See: Minutes of Subcommittee No. 2
5/3/69, p. 1, Vol. XI
Tape #73
Commission Minutes
7/19/69, p. 2, Vol. IX
Tapes #33 and 34

CRIMINAL LAW REVISION COMMISSION
208 Agriculture Building
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ARTICLE 13. SEXUAL OFFENSES

Preliminary Draft No. 1; January 1969

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Subcommittee No. 2

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Preliminary Draft No. 1; January 1969

Reporter's Note:

In drafting the Article on Sexual Offenses careful consideration was given to the broad scope of personal, family, community and religious interests which are or may be affected by sexual activities. While many valuable interests exist only a few were deemed sufficiently vital to warrant criminal sanctions for their protection. Specifically, the interests sought to be protected in the Sexual Offenses Article are as follows:

(1) protection of the individual (adult as well as child) against all nonconsensual and forcible acts;

(2) protection of the young and immature from the sexual advances of older, more mature individuals.

However, the proposed draft is not intended to proscribe the following conduct:

1.) any sexual activities engaged in between spouses;

2.) any sexual conduct engaged in between consenting adults, whether of a heterosexual or a homosexual nature;

3.) any consensual sexual activities engaged in by adolescents, where the parties involved are within four years of age of each other.

All the offenses described in this Article require that the proscribed conduct be committed upon the victim without his consent.

The proposed draft includes the following provisions:

(1) Definition of Terms
(2) Provisions Generally Applicable to the Sexual Offenses Article
(3) Rape (3 degrees)
(4) Sodomy (3 degrees)
(5) Sexual Abuse (2 degrees)

The sections relating to rape, sodomy and sexual abuse are divided into ascending degrees on the basis of the following factors:

(1) The age of the victim and the age of the actor; or

(2) the mental or physical condition of the victim; or

(3) the use of force or threats.

Basically, the draft seeks to increase the liability of the adult actor in proportion to the abnormality of his conduct, while at the same time limiting the liability of the youthful offender who is close to the age of his alleged victim.

As with previous drafts of specific crimes, no penalty sections are included. They will be incorporated into the Draft when all offenses are graded by the Commission.

SEXUAL OFFENSES

Preliminary Draft No. 1; January 1969

Section 1. Sexual Offenses; Definitions. As used in _____, except as the context may require otherwise:

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

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

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

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

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

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

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

COMMENTARY -- SEXUAL OFFENSES; DEFINITIONS

This section defines seven terms which are used in the Sexual Offenses Article. Defining these terms in one section simplifies the language of the various other sections which define crimes by making it possible to incorporate the meanings of these terms by reference to the definition section.

Subsection (1) prescribes that the term "sexual intercourse" is to have its ordinary meaning. Thus, it may occur without orgasm or complete penetration of the penis into the vagina.

Subsection (2) is designed to remove any uncertainty as to what conduct falls within the meaning of "deviate sexual intercourse." Deviate sexual intercourse includes all acts of anal or oral intercourse (fellatio, cunnilingus and sodomy) between human beings but does not include intercourse with animals (bestiality) or with dead bodies (necrophilia).

The term "sexual contact" defined in subsection (3) is applicable to acts of heterosexual or homosexual genital manipulation, and to acts such as the unconsented fondling of a woman's breast. The term does not include the inadvertent touching of the intimate parts of another person. The definition of "sexual contact" includes the words "for the purpose of arousing or gratifying the sexual desire of either party." It is the feeling of some commentators that the inclusion of such wording creates an offense which will be extraordinarily difficult to prove. Under this definition the prosecution would have to prove (1) the touching and (2) that the touching was for the purpose of gratifying sexual desire. 32 Brooklyn L.R. 274 (1966)

In subsection (4) the term "mentally defective" states in the language of contemporary psychiatry when a person is, by reason of mental disease or defect, incapable of consenting to a sexual act.

Subsection (5) describes a person as being "mentally incapacitated" when he is rendered temporarily incapable of appraising or controlling his conduct owing to the influence of a narcotic or intoxicating substance administered to him without his consent, or to any act committed upon him without his consent. It is not required that the defendant administer the substance to the victim but only that the substance be administered without the victim's consent. If the victim is rendered completely unconscious then he comes within the physically helpless definition.

"Physically helpless" is defined in subsection (6) to include a person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act. Thus, a person who is in a state of sleep as a result of barbiturates or who is a total paralytic is deemed "physically helpless."

"Forcible compulsion" is defined in subsection (7) to include threats that place the victim in fear of immediate death or serious physical injury or kidnapping, not only of himself, but also of another person, e.g. a woman's child or her escort. There is no requirement that the victim have "reasonable cause to believe" that the actor will carry out his threat. Force or duress falling short of physical force sufficient to overcome "earnest resistance" or severe intimidation involving a threat of serious injury or kidnapping, does not render the victim's submission non-consensual for purposes of prosecution of a sex crime based upon "forcible compulsion." Thus, a person who submits to a sexual act because of a threat made by the actor to expose a theft the victim had committed, is not forcibly compelled within the meaning of subsection (7). Such duress, however, may possibly constitute assault or coercion.

Section 2. Provisions Generally Applicable to Article ___, Sexual Offenses.

(1) Lack of Consent. Whether or not specifically stated, it is an element of every offense defined in this article that the sexual act was committed without consent of the victim. A person is deemed incapable of consenting to a sexual act when he is (a) less than sixteen years of age or (b) mentally defective or (c) mentally incapacitated or

(d) physically helpless.

(2) Mistake as to Age. In any prosecution under this article in which the criminality of conduct depends on a child's being below the age of ten, it is no defense that the actor did not know the child's age or that he reasonably believed the child to be older than the age of ten. When criminality depends on the child's being below a specified age other than ten, it is a defense for the actor to prove that he reasonably believed the child to be above the specified age at the time of the act giving rise to the charge.

(3) Mistake as to Consent. In any prosecution under this article in which the victim's lack of consent is based solely upon his incapacity to consent because he was mentally defective, mentally incapacitated, or physically helpless, it is a defense for the actor to prove that at the time he engaged in the conduct constituting the offense he did not know of the facts or conditions responsible for such incapacity to consent.

(4) Spouse Relationships. Whenever in this article the definition of an offense excludes conduct with a spouse, the exclusion extends to persons living as man and wife, regardless of the legal status of their relationship. The exclusion is inoperative as respects spouses living apart under a decree of judicial separation. Where the definition of an offense excludes conduct with a spouse, this does not preclude conviction of the spouse as an accomplice in a sexual act which he causes another person, not within the exclusion, to perform.

(5) Sexually Promiscuous Complainants. In any prosecution under sections 3, 4(2), 6, 7(2), 9 and 10(2) of this article, it is a defense

for the actor to prove that the alleged victim was, prior to the time of the offense charged, a prostitute.

(6) Prompt Complaint. No prosecution may be instituted or maintained under this article unless the alleged offense was brought to the notice of public authority within three months after its occurrence or, where the alleged victim was less than sixteen years old or otherwise incompetent to make complaint, within three months after a parent, guardian or other competent person specially interested in the victim learns of the offense.

A. Summary

(1) Lack of Consent. Lack of consent is the common denominator for all the crimes proscribed in this article. This subsection is intended to define the limits of legal incapacity to consent so as to eliminate any efforts to make the term control in instances other than those specified. Generally speaking, a sexual act is committed upon a person "without his consent" in the following instances: (1) when the victim is forcibly compelled to submit; (2) when the victim is deemed to be incapable of consenting; (3) when the victim does not acquiesce in the actor's conduct.

A person is less than sixteen years of age, within the meaning of paragraph (a), up to and including the day before his sixteenth birthday. The age of con-consent in the majority of states is set at under sixteen.

(2) Mistake as to Age. Under present law, it is generally held that a reasonable mistake as to the age of the victim does not exculpate or mitigate the offense. This position has in recent years been criticized by legal commentators in cases where the victim is over a specified minimum age, such as ten years of age. As the age of the victim increases, the sexual act begins to lose its abnormality and physical danger to the victim, and bona-fide mistakes can be made more easily by men who are not essentially dangerous where the victim is physically more developed. (Sec.207.4 MPC Comments T.D. #4 p. 253) A person who engages in a sexual act with a consenting adolescent, believing honestly and reasonably that such adolescent was of sufficient age to exercise discretion

and judgment in the matter may be violating social conventions but such conduct does not betoken any abnormality nor does it exhibit a dangerous propensity to victimize the immature. Ploscowe, Sex and the Law, pp 184-185 (1951). Imposing absolute liability on such an offender would have little deterrent much less rehabilitative effect. In any event the trier of fact would make the ultimate decision as to the reasonableness of the offender's belief.

Where the victim is less than ten years of age at the time of the act giving rise to the charge, no defense is allowed since:

1.) a child of such age would be far below the age of sexual pursuit by normal males;

2.) sexual conduct with a child below this age can be extremely dangerous, both physically and mentally to the child;

3.) in such cases there is high probability that the actor has some mental aberration.

(3) Mistake as to Consent. Lack of knowledge of the facts or conditions responsible for the victim's incapacity to consent is a defense. There is no requirement that the mistake be "reasonable." Since in most cases the only source of information about the mistake will be the defendant himself, this means that he will need to take the stand on his own behalf to prove the defense. At this point the jury should be competent to judge his credibility. The defendant is given the opportunity to exculpate himself but the state is not given the difficult burden of proving culpable knowledge.

(4) Spouse Relationships. This subsection clearly states that if the couple are living as man and wife, they are married for purposes of this article even though as a matter of domestic law they are considered unmarried or even legally incapable of contracting a lawful marriage. If there is a judicial decree of separation, the couple is deemed not married even though no decree of divorce has been entered. Private activity between spouses is intentionally excluded from the scope of the proposed draft.

(5) Sexually Promiscuous Complainants. The entire article on sexual offenses is designed to protect the immature in sexual matters. Therefore, to be realistic the article must allow some flexibility in the assumption of immaturity based solely on age. A minority of American jurisdictions have rejected the traditional common law position that prior unchastity of the female was not a defense to either forceful or "statutory rape" and have allowed the

virtue or character of the girl to be an issue in such cases. The following comments to Sec. 207.4 of the MPC are enlightening on this issue:

> "Inquiries of this character may be justified in cases involving older adolescent girls where the essence of the offense is the defendant's corruption of innocent but capable females. If, however, we proceed on the hypothesis that girls under 16 lack capacity for judgment in this area, it is something of a farce to inquire into their virtue. Previous sexual experience in this situation might well betoken previous victimization, which should not be a defense to a subsequent victimizer. However, one can envision cases of precocious 14 year old girls and even prostitutes of this age who might themselves be the victimizers. Accordingly, the draft while rejecting the concepts of virtue, chastity, or good repute permits the defense that the girl is a prostitute..." (MPC Sec. 207.4 T.D. #4, p. 254)

This subsection recognizes a defense when the victim is an underage prostitute whose lack of consent is based solely on the fact of legal incapacity to consent to the sexual activity because of age. The term prostitute is used in place of "sexually promiscuous" since prostitute is a recognized status in the present law and will be defined in the article dealing with Public Indecency whereas "sexually promiscuous" is a vague concept likely to result in inconsistent verdicts. "Sexually promiscuous" is sufficiently indefinite that it might deter legitimate complaints or lead to unwarranted slanders on the complainant's sex life by a defendant's oath-helpers. On the other hand, it is recognized that the defense may be only an illusory protection to the defendant if he is unable to persuade others to acknowledge unlawful sexual relations in open court. Also, it is felt that the term prostitute is preferable in cases where the complainant and defendant had been voluntary social companions and had engaged in prior sexual relations. In such cases the real issue is consent and it is more appropriate that the mistake provisions govern such cases than that the complainant's character be injected into the trial.

