or

(b) Subjects any animal in his custody to cruel neglect; or

(c) Kills or injures any animal belonging to another.

(2) Cruelty to animals is a Class B misdemeanor.

# # #

Existing Law

ORS
161.310
476.740

Section 11. Falsely reporting an incident. A person commits the crime of falsely reporting an incident if he intentionally initiates or circulates a report, knowing it to be false, concerning an alleged or impending fire, explosion, crime, catastrophe or other emergency under circumstances causing or likely to cause public inconvenience or alarm.

COMMENTARY - FALSELY REPORTING AN INCIDENT

A. Summary

The conduct prohibited by this section is an aggravated form of disturbing the peace. A common and most aggravating example is the airline bomb scare.

The draft Article on Perjury and Related Offenses (Tent. Draft No. 1, s. 8, December 1969) penalized false fire and police reports. An intent to convey the report to the particular public authority is an element of the offense under that section. This section is designed to protect the public against general inconvenience and insecurity, rather than against deliberate interference with governmental administration.

B. Derivation

With substantial structural change the section is taken from Michigan Revised Criminal Code section 5550.

C. Relationship to Existing Law

There is presently no specific penal sanction directed at this kind of misconduct.

ORS 476.740 prohibits false fire alarms.

ORS 161.310 is a dragnet provision condemning offenses against the public peace, health and morals.

TEXT OF REVISIONS OF OTHER STATES

TEXT OF MODEL PENAL CODE

Section 250.3. False Public Alarms.

A person is guilty of a misdemeanor if he initiates or circulates a report or warning of an impending bombing or other crime or catastrophe, knowing that the report or warning is false or baseless and that it is likely to cause evacuation of a building, place of assembly, or facility of public transport, or to cause public inconvenience or alarm.

# # #

TEXT OF NEW YORK REVISED PENAL LAW

§ 240.50 Falsely reporting an incident

A person is guilty of falsely reporting an incident when, knowing the information reported, conveyed or circulated to be false or baseless, he:

1. Initiates or circulates a false report or warning of an alleged occurrence or impending occurrence of a fire, explosion, crime, catastrophe or emergency under circumstances in which it is not unlikely that public alarm or inconvenience will result; or

2. Reports, by word or action, to any official or quasi-official agency or organization having the function of dealing with emergencies involving danger to life or property, an alleged occurrence or impending occurrence of a fire, explosion or other catastrophe or emergency which did not in fact occur or does not in fact exist; or

3. Gratuitously reports to a law enforcement officer or agency (a) the alleged occurrence of an offense or incident which did not in fact occur; or (b) an allegedly impending occurrence of an offense or incident which in fact is not about to occur; or (c) false information relating to an actual offense or incident or to the alleged implication of some person therein.

# # #

TEXT OF MICHIGAN REVISED CRIMINAL CODE

[Falsely Reporting an Incident]

Sec. 5550. (1) A person commits the crime of falsely reporting an incident if with knowledge that the information reported, conveyed or circulated is false, he initiates or circulates a false report or warning of an alleged occurrence or impending occurrence of a fire, explosion, crime, catastrophe or emergency under circumstances in which it is likely to cause evacuation of a building, place of assembly, or transportation facility, or to cause public inconvenience or alarm.

(2) Falsely reporting an incident is a Class B misdemeanor.

# # #

TEXT OF PROPOSED CONNECTICUT PENAL CODE

§ 190. Falsely reporting an incident

A person is guilty of falsely reporting an incident when, knowing the information reported, conveyed or circulated to be false or baseless, he:

1. initiates or circulates a false report or warning of an alleged occurrence or impending occurrence of a fire, explosion, crime catastrophe or emergency under circumstances in which it is likely that public alarm or inconvenience will result; or

2. reports, by word or action, to any official or quasi-official agency or organization having the function of dealing with emergencies involving danger to life or property, an alleged occurrence or impending occurrence of a fire, explosion or other catastrophe or emergency which did not in fact occur or does not in fact exist; or

3. gratuitously reports to a law enforcement officer or agency (a) the alleged occurrence of an offense or incident which did not in fact occur; or (b) an allegedly impending occurrence of an offense or incident which in fact is not about to occur; or (c) false information relating to an actual offense or incident or to the alleged implication of some person therein.

