Report to Senate Judiciary Committee
The Honorable Floyd Prozanski, Chair
June 18, 2013
Author: Eli Lininger
Editor: Tom Lininger

INTRODUCTION

As a young adult in Eugene, Oregon, I have many friends who are fearful of voyeurism. Recently, just blocks away from the school I attend, sexual predators have taken advantage of Oregon's lenient peeping Tom laws and have traumatized women by peering through their residential windows.

I believe that the Oregon Legislature should strengthen criminal laws, and ORS 163.700 in particular, in order to address the threat posed by peeping Toms. Tort suits are not a viable solution to the problem of voyeurism, because they take too much effort on the part of the victim, and they are unlikely to be brought when the perpetrator has little money. The best way to combat voyeurism is through criminal prosecution, because jail time serves as the strongest deterrent for sexual predators. The criminal justice system cannot sit idly by and allow peeping Toms to prey on unsuspecting and innocent victims.

In order to make ORS 163.700 more effective, the Oregon Legislature should revise the law in three ways. First, the peeping Tom statute should not require the nudity of the occupant as a condition for prosecution. Second, the peeping Tom statute should clarify that an occupant has a reasonable expectation of privacy in all rooms of her residence, because the Supreme Court's recent jurisprudence has strengthened the expectation of privacy in one's home. Third, the peeping Tom statute should not exempt a voyeur who looks through windows while trespassing in a hallway, yard or other common area of a property that includes an apartment building or hotel.

FIRST PROPOSED REVISION TO ORS 163.700

The present version of ORS 163.700 only authorizes a prosecution when the defendant has an intent of arousing or gratifying sexual desires, and the defendant "knowingly makes or records a photograph, motion picture, videotape or other visual recording of another person in a state of nudity without the consent of the person being recorded" or the defendant "is in a location to observe another person in a state of nudity." This language does not address cases of voyeurism in which the perpetrator does not observe the victim in a state of nudity.

The legislative history of ORS 163.700 helps to explain the narrow scope of the statute. The legislators who introduced the original bill in 1997 were responding to a very specific set of facts: the owner of a tanning salon in Portland

had been secretly videotaping customers while they were undressing. The fact that the statute presently requires nudity for a criminal prosecution does not reflect a legislative judgment that other invasions of privacy should be beyond the scope of criminal law; rather, the Oregon Legislature was not attempting to deal with a broader problem when it passed ORS 163.700.

The nudity requirement in ORS 163.700 is objectionable on several grounds. First, it is redundant. If the statute already requires that the defendant act for the purpose of arousing or gratifying sexual desires, why should the statute separately require that the defendant view an occupant in a state of nudity?

Second, Oregon's nudity requirement is more restrictive than the approach taken by most other states. The vast majority of states do not require nudity as a condition for prosecution in their versions of ORS 163.700. A state-by-state survey of criminal statutes comparable to ORS 163.700 indicates that only five states (Iowa, Missouri, Ohio, Pennsylvania and Wisconsin) share Oregon's requirement that an occupant must be nude before the state may prosecute for invasion of privacy or an analogous crime.

Oregon should adopt the approach taken by Washington, which criminalizes invasion of privacy even when the voyeur has not seen the occupant in a state of nudity. In Washington, one may be prosecuted if he peeps through a window into a room where another person "would have reasonable expectation of privacy," regardless of whether or not the victim is nude. Washington's statue only applies to viewers who are seeking sexual gratification by peering into a private place. Adopting Washington's approach is a good idea because even though the sexual predator is not observing someone in a state of undress, his mindset is still just as culpable as if he were seeing someone naked. Additionally, seeing a peeping Tom staring through one's window is a traumatizing experience whether or not the victim is nude. The voyeur may see things in the house (other than the person herself) that were not meant for the public eye, leading to further trauma and psychological harm. Also, the peeping Tom may gain information about the house that could lead to further crimes: for instance, looking through the window might provide him with valuable information if he were to break into the house.

Washington's statutory language has withstood challenges that it is overbroad or unconstitutional. If Oregon were to adopt Washington's approach, Oregon courts would likely reach the same conclusion. The law should be more stringent in order to protect innocent people from the traumatizing eyes of voyeurs and peeping Toms.

SECOND PROPOSED REVISION TO ORS 163.700

The current version of ORS 163.700 provides a non-exhaustive list of the rooms where an occupant might have a reasonable expectation of privacy.

According to ORS 163.700, a voyeur may be prosecuted when the person is peering into "places and circumstances where the person has a reasonable expectation of personal privacy includes [...] a bathroom, dressing room, locker room that includes an enclosed area for dressing or showering, tanning booth and any area where a person undresses in an enclosed space that is not open to public view."

This language has a narrow focus due to the facts of the original case to which the Oregon Legislature was responding. The language of the statute should be much broader in order to sufficiently protect a victim from peeping Toms. There is a reasonable expectation of privacy within the home, regardless of whether or not the blinds are drawn or the victim is nude.

The Oregon Legislature should revise section (2)(c) to clarify that an occupant has a reasonable expectation of privacy in every room of a private residence. There is no good reason why a list of protected locations should omit any room in a private residence. The recent voyeurism cases in Eugene all involved a peeping Tom who was peering into rooms of a residence, and there should be no confusion about the fact that ORS 163. 700 applies to such rooms. A person has at least as strong an expectation of privacy in his own residence as he does in the nonresidential settings listed in the current version of section 2(c).

The U.S. Supreme Court's recent jurisprudence has fortified the expectation of privacy in one's home. For example, in 2001, the Supreme Court held in Kyllo v. United States that the use of a thermal imaging device from a public vantage point to monitor the radiation of heat from a person's home was a "search" within the meaning of the Fourth Amendment, and thus required a warrant. Because the police in this case did not have a warrant, the Court reversed Kyllo's conviction for growing marijuana.