It should be noted that the defense is only available in prosecutions brought under sections 3, 4(2), 6, 7(2), 9 and 10(2). The defense is not available in prosecutions brought under sections 4(1), 5, 7(1), 8, 10(1), and 10(3). In the rare cases of promiscuity or prostitution involving girls under the age of ten, the mental aberration of the male seeking gratification from girls of this age is a sufficient menace to warrant denial of the defense regardless of any abnormality in the sex habits of the girl.

(6) Prompt Complaint. At common law, "a strong, but not a conclusive presumption against a woman" was raised by her failing to complain of rape within a reasonable time after the fact. The statute of Westminster I, c 13 provided that the "hue and cry" must be raised in forty days upon the theory that a long delay was indicative of a malicious prosecution and early Scottish law required complaint within forty-eight hours.

Some protection against false complaints is necessary because emotions associated with sexual activity may compromise a victim's ability or inclination to give a true account. Except in cases involving very young children or incompetent persons failure to complain within a reasonable time suggests consent and should be a bar to prosecution. This fact is pointed out in the MPC comments to Sec. 207.4:

> "The possibility that pregnancy might change a willing participant into a vindictive complainant, as well as the sound reasoning that one who has in fact been subjected to an act of violence will not delay in bringing the offense to the attention of the authorities, are sufficient grounds for setting some time limit upon the right to complain. Likewise, the dangers of blackmail or psychopathy of the complainant make objective standards imperative. A specific possibility of extension of time is made in the case of young children and incompetents for the obvious reason that if such individuals, under our rationale, do not possess the judgment and capacity necessary to become 'willing' participants in an act of sexual intercourse, their deficiency may also blind them to the need for complaint. Fear of parental anger or confusion as to the significance of the act might well encourage silence in this situation." (MPC Comments Sec. 207.4, T.D. #4, p. 265)

Under the proposed draft the three month period does not begin to run in the case of young children or incompetents, until after a competent person specially interested in the victim learns of the offense.

This subsection applies to all prosecutions brought under any section of the Sexual Offenses article.

Additional Comments: Seduction statutes usually, rape statutes occasionally and sodomy and indecent exposure cases hardly ever, require that the complainant's testimony be corroborated. If such corroboration defense is to be allowed at all there is validity for applying it to all sex offenses. Wigmore disapproves of corroboration requirements in general on the ground that they are unnecessary because (1) jurors are naturally suspicious of such complaints and (2) the court has the power to set aside a

verdict for insufficient evidence, 7 Wigmore Evidence Sec. 2061 (3 ed. 1940), 60 A.L.R. 1124, 62 Yale L.J. 55 (1952)

While a general caution against convicting on the bare testimony of the complainant has validity, it would seem that the emphasis would be better placed on the credibility of the complainant than on the mere weight of the evidence. If the testimony of the complainant is credible it should be sufficient. Note, 18 Ore. L.Rev. 264 (1939) The other alternative would be to require corroboration as to every element of the crime, since there is no reason to believe that the complainant is more likely to lie or deceive herself on one point rather than another.

B. Derivation.

(1) Lack of Consent. This subsection is adapted from section 130.05 of the New York Revised Penal Law. Subsection (2) of section 130.05 has not been incorporated into the proposed draft. It was felt by your reporter that, except in the instances where a person is deemed incapable of consent, the question of lack of consent should be left to the trier of fact.

(2) Mistake as to Age. Subsection (2) is adapted from section 213.6 (1) of the MPC.

(3) Mistake as to Consent. Subsection (3) is adapted from section 130.10 of the New York Revised Penal Law.

(4) Spouse Relationship. The language of this subsection is taken from section 213.6 (2) of the MPC.

(5) Sexually Promiscuous Complainants. This subsection is patterned after section 213.6 (4) of the MPC. The word "prostitute" has been inserted by your reporter in place of the MPC phrase "engaged promiscuously in sexual relations with others."

(6) Prompt Complaint. The language of this subsection is taken from section 213.6 (5) of the MPC.

C. Relationship to Existing Law.

Subsection (1), Lack of Consent. The draft provides that consent by a person deemed incapable of consenting to a sexual act would not be a defense to a prosecution for either rape, sodomy or sexual abuse; whereas consent by a person not deemed incapable of consenting to a sexual act would be a good defense to a prosecution for those crimes. The victim's non-consent, either in law or in fact, is presently an essential element of the crime of rape. Rape is defined in ORS 163.210 as follows:

> "Any person over the age of 16 years who carnally knows any female child under the age of 16 years, or any person who forcibly ravishes any female, is guilty of rape . . ."

This statute encompasses two types of carnal knowledge as rape: (1) forcible rape and (2) statutory rape.

Lack of consent is an essential element of the crime of forcible rape. The Oregon court has defined the crime as follows: "To constitute rape the act must have been committed forcibly and without the consent of the woman." State v. Gilson, 113 Or 202, 206, 232 P. 621 (1925); State v. Risen, 192 Or 557, 560, 235 P. 2d 764 (1951).

In statutory rape the consent of the female under the age denominated in the statute is deemed not to be consent and therefore lack of consent is presumed in law. State v. Lee, 33 Or 506, 510, 56 P. 415 (1899) states:

> "The law, therefore, conclusively presumes that a female under the prohibited age is incapable of yielding her consent, and sexual intercourse with her before she reaches the period of mental development is denominated statutory rape, in which actual force is not necessarily an ingredient, and, if alleged in the indictment, may be treated as surplusage."

The wisdom of the legislative determination of sixteen as the age of consent was discussed in State v. Sargent, 32 Or 110, 115, 49 P.889 (1897):

> "The law has determined that a female child under the age denominated is incapable of consenting. It is as though she had no mind upon the subject, no volition pertaining to it. There is a period in a child's life when in reality it is incapable of consenting, and the legislature has simply fixed a time, arbitrarily, as it may be, but nevertheless wisely, when a girl may be considered to have arrived at an age of sufficient discretion, and fully competent, to give her consent to an act which is a palpable wrong, both in morals and in law. Under these conditions, while a girl may give her formal consent, yet in law she gives none. The evidence of such consent is withheld, and rendered wholly incompetent for the establishment of such a fact, as in law the fact itself does not exist."

Oregon has thus expressly recognized the limitation placed upon consent on the basis of youth.

In addition to recognizing the incapacity of youth to consent, the proposed draft also makes any person who suffers from a mental

disease or defect which renders him "incapable of appraising the nature of his conduct",(Sec. 1 (4)), incapable of yielding consent. Also, any person who is "rendered temporarily incapable of appraising or controlling his conduct owing to the influence of a narcotic or intoxicating substance administered to him without his consent or to any other act committed upon him without his consent", (Sec. 1 (5)), is deemed incapable of consenting. Finally,the draft makes any person who is "unconscious or for any other reason physically unable to communicate his unwillingness to an act," (Sec.1 (6)), incapable of consenting. Although the terms which represent these mental states, "mentally defective", "mentally incapacitated", and "physically helpless" are new to the statutory phraseology of Oregon, the concepts which they describe are not foreign to factors which the law has long recognized as affecting one's capacity to consent.

The inability of the mentally defective to consent was impliedly pointed out in State v. Lee, supra at 509, where the court said:

> "The rule was early established . . . that the seeming acquiescence of a female of feeble mind . . . to an act of sexual intercourse afforded no defense to an action of rape, because such female, being ignorant of the nature of the act, was incapable of yielding consent, from a defect of understanding." (Emphasis supplied).

Under the draft, if this "defect of understanding" renders a person incapable of appraising the nature of his conduct he is in law unable to effectively consent.

The mental capacity required by law to classigy a person as "feeble minded" was discussed in the annotation at 93 A.L.R. 918. Under the cases there cited the rule for feeble minded persons was either the lack of mental capacity to know the right or wrong of the sexual conduct, State v. Haner, 186 Iowa 1259, 173 N.W. 225 (1919), or so defective as to lack power to give or withhold consent, Lee v. State, 43 Tex Crim Rep 285, 64 S.W. 1047 (1901). The rule stated in the Haner decision closely approximates the rule stated in the preliminary draft, whereas the Lee rule would in fact abolish the legal conclusion of lack of consent of a mental defective by requiring that no power to consent be present. Such a rule makes the statute superfluous.

The rape of a woman who is mentally incapacitated or physically helpless was also recognized at common law. 75 C.J.S., Rape, Sec. 7 at 468 states: "It (rape) may be committed on a

woman who is insane or idiotic, drugged, intoxicated or asleep." Under the draft being drugged or intoxicated "without his consent" renders a person "mentally incapacitated"; whereas, being asleep renders one "physically helpless".

Subsection (1) of Sec. 2 also allows consent as a defense to a prosecution for sodomy. ORS 167.040 presently defines the crime as follows:

> "Any person who commits sodomy or the crime against nature, or any act or practice of sexual perversity, either with mankind or beast, or sustains osculatory relations with the private parts of any person, or permits such relations to be sustained with his private parts, shall be punished upon conviction."

The statute does not required the use of force, nor does it designate an age limitation below which consent is presumed. The absence of such requirements substantiate the conclusion of State v. Stanley, 240 Or 310, 312, 401 P.2d 30 (1965), that presently "one who consents that an act of sodomy be committed upon his person, if capable of consenting, is an accomplice . . ." Clearly, if the consenting party is guilty as an accomplice, his consent is no defense to the perpetrator of the act. The proposed draft would alter this by allowing the consent of a party who is capable of consenting to be a good defense to the prosecution.

Subsection (2) of Sec. 2 provides for the defense of Mistake as to Age. Until the decision in People v. Hernandez, 61 Cal. 2d 529, 39 Cal. Rptr. 361, 393 P.2d 673 (1964), it was the universally accepted view that the defendant's knowledge of the age of the woman was not an essential element of the crime of statutory rape. The rule that knowledge of the victim's age is not an essential element of the crime of statutory rape and that therefore justifiable ignorance of age is not a defense in a prosecution for that crime is apparently an exception to the general rule that guilt attaches only where the accused intended to do the prohibited act.

The courts have justified or explained this divergence in various ways. Where adultery or fornication are crimes themselves, the conviction of the more serious offense of statutory rape may be grounded on the doctrine of transferred intent. However, to the extent that prosecutions for adultery and fornication have become dead letters, it may be somewhat sophisticated to base a conviction of a serious crime upon an intent transferred from the intention to commit such "crimes". The result has also been justified on grounds of social policy, i.e. the interest of society in protecting children. This argument loses much of its effectiveness where the age of consent has been raised substantially.

The rule that reasonable mistake as to the age of the victim of statutory rape is not a defense to a prosecution for that crime has been attacked by scholars and rejected in other countries. See: Jerome Hall; General Principles of Criminal Law, 2d ed. pp. 372-375; Comment: Forcible and Statutory Rape: An Exploration of the Objectives of Consent Standards, 62 Yale L.J. 55; Myers, Reasonable Mistake of Age: A Needed Defense to Statutory Rape, 64 Mich. L.Rev. 105, [illegible], 1965.

Those who have argued against the rule that knowledge of the girl's age is irrelevant have pointed out that no serious social policy of protecting the sexually immature and inexperienced female is likely to be involved in any case where the defendant can make out a reasonable case for his belief that the girl was above the age of consent, and that to apply the rule strictly may lead to convictions of persons who are themselves the victims of imposture by fully experienced and aware, though young, girls, who under our social and sexual mores are permitted and encouraged to go into the world as women and even to marry.