Falsely reporting an incident is a class B misdemeanor.

# # #

See: Commission Minutes
1/10/70, p. 38, Vol. IX
Tape #44

ARTICLE 26.

RIOT, DISORDERLY CONDUCT AND RELATED OFFENSES

Appendix to Preliminary Draft No. 2

Section ___. Treason. (1) A person commits the crime of treason if he levies war against the State of Oregon or adheres to its enemies, giving them aid and comfort.

(2) No person shall be convicted of treason unless upon the testimony of two witnesses to the same overt act or upon confession in open court.

Existing Law
ORS
162.010
162.020
162.030
162.040

COMMENTARY - TREASON

Broadly speaking, treason is a breach of allegiance to a government committed by a person who owes either perpetual or temporary allegiance to it. Aliens domiciled in this country may commit the offense because they owe temporary allegiance during their sojourn. 87 CJS, Treason, pp. 910, 916.

State v. Raley, 136 NE2d 295 (1954), upholding the validity of the Ohio legislature's creation of an Un-American Activities Commission to ascertain whether there existed in the state any evidence of treason, held that treason is a proper subject of state action. The court stated:

> "That sedition and treason are proper subjects of state action, there can be no doubt. This is recognized in Section 2, Article IV of the United States Constitution, wherein it is provided that 'a Person charged with Treason . . . who shall flee from Justice, and be found in another State' shall . . . be delivered up, to be removed to the state having jurisdiction of the crime . . . There have not been many recent instances of trials for treason or sedition against an individual state of the United States, but there were frequent instances in the early history of this country." Id. at 306.

The court cited two such early cases; Ex parte Dorr, 3 How 103, 44 US 103; and Luther v. Borden, 7 How 1, 48 US 1, noting that in neither case did the Supreme Court say or intimate that Rhode Island, the state prosecuting for treason, had acted beyond its jurisdiction.

Similarly, In re Charge to Grand Jury, Fed Cas No 18,275, 1 Story 614 (1842), recognized that treason may be perpetrated against an individual state.

> "There may be treason against a state by levying war which is aimed altogether against the sovereignty of the state; as would be the case if the object of an assembly of persons met with force were to overturn the government or constitution of the state, or to prevent the due exercise of its sovereign powers, or to resist the execution of any one or more of its general laws, without any intention to intermeddle with the relations of the state with the national government, or to displace the national laws or sovereignty therein."

In re Charge to Grand Jury, 4 Pa Law J 33 (1834), is to the same effect:

> "Where the premeditated object and intent of a riotous assembly is to prevent by force and violence the execution of any statute of the commonwealth, or by force and violence to coerce its repeal by the legislative authority, or to deprive any class of the community of the protection afforded by the law . . . and the rioters proceed to execute by force their predetermined objects and intents, they are guilty of high treason against the commonwealth."

However, a treasonable act against the United States is not treason against one of the states, Ex parte Quarrier, 2 W Va 569 (1866), and therefore, treason against the United States is not cognizable in state courts. People v. Lynch, 11 Johns 549 (1814).

Oregon Constitution, Art. I, s. 24, defines treason against the state:

> "Treason against the State shall consist only in levying war against it, or adhering to its enemies, giving them aid or comfort. -No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or confession in open Court.-"

The following acts are stated by ORS 162.010 to constitute the crime of treason against the state:

> "(1) Levying war against this state within its boundaries.
>
> "(2) A combination of two or more persons, by force, to usurp or overturn the government of this state, evidenced by a forcible attempt made within this state to accomplish such purpose.
>
> "(3) Adhering to the enemies of this state while it is separately engaged in a war with a foreign enemy, in the cases prescribed in the Constitution of the United States, and giving to such enemies aid and comfort in this state or elsewhere."