In 2012, the Supreme Court held in United States v. Jones that the use of a GPS system on the undercarriage of a car in order to track its movement was a violation of the Fourth Amendment. While the Court recognized that "bumper beepers" might be permissible when cars are traveling on public streets, the Court was strongly concerned that the GPS devices should not remain on cars when they enter residential garages. This case reaffirmed that there is an increased expectation of privacy within the home

In 2013, the Supreme Court held in Florida v. Jardines that police use of a trained detection dog to sniff for narcotics on the front porch of a private home is a "search" under the Fourth Amendment. Again, the Supreme Court argued that there is a raised expectation of privacy within one's home.

The general theme of these recent Supreme Court ruling is that a person has a very strong expectation of privacy in his or her residence. Indeed, the expectation of privacy in a residence is stronger in 2013 than it was at the time the Oregon Legislature originally approved ORS 163.700 in 1997. Accordingly, the Oregon

Legislature should revise section (2)(c) to clarify that an occupant has a reasonable expectation of privacy in all rooms of a residence.

THIRD PROPOSED REVISION TO ORS 163.700

The present version of ORS 163.700 does not allow prosecution for invasion of privacy unless the victim had a reasonable expectation of privacy at the time the defendant viewed the victim. ORS 163.700(2)(c) indicates that an expectation of privacy is not reasonable in a place where a person is subject to public view. According to ORS 163.700(2)(d), "Public view means that an area can be readily seen and that a person within the area can be distinguished by normal unaided vision when viewed from a public place as defined in ORS 161.015 (General definitions)." ORS 161.015(10) defines "public place" as a "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."

The public view exception in ORS 163.700 is too broad. As it presently stands, the definition of "public place" might extend to a hallway, yard or common area of a property that includes an apartment building or hotel. A trespasser who intrudes in such an area in order to peer through a winder should not be able to defeat a prosecution under the invasion of privacy statute. For example, if the manager of an apartment building has ordered a particular person to leave all the private property under the manager's control, that person should not have a defense to if that person trespasses in the yard so that he can peek through a window. The Oregon Legislature should revise the definition of "public view" under ORS 163.700(d)(2) to make clear that this exception does not apply to a person who trespasses in one of the public places listed in ORS 161.015.

77th OREGON LESIGLATIVE ASSEMBLY -- 2013 Regular Session

NOTE: Matter within { + braces and plus signs + } in an amended section is new. Matter within { - braces and minus signs - } is existing law to be omitted. New sections are within { + braces and plus signs +}.

LC ____

Senate Bill ___

Sponsored by Senator _____

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure as introduced.

Amends statute criminalizing invasion of personal privacy. Provides that nudity of occupant is not necessary for criminal liability. Clarifies that occupant has a reasonable expectation of privacy in all rooms of a residence. Eliminates defense that voyeurism occurred while defendant was trespassing in a hallway, common area, or yard of a private property that includes a hotel or apartment building.

A BILL FOR AN ACT

Relating to criminal law; amending ORS 163.700.
Be It Enacted by the People of the State of Oregon:
SECTION 1. ORS 163.700 is amended to read:
163.700. Invasion of personal privacy.
(1) Except as provided in ORS 163.702 (Exceptions to ORS 163.700), a person commits the crime of invasion of personal privacy if;
(a)(A) The person knowingly makes or records a photograph, motion picture, videotape or other visual recording of another person in a state of nudity without the consent of the person being recorded; and
(B) At the time the visual recording is made or recorded the person being recorded is in a place and circumstances where the person has a reasonable expectation of privacy; or
(b) (A) For the purpose of arousing or gratifying the sexual desire of the person, the person is in a location to observe another person in a state of nudity without the consent of the other person; and
(B) The other person is in a place and circumstances where the person has a reasonable expectation of privacy; { + or
(c) For the purpose of arousing or gratifying the sexual desire of any person, he or she knowingly views, photographs, or films another person without that person's knowledge and consent while the person being viewed, photographed or filmed is in a place where he or she would have a reasonable expectation of privacy. + }

(2) As used in this section:
(a) 'Makes or records a photograph, motion picture, videotape or other visual recording' includes, but is not limited to making or recording or employing, authorizing, permitting, compelling or inducing another person to make or record a photograph, motion picture, videotape or other visual recording.
(b) 'Nudity' means any part of the uncovered, or less than opaquely covered,:
(A) Genitals;
(B) Pubic area; or
(C) Female breasts below a point immediately above the top of the areola.
(c) '{ - Places - } { + A place + } and circumstances where the person has a reasonable expectation of privacy' incudes, but is not limited to, { + any room in the person's residence, as well as + } a bathroom, dressing room, locker room that includes an enclosed area for dressing or showering, tanning booth and any area where a person undresses in an enclosed space that is not open to public view.
(d) 'Public view' means that an area can be readily seen and that a person within the area can be distinguished by normal unaided vision when viewed from { + a vantage point that is:
(A) + } a public place as defined in ORS 161.015 (General definitions) { + ; and
(B) a place where the viewer is not a trespasser.
(e) 'Photographs' or 'films' means the making of a photograph, motion picture film, videotape, digital image, or any other recording or transmission of the image of a person.
(f) 'Views' means the intentional looking upon of another person for more than a brief period of time, in other than a casual or cursory manner, with the unaided eye or with a device designed or intended to improve visual acuity. + }
(3) Invasion of personal privacy is a Class A misdemeanor.
SECTION 2. This 2013 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2013 Act takes effect on its passage.