The Hernandez Court ruled that participation in a mutual act of sexual intercourse by a defendant who believed his partner to be beyond the age of consent, with reasonable grounds for such belief, necessarily revealed a lack of criminal intent, since in such circumstances he has not consciously taken any risk but has subjectively eliminated the risk by satisfying himself by reasonable evidence that the crime would not be committed.

Although the great weight of authority before Hernandez was to disallow the defense of reasonable mistake of age in a prosecution for statutory rape, Oregon has never had the opportunity to rule precisely on the point. Thus the proposed draft allowing the defense would not disrupt Oregon case law and would provide a clear legislative showing of the intent to allow such a defense. See 44 O.L.R. 243 for possibility of following the Hernandez decision under the present Oregon statutory scheme.

Subsection (3) of Sec. 2 covers Mistake as to Consent. There are no reported cases in Oregon ruling on the availability of such a defense in prosecutions for rape; however, it would appear that if there was in fact no consent, the crime would be committed. Also, there are no reported cases on the availability of such a defense in prosecutions for sodomy; however, since consent is no defense to sodomy, it would appear that mistake as to consent would not provide a defense.

Subsection (4), Spouse Relationships: The foundation of this subsection was recognized in State v. Blackwell, 241 Or 528, 407 P.2d 617 (1965), wherein it was stated:

" We will assume that such statute (ORS 163.210) incorporates the common law, i.e., a husband cannot be guilty of rape by personally forcing himself upon his wife . . . We hold, however, that he can be guilty of rape by forcing his wife to have intercourse with another . . . The decisions from other jurisdictions so hold and we stated our accord with such decisions by way of dictum in State v. Olsen, 138 Or 669, 7 P.2d 799 (1932).

"The broad principle is that one can be indicted for an act and convicted upon proof that the defendant did not personally do the act but was the prime mover in having another voluntarily or involuntarily, perform the actual act." State v. Blackwell, supra, at 529-531.

Subsection (4) changes the common law to the extent that it allows the spouse relationship to protect parties who are not in fact legally married if they are living as man and wife, while it denies the relationship as a defense to parties living apart under a decree of judicial separation.

Allowing the spouse relationship as a defense to a prosecution for sodomy would limit the present statute. ORS 167.040 condemns "any person" who performs or willingly sustains any of the three types of conduct proscribed by the statute. There is no reference to private consensual acts between spouses as being outside the environs of the statute.

Subsection (5), Sexually Promiscuous Complainants: This subsection could produce significant changes in the present law pertaining to the admissability of evidence of the prosecutrix's previous chastity. Allowing such evidence to be introduced in a prosecution based on a child's legal incapacity to consent would alter present evidentiary law in cases of statutory rape.

Presently it is held that, "The essential elements of statutory rape are the facts of intercourse and the age of the prosecutrix . . . Since consent is not in issue in statutory rape, evidence that the prosecutrix had prior intercourse with other men . . . or that her reputation for chastity was bad is immaterial." 140 A.L.R. 364, 365; State v. Haynes, 116 Or 635, 242 P. 603 (1925); State v. McKiel, 122 Or 504, 259 P. 917 (1927); State v. Morrow, 158 Or 412, 75 P.2d 737 (1938).

An exception to the rule occurs when the prosecutrix seeks to substantiate her story by showing that she is pregnant, gave birth to a child, had a miscarriage, became infected with a venereal disease or that her hymen was broken. In such cases the defendant is allowed to introduce evidence of previous unchastity to show that another might have been responsible for the

condition. 140 A.L.R., supra at 375; State v. Haynes, supra. It does not appear that this exception would be destroyed by subsection (5), since allowing proof of sexual promiscuity goes to the defense alone and does not affect the right to introduce rebuttal testimony of evidence introduced to corroborate the story of the prosecutrix. State v. Newburn, 178 Or 238, 166 P.2d 470 (1946).

The same A.L.R. article points out that as a general rule evidence of previous unchastity is not admissable to impeach the credibility of the prosecutrix; however, evidence that the prosecutrix was a prostitute would be admissable for impeachment purposes in some jurisdictions. Such evidence would not appear to be admissable in Oregon. State v. Ogden, 39 Or 196, 65 P. 449 (1901) held inadmissable previous acts of unchastity between the prosecutrix and other men. State v. Haynes, supra, stated by way of dictum that in a prosecution for statutory rape, proof that the victim was a prostitute would be irrelevant. These cases would be over-ruled by the new draft to the extent it allows such evidence where it tends to prove that the prosecutrix was a prostitute. Subsection (5), however, would place more stringent force behind the rule allowing for proof of the prosecutrix's status as a "prostitute" by making such proof substantive evidence for the defense and not just relating to the girl's credibility. However, the Ogden ruling that the defendant can show prior acts of intercourse between the prosecutrix and himself would not be disturbed and would be covered under subsection (1), Lack of Consent.

The draft limits the defense to proof that the victim was a prostitute. Justification for this limitation can be found in State v. Pace, 187 Or 498, 212 P.2d 755 (1950), where the court stated:

> "The girl is not on trial and it would be unfair to allow evidence of other specific acts of unchastity where there would be no opportunity to make any defense against such accusations. It would only tend to confuse the jury as to the real issue: Did the defendant have sexual intercourse with this girl?" Id. at 510.

Subsection (6), Prompt Complaint: State v. Birchard, 35 Or 484, 59 P. 468 (1899) stated the rationale upon which the common law recognized the importance of prompt complaint by the prosecutrix:

> "In actions of forcible ravishment it is customary for the state to prove that the prosecutrix made complaint of the assault upon her as soon after its commission as she could find a person in whom she could safely confide . . . her failure to make complaint . . . is generally construed as authorizing the inference that she at least partially consented to the commission of the particular act, which, when

> discovered, evidences her degradation . . . Such complaint is but the natural expression of a virtuous female who has been wantonly outraged by the use of superior physical force, or intimidation by threats."

State v. Risen, supra, cited 44 Am. Jur., Rape, Sec. 103 and State v. Birchard, supra, for the proposition that "Failure to make complaint as soon as possible after commission of the offense is a circumstance tending to show consent. The Risen court, however, alluded to factors which were permissable to refute the inference of consent. The court stated at page 563:

> "Such failure, however, may be explained and excused. A sufficient explanation may be found in the particular circumstances of the case, including the age of the prosecutrix, her degree of intelligence, and threats by the perpetrator of the wrong."

The draft would alter this rule to the extent that a failure to make complaint by one over sixteen years of age and not otherwise incompetent would be a bar to the prosecution.

The proposed draft contains no general provision requiring that prosecutions under the article be supported by corroborating evidence. Oregon's only requirement for corroboration in a criminal case is found in ORS 136.550.

It is the rule in most jurisdictions that in the absence of statute a conviction for rape may be sustained on the uncorroborated testimony of the prosecutrix. 60 A.L.R. 1124. Oregon adopted this rule early in State v. Knighten, 39 Or 63, 64 P. 866 (1900). Since that time it has been held consistently that a prosecutrix in a prosecution for rape, either forcible or statutory, is not an accomplice within the meaning of ORS 136.550.

State v. Friddles, 62 Or 209, 123 P. 904 (1912), states:

> "The charge of rape is one which, as Lord Hale observes, is 'an accusation easily to be made, hard to be proved and harder to be defended by the party accused though never so innocent.' And the court should instruct the jury on the danger of convicting a defendant on the uncorroborated testimony of the prosecutrix . . . However, corroboration of the testimony of the prosecutrix by other evidence is not, in the absence of a statutory requirement therefore, absolutely essential, and a conviction may be had on the uncorroborated evidence of the prosecutrix." Id. at 210-211.

Likewise in State v. McPherson, 69 Or 381, 138 P. 1076 (1914), the court ruled that "The prosecutrix testified positively to the assault, and such testimony, even though uncorroborated, is sufficient to convict." State v. Edy, 117 Or 430, 433, 244 P. 538 (1926) cited the Knighten and McPherson cases for the proposition that "There is no law in this state requiring the corroboration of the testimony of the prosecutrix before a conviction can be had in a case of rape." State v. Yates, 239 Or 596, 597, 398 P.2d 161 (1965) cited the Friddles decision in recognizing that although the only evidence that an act of intercourse occurred was the testimony of the prosecutrix, in this state the testimony of the prosecutrix alone is sufficient to sustain a conviction.

From this line of cases it is evident that the proposed draft's omission of a corroboration requirement will not affect the law of the state regarding prosecutions for rape. In prosecutions for sodomy, however, compulsion or force is not an element of the crime as defined by the Oregon statute. State v. Weitzel, 157 Or 334, 69 P.2d 958 (1937). Thus a party to the crime not on trial, if he consented to the act is an accomplice under the corroboration statute. State v. Stanley, supra. The proposed draft would not require corroboration for sodomy, however, since consensual sodomy would not be a crime under the draft the present corroboration statute would not be applicable to any prosecution for sodomy brought under it.

The second area of general consideration not considered in Section 2 of the proposed draft is the defense of impotency. 75 C.J.S., Rape, Sec. 6 p. 466-67, states:

> "The crime of rape can be committed directly only by a male person of sufficient mental capacity to entertain a criminal intent and physically capable of committing the offense.
>
> "Capacity to commit the crime does not exist until a male has reached the age of puberty and who is capable of committing rape."

The general presumptions regarding the male's capacity to commit the crime are stated in 26 A.L.R. 772 as follows:

> "Persons over the age of 14 years are presumed prima facie physically capable of the crime of rape. But the presumption may be rebutted . . .the defendant may introduce evidence relevant to the issue of his physical capacity to accomplish the offense, the sufficiency of proof to that end being ordinarily a jury question."

The same annotation then states the two views as to the conclusiveness of the presumption concerning males under the age of fourteen. At pages 774 and 776 it is stated:

> "The majority of American jurisdictions apply the rule that male infants under the age of 14 are prima facie presumed physically incapable of committing the crime of rape, but that presumption may be rebutted by proof that the infant has in fact arrived at puberty. . . England and several of the American states still adhere strictly to the common law rule that an infant under the age of 14 years is conclusively presumed to be physically incapable of committing rape."

Oregon follows the doctrine of conclusive presumption of incapacity of males under the age of fourteen. In State v. Knighten, supra at 64, the court said:

> "The statute provides that 'if any person over the age of sixteen years shall carnally know any female child under the age of sixteen years' etc., he shall be deemed guilty of rape . . . as we understand the statute, its only effect is to raise the age of capacity of the male from fourteen, as it was at common law, to sixteen years. At common law, a boy under fourteen years of age was conclusively presumed to be physically incapable of committing the crime of rape, but it was never held that it was necessary to allege the age of the defendant in an indictment for that crime . . .Nor is it necessary under the statute. If the defendant was below the requisite age, it is a matter of defense . . . If he is below 14 it is simply a matter of defense."

The third area of general application to sex offenses which is not noted in Section 2, and for purposes of that section need not be, is the indeterminate sentence for certain sex offenders. ORS 167.050. That statute provides that a person convicted of violating either ORS 163.210, rape; 163.220 rape of daughter; ORS 163.270, assault with intent to commit rape; 167.035, incest; ORS 167.040, sodomy; and 167.045, removal of a child with intent to commit certain sex offenses, who has previously been convicted for violating any of those statutes.", ". . . shall be sentenced to imprisonment in the state penitentiary for an indeterminate term not exceeding the natural life of such person."

ORS 137.111 provides that a person convicted of any of the statutes which are listed in ORS 167.050 may be sentenced to an indeterminate term not exceeding the offender's natural life if:

> "(1) the offense involved a child under the age of 16 years; and

> "(2) the court finds that such person has a mental or emotional disturbance, deficiency or condition predisposing him to the commission of any crime punishable /under the enumerated sections/ to a degree rendering the person a menace to the health or safety of others."