Although it is not specifically included within the definition, a specific intent to betray and an overt act in manifestation of the treasonable intent are essential elements to a conviction for treason. 87 CJS, Treason, p. 912.

Subsection (1) of ORS 162.010, supra, states that "levying war" against the state is an act of treason. "Levying war" is defined in ORS 162.020 in part as follows:

> "To constitute levying war against this state, an actual act of war must be committed. To merely conspire to levy war does not constitute levying war."

Expanding on this basic statement of the law, 87 CJS, Treason, s. 5, p. 913, states:

> " . . . there must be an actual assemblage of men for the purpose of executing a treasonable design by force . . . While it is not essential that any blow be struck, provided the assemblage is in a condition to use force . . . it is essential that the assemblage of men have an intent to carry out its purpose by violence . . . "

The second type of conduct, defined by ORS 162.020 to constitute "levying war," is:

> "Where persons rise in insurrection with intent to prevent in general, by force and intimidation, the execution of a statute of this state, or to force its repeal, they are guilty of levying war."

Again, 87 CJS, Treason, s. 6, p. 914, is instructive on the ingredients of such opposition to public law. It states:

> "In order to constitute the crime of treason, under this interpretation of the phrase 'levying war', there must be a combination of the following elements: A combination, or conspiracy, by which different individuals are united in one common purpose; a common purpose to prevent the execution of some public law . . . and the actual use of force, by such combination to prevent the execution of that law."

However, ORS 162.020 imposes a limitation on this definition of "levying war" in that " . . . an endeavor, although by numbers and force of arms, to resist the execution of a law in a single instance and for a private purpose is not levying war." This limitation is properly related to the necessity of a treasonable intent. As stated in 87 CJS, Treason, s. 3, p. 912:

> "There must be not only an intention to overthrow the government or defeat the execution of its laws, but the intention must be of an act of a general and universal instead of a local, private or transitory nature."

The second act of treason stated in ORS 162.010 appears unnecessary in view of the scope of the concept of "levying war." Two or more persons who forcibly attempt to overturn a sovereign government to whom they owe allegiance "levy war" against the government within the meaning of the definition of treason. The chances of success or failure are immaterial.

The third act of treason stated in ORS 162.010 consists of two elements: (1) adherence to the enemy and (2) giving him aid and comfort at a time the state is separately engaged in a war with a foreign enemy in the cases prescribed in the United States Constitution. Art. I, s. 10, says that a state may not engage in war "without the Consent of Congress . . . unless actually invaded or in such imminent Danger as will not admit of delay."

The utility of maintaining this statement of a separate act of treason appears questionable. Clearly it seems reasonable to forecast that Congress would not consent to an individual state separately engaging in a war with a foreign nation. Also, an invasion of one state would be an act of war against the United States. Therefore, adhering to or giving aid to the invading enemy would be an act of treason against the United States and not within the jurisdiction of the state to punish as treason.

Treasonable acts initially directed against the state may merge into treason against the United States. 87 CJS, Treason, s. 8, p. 916. This is the apparent result today since there has not been a reported case of treason against a state since the first half of the nineteenth century. However, if an instance should arise where treasonable conduct against the state did not amount to treason against the United States, there are sections within the proposed code which prohibit the type of conduct displayed by an overt manifestation of a treasonable intent, while the difficult "treasonable intent" is not an element to be established for conviction. For example, both types of conduct which amount to "levying war" would be encompassed within the Articles on Riot and Obstructing Governmental Administration.

An assemblage of men for the purpose of executing a treasonable design by force would be covered by the proposed Riot Article. Also, where there is a combination of persons to prevent the execution of some public law by force, the Article on Obstructing Governmental Administration would encompass the prohibited acts. Although neither one of these Articles will probably punish these offenses with the severity presently prescribed for treason (life imprisonment), it might fairly be argued that any "treason" against the state which was not also treason against the United States would be adequately covered by the Articles.

The purpose of the proposed section is to preserve the statutory crime of treason as defined in the Oregon Constitution. It would seem that the classical definition of treason is broad enough to cover overt acts that might occur, and most of the activities would probably violate other sections of the draft.

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