State v. Dixon, 238 Or 121, 393 P.2d 204 (1964) reveals the procedure for carrying out the committment authorized by ORS 137.111. In that case the defendant, upon pleading guilty to an offense involving a child under sixteen years of age proscribed by ORS 163.210 satisfied ORS 137.111(1). Pursuant to the provisions of ORS 137.112, a psychiatrist at the Oregon State Hospital made an initial determination that the defendant was suffering from a mental condition as outlined in ORS 137.111(2). The psychiatrist's report was submitted to the court and a hearing was held. ORS 137.113 to ORS 137.115. In a judicial proceeding contemplated by ORS 137.114, the trial court found that the defendant fell within the terms of ORS 137.111(2).

The question presented to the Dixon court was whether the enhanced penalty scheme outlined in ORS 137.111 was constitutional. The court, at page 124 held:

> "This court has held . . . that it is within the power of the legislature to designate certain factual situations in which criminal penalties may be enhanced without the necessity of a trial by jury. See, e.g. State v. Hoffman, 236 Or 98, 385 P.2d 741 (1963). In the instant case a jury was not required."

Kloss v. Gladden, 233 Or 98, 377 P.2d 146 (1962), held that failure to provide a psychiatric examination under ORS 137.111 was not mandatory on the court and the court's refusal to so provide for one was not a denial of due process. The court held:

> "As we have noted, a presentence examination of a suspected sexual psychopath was not required in Oregon until 1953. In 1961 the ordering of a psychiatric examination was left to the discretion of the trial court. (Ch. 424, Oregon Laws, 1961) There is nothing in this legislative history to suggest that a psychiatric examination is an essential of due process." Id. at 102.

Barnett v. Gladden, 237 Or 76, 390 P.2d 614 (1963) held that attempts to commit the sex offenses enumerated in ORS 137.111 also fell within the ambit of the legislative intention to provide indeterminate sentences for such violators. The court held:

"In our opinion, an attempt to commit a sex crime falls within the ambit of legislative intention expressed in ORS 137.111, as fully as if the crime denounced had been completed. The purpose of the statute is to provide for the rehabilitation of a sex offender who has disclosed a tendency to be a menace to society."

The constitutionality of the enhanced penalty provisions of ORS 167.050 was discussed at length in Jensen v. Gladden, 231 Or 141, 372 P.2d 183 (1962). The court stated:

"Viewing ORS 167.050 simply as a statute designed to provide for enhanced punishment for recidivists, we would be called upon to decide whether, under the circumstances presented in the instant case, an indeterminate sentence with a maximum of life imprisonment, would necessarily be so disproportionate to the offense that it would 'shock the moral sense of all reasonable men as to what is right and proper under the circumstances. . .Whether it would so shock the moral sense would, of course, depend upon the seriousness of repetitive sexual conduct of this kind and the ... danger that it forecasts for others unless the defendant is segregated from society . . .

"The view is held by some that sex offenders tend to progress from minor to major crimes. And there is a belief that all sex offenders tend to be recidivists. It is not unlikely that the legislature in enacting ORS 167.050 had these or similar considerations in mind and although the views noted above are criticized as not being founded upon fact, (See Guttmacher and Weihofen, Psychiatry and the Law (1952) at pages 111-112 where it is said: ' . . . it is believed that sex offenders regularly progress from minor offenses such as exhibitionism to major offenses like forced rape. Such a graduation is almost unknown . . . another major error is the belief that sex offenders tend to be recidivists.') we cannot say that there was not a reasonable basis for the enactment of the punishment provisions in ORS 167.050 . . .

"It may be noted in passing that the sentence provided for in ORS 167.050 was probably enacted as a part of a statutory scheme designed to provide a more effective rehabilitation program for sex law offenders. In the same Act which contained ORS 167.050 the legislature enacted what is now compiled as ORS 144.228 requiring a periodic review of the files of those persons convicted under ORS 167.050. Undoubtedly this legislation was influenced by the movement then under way which proposed that sex law offenders be incarcerated for an indeterminate time so as to measure their imprisonment in accordance with the time that it was necessary to effect psychiatric rehabilitation. Id. at 145-147."

Although the indeterminate and enhanced penalty provisions of ORS 137.111 and ORS 167.050 are not referred to in the proposed draft their existence must be considered in connection with the sections of the proposed draft to which their penalties would apply.

Section 3. Rape in the third degree. A male who has sexual intercourse with a female not his wife commits the crime of rape in the third degree if:

EXISTING LAW
ORS 163.210 163.220 167.050

(1) the female is less than sixteen years of age and the male is at least four years older than the female.

/(2) he knows that the female is unaware that a sexual act is being committed upon her or that she submits because she falsely supposes that he is her husband/

Section 4. Rape in the second degree. A male who has sexual intercourse with a female not his wife commits the crime of rape in the second degree if:

(1) the female is incapable of consent by reason of mental defect, mental incapacitation, or physical helplessness.

(2) the female is less than fourteen years of age and the male is eighteen years of age or more.

Section 5. Rape in the first degree. A male who has sexual intercourse with a female not his wife commits the crime of rape in the first degree if:

(1) the female is subjected to forcible compulsion by the male; or

(2) the female is less than ten years of age; or

(3) the female is less than sixteen years of age and is the actor's sister, of the whole or half-blood, his daughter or his wife's daughter.

/Optional/

COMMENTARY -- RAPE

A. Summary.

Rape has been a serious offense since early Biblical days. The difficulties inherent in formulating an adequate and fair statute are best summed up in the comments to section 207.4 of the MPC:

> "The chief problems are (i) to decide and express what shall be the minimum amount of coercion or deception to be included here, i.e., drawing the line between rape-seduction, on the one hand, and illicit intercourse on the other; and (ii) to devise a grading system that distributes the entire group of offenses rationally over the range of available punishments. The latter problem is especially important because: (1) the upper ranges of punishment include life imprisonment and even death; (2) the offense is typically committed in privacy, so that conviction often rests on little more than the testimony of the complainant; (3) the central issue is likely to be the question of consent on the part of the female, a subtle psychological problem in view of social and religious pressures upon the woman to conceive of herself as victim rather than collaborator; and (4) the offender's threat to society is difficult to evaluate." (MPC Comments Sec. 207.4, T.D. #4, p.241)

A few states, including Oregon, define only one category of the offense. A number of states divide rape into two classes, the lower class covering intercourse with a female below a specified age and the higher class covering rape by force without consent and consensual relations with very young girls. The majority of states have adopted a triple classification scheme with the additional category covering specific age groups, fundamental forms of deception, threats, incapacitation, etc.

The proposed draft contains three ascending degrees of rape. The substantive offense of rape remains unchanged but the three degree breakdown allows for a more equitable and rational penalty structure; the rationale being that severe punishments should be reserved for situations which involve brutality, threaten public security or manifest dangerous mental aberrations, and that lesser punishments should be imposed where desirable or safe. This is in accord with the present judicial tendency to mitigate the harshness of existing rape statutes.

The basic offense of rape is differentiated in three degrees on the basis of the following factors:

(1) the age of the victim and the age of the actor; or

(2) the mental or physical condition of the victim; or

(3) the use of force or threats.

With respect to age, the degree of the crime increases in proportion to the youthfulness of the victim. The following age scheme is applicable to both the rape and sodomy sections:

Offense		Age of Victim	Age of Defendant
3rd degree	(rape (sodomy	Under 16	At least 4 yrs. older than victim
2nd degree	(rape (sodomy	Under 14	Over 18
1st degree	(rape (sodomy	Under 10	Any

It should be noted that the choice of a particular age to designate degrees of an offense has a certain element of arbitrariness and it is felt sufficient to suggest a certain age, bearing in mind that the Commission may choose to raise or lower the age suggested.

Rape in the third degree is committed if a male, being four years older than the female, has sexual intercourse with a female less than sixteen years of age. The age difference is substantial enough to designate intercourse of this nature as rape. If the male is four years older than the female and the female is less than 14 years of age it is rape in the second degree, and if the female is less than 10 years of age the offense is raised to rape in the first degree. In any prosecution for third degree rape it is a defense for the actor to prove that at the time the act was committed he did not know that the female was less than the age of sixteen.

An optional subsection (2) is presented to cover two classes of cases; those where the female is unaware that a sex act is being committed (e.g. doctor-patient situation) or where the female submits believing that the intercourse is marital (e.g. defendant impersonates the husband, mock marriage, bigamous marriage.) This subsection deals with intercourse by trick or deception, a kind of activity that most women can prevent or which can be deterred by lesser sanctions.

Rape in the second degree covers the situations where the female is incapable of consent by reason of mental defect, mental incapacitation or physical helplessness. The definitions of these terms, contained in section one of the draft are directly incorporated into section four. "Lack of capacity to appraise the nature of her conduct" does not include appraisal involving value judgments or consideration of remote consequences of the immediate act. It is a defense for the actor to prove that at the time he engaged in the sexual intercourse he did not know of the facts or conditions responsible for the victim's incapacity to consent.

Both the New York and Michigan codes differentiate between incapacity to consent by reason of mental defect and mental incapacitation and incapacity to consent by reason of physical helplessness. It was felt by your reporter that there is no logical reason for such a distinction and that the disparity in sentencing which would result from such a distinction would be unjustified and indefensible. It is also felt that the element of victimization present in such cases justifies raising this offense to rape in the second degree.

Subsection (2) of Rape in the second degree covers rape of a female less than fourteen years of age by a male eighteen years of age or more. By carefully delineating the ages of actor and victim the draft attempts to avoid punishing adolescent sexual experimentation as rape. In cases involving no victimization, or compulsion where the actor is less than four years older than the female and the female is over fourteen years of age, the rape sections will not apply.

It is a defense to a charge of rape in the second degree for the actor to prove that he did not know the female was less than fourteen years of age at the time the offense was committed.

Rape in the first degree is limited to the two most serious forms of rape:

(1) where the female is subjected to forcible compulsion by the male; and

(2) where the female is less than 10 years of age.

In both of the above situations the conduct involved is so dangerous to the victim that it deserves the most severe penalty. The definition of forcible compulsion (Section 1 (7)) is directly incorporated into this section. No defense of mistake of age is allowed where the victim is less than ten years of age.

The substantive offense of rape is defined in terms of male aggression. While some states define rape to include female aggression, it was felt more realistic to treat such conduct as sexual abuse rather than rape. This does not preclude liability of a female who aids a male to rape a female.

Seduction has been eliminated as a separate offense under the proposed draft. The following comments to Section 207.4 of the MPC sum up the prevailing arguments against making seduction a criminal offense:

> "Whatever may have been the case in preceding generations, the present generation would hardly be unanimous in the view that intercourse is a favor granted by the female only in exchange for a quid pro quo. A substantial body of present opinion would regard intercourse as a matter of mutual gratification, and expression as much of the female's libido as the male's. To the extent that this is the case, it would rarely be true that the female 'yields' completely or predominantly on account of the deception . . . deception in love does not betoken the same depravity and deviation from social norms as deception in business, and is less likely to deprive the victim of anything she really wants to keep.
>
> "Moreover the penal legislator must recognize that in such an area courts and juries will have unusual difficulty in distinguishing with sufficient certainty between vicious instances of victimization by fraud and superficially similar cases in which an angry and disappointed woman testifies to words or innuendoes of promise. Considerations of this character have lead to widespread legislation abolishing civil actions for breach-of-promise and seduction, one of the main grounds being that it was primarily an instrument of blackmail." (MPC Comments Sec. 207.4 T.D. #4, pp 256-257.)

B. Derivation.

Section 3 (1) is adapted from section 130.25 of the New York Revised Penal Law and section 213.3 (1)(a) of the MPC. The age of the female was set by your reporter at sixteen rather than seventeen. Subsection (2) (optional) was adapted from section 213.1 (2)(c) of the MPC.

Section 4 is adapted from sections 130.25 (1), 130.30, and 130.35 (2) of the New York Revised Penal Law.

Section 5 is adapted from section 130.35 of the New York Revised Penal Law. The age of the female was lowered by your reporter from eleven to ten.

C. Relationship to Existing Law.

Sections 3, 4 and 5 of the proposed draft divide the crime of rape into three degrees. In the absence of statute there are no degrees to the crime of rape. 75 C.J.S., Rape, Sec. 3, p. 464.

Although rape has been defined as the carnal knowledge or unlawful carnal knowledge of a woman or female by force, or forcibly and against her will, State v. Gilson, 113 Or 202, 232 P. 621 (1925), rape at common law was the unlawful carnal knowledge of a woman over the age of ten years forcibly and without her consent. 75 C.J.S., Rape, Sec. 1, p. 462. Lord Hale defines the crime as follows: "Rape is the carnal knowledge of any woman above the age of ten years against her will, and of a woman child, under the age of ten years, with or against her will." 1 Hale, P.C. (Eng.) 628.

At common law, to constitute the crime of rape on a female above the age of consent, three elements must be present: (1) carnal knowledge, (2) force, and (3) the commission of the act without the consent or against the will of the woman. C.J.S., supra at 471.

Only one of these elements, sexual intercourse or carnal knowledge, is required by Section 3(1) of the proposed draft. That section is a modification of the common law and present statutory definition of the crime of statutory rape. It modifies the common law to the extent that the age of consent is raised from ten to sixteen and it modifies the present statutory definition to the extent that the age of the male is required to be at least four years older than that of the victim, rather than the present requirement that the male only be over the age of sixteen.

Under the present statute "the essential elements of statutory rape are the facts of sexual intercourse, and the age of the prosecutrix." State v. Gauthier, 113 Or 297, 231 P. 141 (1925). It is settled in this state that it is not necessary for the indictment to allege the age of the defendant in charging the crime of statutory rape. State v. Knighten, supra; State v. Edy, supra; State v. Ralph, 135 Or 599, 296 P 1065 (1931).

Since carnal knowledge, i.e. sexual intercourse, is an essential element of the crime of statutory rape under the draft and presnet law, proof of some penetration is necessary. State v. Poole, 161 Or 481, 90 P.2d 472 (1939); State v. Hoffman, 236 Or 98, 385 P.2d 741 (1963).

Since the age of the prosecutrix is an essential element of the crime of statutory rape it is necessary that there be an allegation that she was below the statutory age at the date of the commission of the offense. State v. Nesmith, 136 Or 593, 330 P. 356 (1931). Since the age of the prosecutrix is important, the date of the

alleged crime becomes important. Ordinarily, the state is not required to prove the specific date of the commission of the crime. State v. Howard, 214 Or 611, 331 P.2d 1116 (1958); State v. Pace, supra; However, "when a defendant asks for a specific date, and can show that the time element is essential . . . as when an act committed after a certain date would not be a crime, the court must require the state to prove the date . . ." State v. Yielding, 238 Or 419, 424, 395 P.2d 172 (1964).

Subsection (2) of Section 3 is likewise outside the scope of the common law definition of the crime according to the weight of most authorities. That section does not require force, but rather fraud or impersonation to gain the victim's consent to the sexual act. Commonwealth v. Goldenberg, 338 Mass. 377, 155 N.E.2d 187 (1959) held: "The essense of the crime is not the fact of intercourse, but the injury and outrage to the feelings of the woman by the forceful penetration of her person . . . Fraud cannot be allowed to supply the place of the force for which the statute makes mandatory."

Similarly, in cases involving impersonation of a husband it has been held that rape was not committed where facts showed an impersonation by the defendant of a woman's husband in order to procure intercourse. State v. Lewis, 30 Ala. 54 (1857); Moran v. People, 25 Mich. 356 (1872); State v. Brooks, 76 N.C. 1 (1877); Commonwealth v. Dichnicz, 59 Pa. Super 527 (1915); 91 A.L.R. 2d 591.

It has also been held that rape was not committed where the facts showed that the intercourse in question followed feigned marriage and defendant was aware of the sham but the woman was unaware. State v. Murphy, 6 Ala. 765 (1844); Bloodworth v. State, 65 Tenn. 614 (1872); Papadimitropoulos v. Reg. (Austr.) 98 C.L.R. 249 (1958). For the contrary view that fraud vitiates consent or supplies the requisite force see: People v. Bartow, (1823 N.Y.) 1 Wheeler C.C. 378; Walter v. People, (1867, N.Y.) 50 Barb 144, 1Cow Crim. 344.

Section 4(1) of the proposed draft differs from common law also in that only intercourse between a female of 14 and a male of 18 is required. Force and lack of consent are not required. Thus, with the modicication of the age difference, Section 3(1) and section 4(1) are essentially the same.

Section 4(2) makes intercourse with a female deemed incapable of consenting by some reason other than age, rape in the second degree. Force is not required. At common law intercourse with a woman incapable of consenting was rape even without force. There were no degrees of rape at common law. The draft, therefore, recognizes the common law but makes the act, when committed without

"forcible compulsion" rape in the second degree.

Section 5 (1) and (2) restates the common law definition of rape, i.e. sexual intercourse with a female by forcible compulsion and against her will; or with a female under ten years of age either with or without her consent. It is therefore pertinent to examine more closely what conduct satisfies the three essential elements of the crime of rape.

The first requirement is "sexual intercourse". State v. Wisdom, 122 Or 148, 257 P. 826 (1927) states that ". . . if there is the slightest penetration within the labia of the female organ, that is sufficient to constitute statutory rape, and without regard to the extent of the penetration if the other elements of the crime are present." At 161. State v. Kendrick, 239 Or 512, 519, 398 P.2d 471 (1965), adopted the rule announced in Wisdom and applied it to cases of forcible rape: "Even the slightest penetration is sufficient."

Oregon has no reported cases on the necessity of emission; however, since only slight penetration is required it would appear that emission is not necessary. Thus, the present definition of "sexual intercourse" and that proposed by Sec. 1 (1) of the draft are essentially the same.

The other two elements of the crime of rape, i.e., force and the absence of consent of the victimized female are closely connected in proof of fact. Proof of these two elements is dependent upon proof of resistance. This rule was stated in State v. Colestock, 41 Or 9, 67 P. 413 (1902):

> "While it may be expected in such cases, from the nature of the crime, that the utmost reluctance would be manifested, and the utmost resistance made which the circumstances of a particular case would allow, still, to hold, as a matter of law, that such manifestation and resistance are essential to the exixtence of the crime, so that the crime could not be committed if they were wanting, would be going farther than any well-considered case in criminal law has hitherto gone . . . This importance of resistance is simply to show two elements in the crime, - carnal knowledge by force by one of the parties, and nonconsent thereto by the other. These are essential elements and the whole question is one of fact for the jury." (Emphasis supplied). Id. at 12.

The necessity and amount of resistance was considered at length in State v. Risen, supra at 561-562:

"The woman must resist by more than mere words. Her resistance must be reasonably proportionate to her strength and her opportunities. It must not be a mere pretended resistance, but in good faith and continued to the extent of the woman's ability until the act has been consummated. 44 Am.Jur. Rape, Sec. 7; People v. Dohring, 59 N.Y. 374, 17 Am. Rep. 349, 355; Mills v. United States, 164 U.S. 644, 648, 41 L.Ed. 584, 17 S.Ct. 210; Brown v. State, 127 Wis. 193, 199, 106 N.W. 536; Bailey v. Commonwealth, 82 Va. 87, 107, 3 Am.St.Rep. 89. Those are the law's requirements in the case of a woman 'in the normal condition, awake, mentally competent, and not in fear.'2 Bishop on Criminal Law, 9th ed., Sec. 1122 (5). If the evidence does not show that the woman resisted to the utmost extent of which she was capable, the jury may infer that, at some time during the course of the act, it was not against her will. Nevertheless, the phrase'utmost resistance' is a relative one; one woman's resistance may be more violent and prolonged than that of another. Moreover, the attending circumstances may modify the requirements of the rule . . .

"The reason why evidence of resistance is important is to show carnal knowledge of the woman by force and nonconsent on her part. State v. Colestock, 41 Or 9, 12, 67 P. 418. Where submission of a girl is induced 'through the coercion of one whom she is accustomed to obey, such as a parent or one standing in loco parentis; the law is satisfied with less than a showing of the utmost physical resistance of which she was capable."

State v. Christiansen, 119 Or 333, 249 P. 366 (1926), and State v. Cook, 242 Or 509, 411 P.2d 78 (1966), stand for the proposition that actual force is not necessary, but rather only a threat of force sufficient to overcome the resistance of the female. State v. Christiansen, at p. 335, cites 22 R.C.L. 1185 as stating:

"Consent of the woman from fear of personal violence is void, and though a man lays no hands on a woman, yet, if by an array of physical force, he so overpowers her mind that she dares not resist or she ceases resistance through fear of great harm, the consummation of unlawful intercourse by the man would be rape."

State v. Cook, supra, approved an instruction to the effect that if the defendant threatened the girl and she was so terrified by the threats that she did not resist defendant's having intercourse with her, the defendant would nevertheless be guilty of rape.

Clearly then, force which overcomes earnest resistance or the threat of force which places a person in fear of serious physical injury is recognized by Oregon as constituting "forcible compulsion".

See Sec. 1 (1) of the proposed draft. The proposed draft's allowance of the threat of force to be applied to a third person apparently would extend the Oregon rule although there are no reported cases on point.

Subsection (2) of section (5) makes intercourse with a female under ten years of age rape in the first degree regardless of force or consent. This codifies the common law definition of the crime as stated by Lord Hale. This section would retain the applicability of Oregon case law on statutory rape; that is, the essential elements would be the intercourse and the age of the prosecutrix. Mistake as to age or consent would not be available as a defense to a prosecution under this section.

The crime of seduction as defined in ORS 167.025 would be repealed by the proposed draft. The ingredients of this crime were stated in State v. Meister, 60 Or 469, 120 P. 406 (1912).

> ". . . in order to convict a defendant for a perpetration of the offense denounced, proof must be adduced tending to establish the following constitutient ingredients of the crime, to wit: (1) that under a promise of marriage (2) he seduced and had illicit connection (3) with an unmarried female (4) of previous chaste character." Id. at 473.

The court later continued to distinguish which of these elements were considered the gravamen of the offense requiring corroborative proof:

> ". . . the promise of marriage and the illicit intercourse constitute the gravamen of the offense . . . Corroborating evidence is required only as to these two." Id. at 481.

Concerning the two elements not constituting the gravamen of the offense, the Court noted its reasons for refusing to examine, beyond the promise of marriage, the motivating factors which produced the illicit intercourse:

> "An unconditional promise of marriage made by a man to a previously chaste woman, and her acceptance of the offer in reliance upon the engagement whereby she is induced by his persuasion to yield consent to illicit intercourse with him are essential facts to be established in a criminal action . . . The court will not determine the preponderance of desires for sexual indulgence entertained by either party to the illicit connection, for the woman, who under the promise of marriage yields her chastity . . . takes upon herself the more onerous burden of shame, disgrace and social ostracism in case of discovery than the man, and for that reason she is entitled at least to equal protection." Id. at 483.

The rationale upon which the court based its reluctance to examine the sexual desire or curiosity of the female as contributing to her acquiescence appears to support your reporter's position for the repeal of this offense.

Likewise, the proposed draft would repeal the offense of fornication. State v. Gilson, supra at 206, states the distinction between rape and fornication:

> "Where rape is charged to have been committed upon a woman over the age of consent, which, in this state, is sixteen years, the words used by the statute in defining the crime are 'forcibly ravish'. Rape, therefore, as at common law, is the carnal knowledge of a woman by a man forcibly and unlawfully against her will. Fornication, however, as defined by statute, is the carnal knowledge of a woman, under the age of eighteen years and over the age of sixteen years who is not his wife, by a man without force and with her consent."

State v. Mallory, 92 Or 133, 180 P. 99 (1919), states the elements of the crime of fornication:

> "First, the offender must be a male person over the age of eighteen years, and it must be committed so as not to make the act rape; second, the offender must 'carnally know any female person of previous chaste and moral character'; third, who is over the age of sixteen years, and is not his lawful wife; and when so committed, such male person shall be deemed guilty of fornication." Id. at 138.

As previously noted, State v. Blackwell assumed that ORS 163.210 incorporated the common law doctrine that a husband could not be guilty of the rape of his wife. However, it is not necessary under Oregon law to allege in the indictment that the defendant charged with rape was not the husband of his alleged victim because our statute does not use a reference to a victim as not being the wife of the accused. State v. Edy, supra; State v. Gautier, supra; State v. Hilton, 119 Or 441, 249 P. 1103 (1926); State v. Nesmith, supra. However, under the proposed draft, the wording refers to intercourse "with a female not his wife". It would therefore appear necessary that such an allegation be stated in the indictment under the wording of the proposed draft.

Similarly, under present Oregon case law it is not necessary in a prosecution for statutory rape to allege the age of the defendant as being over sixteen years. The proposed draft likewise states specific age requirements on the part of the male to be guilty of second or third degree rape. The present case law

indicates that the age of the defendant is a matter of defense, and under the proposed draft, the defendant's age would likewise be a matter of defense. State v. Knighten, supra; State v. Nesmith, supra; State v. Cole, 244 Or 455, 418 P.2d 844 (1966).

Subsection (3) of Section 5 incorporates the present effect of ORS 163.220, rape of sister, daughter or wife's daughter. The statute states:

> "A person convicted of raping his sister, of the whole or half-blood, or his daughter, or the daughter of his wife shall be punished by imprisonment in the penitentiary for life or any lesser period."

State v. Jarvis, 20 Or 437 (1891), held that the crimes of incest and rape were separate and distinct offenses. The court, at p. 441, stated:

> "We think that the decided weight of authority is that under a statute like ours, the crimes of rape, by forcible ravishment, and incest cannot be committed by the same act, but that of incest requires the concurring assent of both parties."

In State v. Winfree, 136 Or 531, 299 P. 1005 (1931), the defendant was charged with the statutory rape of his daughter. The court ruled that the indictment did not state two crimes, incest and rape, because the child was incapable of consenting:

> "A female under sixteen years of age is incapable of consenting to an act of carnal knowledge. Incest is the voluntary act of carnal knowledge with the consent of both."

Clearly, under State v. Winfree, supra, an indictment framed under subsection (3) of section 5 would not state two crimes, rape and incest.

The purpose of subsection (3) is to provide for an enhanced degree of rape where the parties to the offense are within the prescribed degree of relationship and the victim is under sixteen. As punishment for a father or step-father who takes advantage of a consenting daughter or step-daughter, this is not an excessive classification. State v. Gidley, 231 Or 89, 371 P.2d 992 (1962), recognized the validity of such a classification in considering the enhanced penalty provision of ORS 163.220. The court stated:

> "The crime of which the plaintiff was convicted is punishable by imprisonment in the penitentiary for life or any lesser period. ORS 163.220. In view of the nature of the crime, it cannot be said that even the maximum punishment

prescribed is per se excessive, cruel, or unusual, and not proportioned to the offense." Id. at 90.

Forcible rape of a female so related to the actor would be covered by subsection (1) regardless of the victim's age.

Section 6. Sodomy in the third degree. A person who engages in deviate sexual intercourse with a person not his spouse or causes another to engage in deviate sexual intercourse commits the crime of sodomy in the third degree if the victim is less than sixteen years of age and the actor is at least four years older than the victim.

(Existing Law 167.040

Section 7. Sodomy in the second degree. A person who engages in deviate sexual intercourse with a person not his spouse or causes another to engage in deviate sexual intercourse commits the crime of sodomy in the second degree if:

(1) the victim is incapable of consent by reason of mental defect, mental incapacitation, or physical helplessness; or

(2) the victim is less than fourteen years of age and the actor is eighteen years of age or more.

Section 8. Sodomy in the first degree. A person who engages in deviate sexual intercourse with a person not his spouse or causes another to engage in deviate sexual intercourse commits the crime of sodomy in the first degree if:

(1) the victim is subjected to forcible compulsion by the actor; or

(2) the victim is less than ~~ten~~ 12 years of age.

COMMENTARY - SODOMY

A. Summary.

Deviate sexuality has been regarded with intense aversion in almost all cultures and ages and has been the subject of severe punishment and condemnation. The law-maker will find little consensus among experts in this area as to the causes of deviate sexuality or as to the possibilities of curing the offender. The difficulty lies in defining laws which will result in the removal of mentally deranged and dangerous persons from society and at the same time impose only minor penalties or no penalties in cases where the deviate sexuality is a minor incident and constitutes no threat to the public safety. The objective of the sections relating to sodomy in the proposed draft is to (1) protect all persons from acts of sexual aggression and (2) to protect children from abuse because of their immaturity. The protection of the public from public solicitation or performance of sexual acts will be covered by the article relating to Public Indecency.

The proposed draft, therefore, excludes from the criminal law all sexual practices not involving force, adult corruption of minors, or public offense and all sexual practices between married persons and consenting adults. As stated in the Comments to section 207.5 of the MPC: "No harm to the secular interests is involved in atypical sex practice in private between consenting adult partners. This area of private morals is the distinctive concern of spiritual authorities." (MPC Comments Sec. 207.5 T.O. #4, pp.277-278) therefore, all homosexual conduct and all heterosexual intercourse other than vaginal engaged in between consenting adults in private is not criminal under the proposed draft. The rationale behind this position is threefold:

1.) there is no more reason to penalize private consensual homosexual acts between adults than there is to penalize non-marital heterosexual intercourse between such adults;

2.) such laws are substantially unenforceable and constitute a potential danger of arbitrary and discriminatory enforcement;

3.) such statutes have only minimal deterrence and no rehabilitative value.

Medical writings approach consensus on the opinion that homosexual conduct is symptomatic of pathological disorders stemming from a failure to achieve mature psychic development and that it cannot be cured unless the underlying psychological deviation is cured. 60 Mich. L.R. 717, 753-57 (1962); Sexual Behavior and the Law, 434-77 (Slovenko ed. 1964). Criminal sanctions are no more able to cure homosexual conduct than they

are mental disease or defect. Such criminal sanctions may actually deter some people from seeking psychiatric or other assistance for their emotional problems.

As pointed out in the MPC commentary:

> ". . . there is the fundamental question of the protection to which every individual is entitled against state interference in his personal affairs when he is not hurting others. Lastly, the practicalities of police administration must be considered. Funds and personnel for police work are limited, and it would appear poor policy to use them to any extent in this area when large numbers of atrocious crimes remain unsolved. Even the necessary utilization of police in cases involving minors or public solicitation raises special problems of police morale, because of the entrapment practices that enforcement seems to require, and the temptation to bribery or extortion." (MPC Comments Sec. 207.5, T.D. #4, pp. 278-279).

In general, it can be stated that what would be criminal heterosexual activity under the rape sections is sodomy in the corresponding degree if it involves deviate sexual intercourse. The forms and degrees of the two crimes, involving age factors and other types of consensual incapacity and forcible compulsion are presented in an identical structure e.g., section 3 Rape in the third degree parallels section 6 Sodomy in the third degree. Therefore, the comments to the rape sections are equally applicable, where appropriate, to the sections relating to sodomy.

Sodomy based on compulsion or perpetrated on a young person or on anyone incapable of consenting can be as dangerous and harmful to the victim as a heterosexual attack. At this time, it cannot be determined whether the penalties imposed for the various degrees of sodomy will correspond to the penalties imposed for the identical degrees of rape or whether they will differ. However, two factors deserve consideration in assessing the ultimate penalty structure: (1) there is considerable medical authority to support the view that deviate sexual behavior committed with a child, especially a male, going through the transition from pre-pubertal sexuality to mature sexual adjustment exposes him to a much greater danger of lasting psychological damage and sexual maladjustment than does a heterosexual contact during this same period; (2) the MPC imposes higher penalties for rape than sodomy on the grounds that the harm done to a woman by forceful sexual intercourse is graver than that involved in deviate sexual intercourse, e.g., the possibility of pregnancy, the physical danger in case abortion is required and the impairment of her marriage eligibility.

In the sections relating to sodomy the perpetrator is described as a person to indicate that either a male or female may commit the offense.

The clause "or causes another to engage in deviate sexual intercourse" in the sodomy sections is intended to cover not only the situation where the victim has some deviate act forced upon him or her, but also where the victim is compelled to perform such an act upon the perpetrator of the offense, or upon some third person.

As defined in section 1 (2) deviate sexual intercourse includes unnatural acts between human beings but does not include intercourse with animals (bestiality) or with dead bodies (necrophilia). It is felt that such conduct is more appropriately covered under statutes relating to cruelty to animals or abuse of a corpse. The only real justification for including such acts in articles relating to sex offenses is the extreme repulsiveness of the behavior. Occasional conduct of this nature is not likely to be deterred by criminal sanction and habitual conduct would be better treated in other ways.

The Kinsey studies indicate that while bestiality is rare in the general population, it is common among adolescent farm youths. When such acts occur in this group they are usually brief, youthful "experiments" rather than part of a pattern of conduct that either contributes to or constitutes a significant degeneration of the individual involved. Kinsey, Pomeroy and Martin, Sexual Behavior in the Human Male, 667-78 (1st ed. 1948). In such instances "focusing public attention on the person who happens to be found in such an act serves no useful social purpose and may seriously impair the development of the accused to a normal life." Ill. Annot. Statutes, Commentary to Ch. 38 Sec. 11-2.

B. Derivation.

Section 6 is adapted from section 130.40 of the New York Revised Penal Law and section 213.3 (1) (a) of the MPC.

Section 7 is adapted from sections 130.40 (1), 130.45 and 130.50 (2) of the New York Revised Penal Law.

Section 8 is adapted from section 130.50 (1) and (3) of the New York Revised Penal Law.

The age of the victim was lowered by your reporter from eleven to ten.

C. Relationship to Existing Law.

Sections 6,7 and 8 of the proposed draft defines the three degrees of sodomy. Oregon defines only one degree of sodomy in ORS 167.040, but the statute encompasses three prohibitions. State v. Anthony, 179 Or 282, 169 P.2d 587 (1946), describes these three prohibitions:

> "O.C.L.A. Sec. 23-910 (now ORS 167.040) embraces three separate prohibitions. The first clause of the statute prohibits sodomy or the crime against nature . . . Being a crime known to the common law, further statutory definition of the word 'sodomy' was unnecessary.
>
> "Part two . . . prohibits any act or practice of sexual perversity either with mankind or beast. Part three relates specifically to certain osculatory relations which this court has held were within the prohibition of the sodomy statute prior to its amendment."

The court's reference to a prior holding concerning the nature of osculatory relations refers to State v. Start, 65 Or 178, 132 P. 512 (1913). There the court said:

> "The rule at common law was that: 'All unnatural carnal copulation whether with man or beast seem to come under the notion of sodomy': 1 Hawk. P.C. 357.. . It is self-evident that the use of either opening (mouth or anus) . . . for the purpose of sexual copulation is against the natural design of the human body. In other words, it is an offense against nature. There is no difference in reason whether such an unnatural coition takes place in the mouth or in the fundament . . . Each is rightfully included in the true scope and meaning of the common law definition quoted above from Hawkins. . .
>
> "It is said in Section 1539, L.O.L. (now ORS 167.040 (2)) that 'Proof of actual penetration into the body is sufficient to sustain an indictment . . . for the crime against nature.' No particular opening of the body into which penetration can be made is specified in this section. It follows that the actual penetration of the virile member into any orifice of the human body is sufficient for establishment of the crime in question." Id. at 180-81.

The later two paragraphs of this statement from State v. Start, presents two points for discussion.

First, the recognition by the court that either opening, mouth or anus, for the purpose of sexual copulation is embraced by the crime of sodomy. To this extent there is no difference between present Oregon law and the proposed draft's condemnation of "deviate sexual intercourse" which is defined in Section 1 (2) as involving the mouth or anus of another.

Second, the court's reference to proof of penetration into any orifice of the body as sufficient to sustain the indictment might provide an argument that cunnilingus was not within the scope of the statute.

At common law, sodomy involved only two essential elements: (1) penetration, (2) into an aperture of the body. Aperture was generally construed as being limited to copulation, per os or per anum. The requirement of actual penetration has been held to exclude cunnilingus from the scope of the common law crime of sodomy. 81 C.J.S., Sodomy, p. 371. Thus, before the amendment to ORS 167.040 it could be argued that that form of sexual contact was not within the common law crime. However, State v. Start was concerned only with fellatio and since the statute now prohibits "osculatory relations with the private parts of any person" it appears that cunnilingus is definitely provided for. Therefore, to the extent the Anthony court seemingly indicated that the osculatory relations defined in the statute were under the scope of sodomy as defined by the Oregon case law prior to the amendment, seems inaccurate. Under this view, the first part of the statute proscribing "sodomy" and the third part of the statute proscribing certain osculatory relations serve a distinct purpose.

The second part of the statute concerning any act or practice of "sexual perversity" either with mankind or beast was the portion of the statute with which the court in Anthony was most concerned. The reference in this portion of the statute to acts of sexual perversity with a beast would indeed seem to be unnecessary in view of State v. Start's common law definition of sodomy as including unnatural copulation with a beast. However, to give independent effect to the inclusion the statute would appear to contain within its scope acts of sexual perversity with a beast other than copulation. What, if any, acts of sexual perversity would be included may be enlightened after an examination of Anthony's discussion of "sexual perversity" as defining criminal conduct.

In Anthony, the court was faced with determining whether "sexual perversity" as defining the crime of sodomy was "void for vagueness". The court ruled that such phraseology unlimited and undefined by judicial construction would in fact be void. The court stated:

". . . the legislature has ventured into the dim and uncertain mazes of abnormal psychology. If the Act were to be left unlimited and undefined by construction . . . we think it would not only be void for uncertainty, but might also be applied in such manner as to invade other constitutional rights." Id. at 305.

However, after recognizing the statute's face value defects the court held that it could be judicially applied in a manner not to offend constitutional standards and stated the limitations to be applied to the statute.

"But we hold that the statute may be so limited by construction as to render it valid as here applied.

". . . it is clear that the words 'sexual perversity' cannot be limited in their application to cases involving carnal copulation for such cases were already included in the sodomy statute . . . By applying the doctrine of ejusdem generis, we find that the words,'or any act or practice of sexual perversity' are preceded . . . by the words 'if any person shall commit the crime of sodomy or the crime against nature' . . . the words 'sodomy or the crime against nature' have a definite meaning at common law. Those terms, which are synonomous, relate and are limited to offenses directly involving the sex organ of at least one of the parties; and . . . we conclude that the prohibited acts of sexual perversity are likewise so limited . . .

"Not only must the statute be limited to cases directly involving the sex organ, but . . . it must be limited to unnatural conduct contrary to the course of nature. The act does not prohibit such personal and physical intimacies as accompany or precede normal relations and intercourse between the sexes. Again the prohibited conduct must have been performed for the purpose of accomplishing abnormal sexual satisfaction on the part of the actor." Id. at 305, 306, 307.

The final limitation placed upon the statute's application was stated at p. 310 to be that the state must show that the particular act charged was "willful", i.e. that it was done intentionally or recklessly.

State v. Anthony thus required four elements to be established in a prosecution for sodomy under the sexual perversity section of the statute. First, the act must involve a sex organ of one of the parties; second, the act must be unnatural, i.e. not involved in normal sexual foreplay between the sexes; third, the act must have been performed for the purpose of accomplishing some abnormal sexual satisfaction; fourth, the act must have been done inten-

tionally or recklessly. It should be noted that compulsion or force is not an element of the crime of sodomy as defined by the statute. State v. Weitzel, 157 Or 334, 69 P.2d 958 (1937).

Applying these standards to sexual perversity with a beast, it is possible to commit sodomy in a manner not involving copulation. For example, masturbating a male animal or forcing an object into the sex organ of a female animal. As the commentary to the proposed draft indicates it is not the reporter's intention to include such conduct within the scope of sodomy. It was believed that such acts would better be dealt with under a statute proscribing cruelty to animals.

Applying these criteria to the facts of an earlier Oregon decision, State v. Brazell, 126 Or 579, 269 P. 884 (1928), one can determine the type of conduct between humans which the present statute proscribes. State v. Brazell, Id. at 580, held that practicing masturbation by a man upon a boy is an act of sexual perversity within the ordinary meaning and acceptation of the words. Applying the Anthony criteria, such conduct amounts to sodomy under the present Oregon law. First, clearly a sex organ of one of the parties, the penis of the boy, is involved. Second, it is not an act naturally preceding intercourse between the sexes. Third, the inference may easily be drawn as to the purpose of the act, i.e. to satisfy an abnormal sexual desire. Fourth, such an act must clearly have been performed intentionally.

Presently under Oregon law "the general rule is that one who consents that an act of sodomy be committed upon his person, if capable of consent, is an accomplice . . ." State v. Stanley, supra at 312.

The term "accomplice" has been defined by the Oregon court as "a person who knowingly, voluntarily and with common intent with the principal offender, unites in the commission of a crime." State v. Stacey, 153 Or 449, 445, 56 P.2d 1152 (1936); State v. Ewing, 174 Or 487, 149 P.2d 765 (1944); State v. Nice, 240 Or 343, 401 P.2d 296 (1965).

The fact that a person who consents to an act of sodomy is an accomplice presents a problem under Oregon law, i.e. if the person is an accomplice his testimony must be corroborated to sustain a conviction. ORS 136.550. This requirement of proof has presented the issue of whether or not a child may be an accomplice requiring corroboration of his testimony.

In State v. Ewing, supra, the court was faced with the question of whether or not a thirteen year old was an accomplice to the crime of sodomy. The court applied the common law rebuttable presumption that children between seven and fourteen years of age are without criminal capacity. The court then ruled that whether an infant

prosecuting witness of thirteen possessed and exercised sufficient mentality to make an intelligent choice to voluntarily consent to an act of sodomy, thereby becoming the accused's accomplice was a question for the jury. Therefore, if they did determine that he was an accomplice, to apply the evidenciary requirement of corroborative proof of commission of the crime.

In State v. Stanely, supra,the defendant was convicted of the crime of sodomy committed orally upon or with a fifteen year old boy. The defendant argued he was convicted on the uncorroborated testimony of an accomplice, violating ORS 136.550. Since the age of the child would not allow the court to rely on the common law rebuttable presumption established in Ewing, the court instead noted that they were not asked to rule upon the effect of ORS 419.476 as to whether a child under sixteen may or may not be an accomplice. However, the court made no reference to the common law fourteen year old presumption and ruled that it was a jury question whether the child of fifteen was an accomplice, thereby impliedly recognizing that the juvenile code modified the age of the common law presumption.

However, State v. Nice, supra, apparently handed down during the same term, returned to the common law presumption and ruled that a twelve-year old participant in a Violation of ORS 167.040 may or may not be an accomplice. The court, at page 345-46 stated:

> "In State v. Ewing, 174 Or 407, 149 P2d 765 (1944), we took notice of the common law rebuttable presumption that children between the ages of seven and fourteen years of age are without criminal capacity. We held that it was a jury question in a given case whether the child knew and appreciated the nature of the act and made an intelligent choice in participating in it. If the jury so found, it would apply to the child's testimony the cautionary rule concerning the testimony of an accomplice. We hold that the rule stated in State v. Ewing, supra, is still valid, despite the subsequent enactment of ORS 419.478 and 419.533, which vest in the juvenile court exclusive jurisdiction over children less than sixteen years of age who may commit [illegible] denounced as crimes.
>
> "While it is now possible to argue in certain cases that a given child does not exactly fit the traditional role of an accomplice because he may not be subject to prosecution as an adult offender, the child is still under the control of law enforcement officers and other persons in authority. This control over the witness by the state is the reason why the law subjects his testimony to special scrutiny. The testimony of an accomplice may be given under the hope of leniency . . . This reason applies with equal force to the testimony of a child who is under the control of the state." (Emphasis supplied).

Relating present law to the proposed draft, five areas of comparison need to be examined. First, sodomy or sexual perversity with an animal; second, sodomy per os or per anum; third, osculatory relations; fourth, acts of sexual perversity, and fifth, the age of the "victims".

First, sodomy or sexual perversity with an animal. At present Oregon law includes within its concept of sodomy both copulation with an animal and sexual perversity not involving copulation with an animal. The proposed draft would encompass neither of these activities within its definition of sodomy. The draft defines sodomy in the terms of "deviate sexual intercourse" as "contact between the sex organ of one person and the mouth or anus of another". Clearly within this framework the term "person" excludes animals and the use of "another" likewise indicates "another person" and not an animal.

The second and third areas can be combined for purposes of comparative discussion since the only possible distinction between the two under Oregon law could be that osculatory relations includes cunnilingus whereas sodomy per os or per anum, as implying the necessity of penetration, ~~emgymmot~~.

The proposed draft would not affect present Oregon law to the extent that it defines sodomy as sexual copulation of the virile member of the body through either the opening of the mouth or the anus. See State v. Start, supra. Such activity clearly falls within the scope of the definition of "deviate sexual intercourse" as involving "contact between the sex organ of one and the mouth or anus of another." Likewise, the definition of the proposed draft would include cunnilingus presently proscribed by the osculatory relations portion of ORS 167.040. This is evident by the draft's reference to contact with a sex organ.

An instruction on the meaning of "sex organ" was approved in State v. Anthony, supra at 309. The pertinent portions of the instructions stated:

> ". . . the anal opening . . . refers to the anus, situated near the anal orifice or opening of the rectum and not to the sex organ. Therefore, the penetration of such opening alone in and of itself, except by the male organ, would not necessarily constitute the crime . . ."

Clearly then, the anus is not the sex organ of a person. The sex organ in the male is, therefore, limited to the penis; in the female, it is limited to the vagina. If the female vagina is contacted by the mouth of another, performing the act of cunnilingus, the act is sodomy under the draft and under the osculatory relations portion

of ORS 167.040. Therefore, the proposed draft would include as sodomy the physical acts presently prohibited by the first and third portions of the present statute.

Fourth, the present scope of acts included within the confines of the "sexual perversity" portion of the sodomy statute would not be included as acts of sodomy under the proposed draft. Acts not involving contact between the sex organ of one person and the mouth or anus of another would not be sodomy under the draft. Therefore, the act of masturbation by a man upon a boy, sodomy under the Brazell case, would not be sodomy under the draft. The act of forcing an object other than the male sex organ within the anus would not be sodomy under the draft or Oregon law. If the object was placed within the vagina, the act would be sodomy under Oregon law, but would not be sodomy under the draft. This is so because for an act to be sexually perverse under Oregon law all that is required is that the sex organ of one party or the other be involved, either penetrated or manipulated. However, contrary to Anthony, the draft does not require proof that the act was done for the purpose of gratifying some abnormal sexual desire.

In summary then, the draft would include all acts presently within ORS 167.040 except those acts of sexual perversity not involving the sex organ of one party and the mouth or anus of the other. Such acts of "sexual perversity" would come within the confines of the Sexual Abuse sections.

The draft does make some changes concerning the parties who can be guilty of sodomy. In each degree of sodomy defined in the draft, the definition excludes acts between spouses. The draft also excludes acts between consenting parties. A party is deemed capable of consent if he or she is above the age of sixteen and is not mentally defective, mentally incapacitated or physically helpless. If the person is capable of consent the draft requires the act be perpetrated through the use of forcible compulsion. None of these factors are presently found in ORS 167.040.

Fifth, the selection of sixteen as the age of consent would make impossible a finding that a person below that age was an accomplice. This result clearly effects present case law. State v. Ewing, supra, State v. Stanley, supra, and State v. Nice, supra, all recognized that a child under (either 14 or 16) and above the age of seven, could be an accomplice to the crime. Although this rule allows for a showing of consent and complicity by the infant it would not affect the guilt or innocence of the accused since consensual sodomy is a crime, however, theoretically it could aid an accused's defense if there were no corroborative evidence.

The draft would alter this by making sixteen the age under which an infant would be deemed incapable of criminal capacity. This would overrule State v. Nice and State v. Ewing. However, the defense of Mistake as to Age would be available to a defendant charged with sodomy committed upon a consenting victim between the ages of ten and sixteen.

Section 9. Sexual abuse in the second degree.

(1) A person commits the crime of sexual abuse in the second degree when he subjects another person not his spouse to sexual contact and:

(a) the victim does not consent to the sexual contact; or

(b) the victim is incapable of consent by reason of being mentally defective, mentally incapacitated or physically helpless.

(2) In any prosecution under this section it is a defense for the actor to prove that (a) the alleged victim's lack of consent was due solely to incapacity to consent by reason of being less than sixteen years of age (b) the alleged victim was more than fourteen years of age and (c) the actor was less than four years older than the alleged victim.

Section 10. Sexual abuse in the first degree. A person commits the crime of sexual abuse in the first degree when he subjects another person to sexual contact and:

(1) the victim is less than ten years of age; or

(2) the victim was subjected to forcible compulsion by the actor.

COMMENTARY - SEXUAL ABUSE

A. Summary

The offense of sexual abuse is intended to cover all unconsented acts of sexual contact which do not involve the element of genital penetration. The section encompasses the following types of behavior:

(1) fondling
(2) manipulation of genitals
(3) digital penetration
(4) sadistic or masochistic flagellation

Under the common law such conduct would have constituted an assault. Most state laws do not differentiate sexual from other assaults, except assaults with intent to rape or commit sodomy. Assault as defined in the Preliminary Draft No. 1, Assault and Related Offenses requires the infliction of actual physical injury. It is contemplated that in many instances the conduct dealt with in the sexual abuse sections will not result in physical injury and therefore, would not be covered by the assault article. When such sexual contacts do result in injury, the assault sections may also apply. In accord with other offenses involving sexual imposition contained in this article, the sexual abuse sections are applicable to both children and adults.

The definition of sexual contact contained in section 1 (3) and directly incorporated into sections 9 and 10 proscribes any non-consensual salacious "touching" of a person's sexual or other intimate parts. An actual touching is required. Indecent proposals and obscene gestures will be treated in the article relating to Public Indecency (Disorderly Conduct, Harassment).

However, the contact need not be directly with the person's body; it is sufficient if the defendant touches the victim's sexual or intimate parts through clothing. The contact need only be with either the victim or the actor but it need not be between them. Thus, subjecting another to sexual contact with an animal or another person is also covered.

The inclusion of the words "or other intimate parts" does not limit the touching to genitalia but is intended to include genitalia, breasts and whatever anatomical areas the trier of fact deems "intimate" in the particular cases which arise. Thus, the ultimate decision of "intimate" parts is left to the community sense of decency, propriety and morality.

The proposed draft requires that the touching be for "the purpose of arousing or gratifying the sexual desire of either party." Thus, inadvertent touching of the intimate parts of a person (crowded elevator) does not constitute sexual contact.

The offense of sexual abuse is divided into two ascending degrees. Section 9, Sexual abuse in the second degree defines the basic offense. It should be noted that consensual sexual contacts between adults are not proscribed. Subsection (2) of section 9 makes a defense available to the defendant when the circumstances are as specified. The purpose of this defense is to exclude from criminal

sanction certain activity by adolescents, i.e. "the necking party" between a 14, 15 or 16 year old "victim" and another young though criminally responsible person of slightly greater age. It is anticipated that the age of criminal responsibility will be 14 in the final proposed Code.

The offense is raised a degree if either of the following factors are present:

1.) the victim is less than ten years of age; or
2.) the victim was subjected to forcible compulsion by the actor.

B. Derivation

Section 9 is adapted from section 130.55 of the New York Revised Penal Law. Subsection (b) has been added by your reporter to this section.

Section 10 is adapted from section 130.65 of the New York Revised Penal Law.

C. Relationship to Existing Law.

Sections 9 and 10 of the proposed draft define two degrees of sexual abuse. Presently there is no Oregon statute treating this offense specifically.

The offense is defined in terms of "sexual contact". Section 1 defines "sexual contact" as "any touching of the sexual or other intimate parts of a person not married to the actor for the purpose of arousing or gratifying the sexual desire of either party."

This definition would include within it the judicial interpretation of "sexual perversity" found in Anthony, i.e. conduct involving the sex organ of either party for the purpose of gratifying abnormal sexual desires. These two elements are stated in Anthony and would be within the definition of "sexual contact". However, the definition of "sexual contact" is broader than the concept of sexual perversity. First, the sexual contact need not be "unnatural"; and, second, it is not limited to contact with a "sexual" organ, but can be contact with "other intimate parts".

The Anthony court discussed the intent requirement of a sexually perverse act. Rejecting the prosecution's interpretation of intent the court stated:

> "The prosecution in reliance upon statements found in learned dissertations on abnormal psychology has urged upon the court that any act of physical contact by a male person with the body of a female person with intent to cause and causing sexual

satisfaction to the actor constitutes an act of sexual perversity. Whatever may be said by the psychiatrists concerning this theory, we reject it as unreasonable, arbitrary and an unconstitutional criterion when applied to a criminal statute." Id. at 307.

The draft's inclusion of the intent requirement may come close to exceeding the limitations placed upon the terminology by the court. For sodomy, the court required that the application be limited to contact with a "sex organ" with the purpose of gratifying an abnormal sexual satisfaction. The draft allows the contact to be with an "intimate " part of the body and does not require that the purpose of the contact be to arouse "abnormal" sexual desire, but only that its purpose be to arouse or gratify the sexual desire, either normal or abnormal, of either party.

The precise meaning of "other intimate parts" is not defined in the draft and the intent of the reporter is for the triers of the fact to determine what parts of the body are "intimate". Case law in Oregon has never interpreted the meaning of "intimate" parts but has had occasion to discuss the import of "private parts".

State v. Moore, 194 Or 232, 241 P.2d 455 (1952), at pages 540-541, states:

> "It is hornbook law that whenever and wherever the terms 'privates' or 'private parts' are used as descriptive of a part of the human body, they refer to the genital organs . . . A woman's breasts do not come within the designation 'private parts'. Obviously they are not part of her genital organs."

Although Oregon has no statute which deals specifically with "sexual" assaults, when the victim of such an assault is under eighteen years a prosecution may be brought under ORS 167.210, Causing or Contributing to the Delinquency of a Child. The term "delinquent" child is defined for purposes of this statute within ORS 419.476. Proof of contributing requires only proof of an act which has a "manifest tendency" to cause a child to become delinquent.

State v. Hoffman, 236 Or 98, 385 P.2d 471 (1963), ruled that "proof of the defendant's placing his private parts upon and against those of a minor child, standing alone, would suffice to sustain a verdict of guilty of contributing." Id. at 102. Bonnie v. Gladden, 240 Or 462, 402 P.2d 237 (1965) ruled that an indictment charging the crime of contributing by the defendant's placing his tongue inside a minor's mouth and his face upon her lap presented a question of fact for jury determination whether the acts had a manifest tendency to induce the child to act in a manner which would bring her within the definition of delinquency. ORS 419.476(c).

The proposed draft would not alter the decision in either of these cases, it would merely place such conduct under the category of "Sexual Abuse". The facts of Hoffman would not be sodomy because there was no contact with the mouth or anus. Neither did they constitute rape, because there was no penetration. The facts of Bonnie present an excellent example of the jury's function in deciding what portions of the body constitute "intimate parts", i.e. under the facts of that case did the mouth and lap of the child constitute "intimate parts".

The proposed draft would alter the effect of the contributing statute as applied to sexual assaults by allowing a child above the age of sixteen to consent to sexual contact and further by providing a defense if the child is between fourteen and sixteen and the actor is less than four years older than the alleged victim.

TEXT OF REVISIONS OF OTHER STATES

Text of Model Penal Code.

Section 210.0. Definitions.

In Articles 210-213, unless a different meaning plainly is required:

(1) "human being" means a person who has been born and is alive;

(2) "bodily injury" means physical pain, illness or any impairment of physical condition;

(3) "serious bodily injury" means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ;

(4) "deadly weapon" means any firearm, or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is known to be capable of producing death or serious bodily injury.

Section 213.0. Definitions.

In this Article, the definitions given in Section 210.0 apply unless a different meaning plainly is required.

Sexual intercourse includes intercourse per os or per anum, with some penetration however slight; emission is not required.

Deviate sexual intercourse means sexual intercourse per os or per anum between human beings who are not husband and wife, and any form of sexual intercourse with an animal.

TEXT OF REVISIONS OF OTHER STATES

Text of Model Penal Code

Section 213.1 Rape and Related Offenses.

(1) Rape. A male who has sexual intercourse with a female not his wife is guily of rape if:

(a) he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone; or

(b) he has substantially impaired her power to appraise or control her conduct by administering or employing without her knowledge drugs, intoxicants or other means for the purpose of preventing resistance; or

(c) the female is unconscious; or

(d) the female is less than 10 years old.

Rape is a felony of the second degree unless (i) in the course thereof the actor inflicts serious bodily injury upon anyone, or (ii) the victim was not a voluntary social companion of the actor upon the occasion of the crime and had not previously permitted him sexual liberties, in which cases the offense is a felony of the first degree.

(2) Gross Sexual Imposition. A male who has sexual intercourse with a female not his wife commits a felony of the third degree if:

(a) he compels her to submit by any threat that would prevent resistance by a woman of ordinary resolution; or

(b) he knows that she suffers from a mental disease or defect which renders her incapable of appraising the nature of her conduct; or

(c) he knows that she is unaware that a sexual act is being committed upon her or that she submits because she mistakenly suppeses that he is her husband.

TEXT OF REVISIONS OF OTHER STATES

Text of Model Penal Code

Section 213.2 Deviate Sexual Intercourse by Force or Imposition.

(1) By Force or Its Equivalent. A person who engages in deviate sexual intercourse with another person, or who causes another to engage in deviate sexual intercourse, commits a felony of the second degree if:

(a) he compels the other person to participate by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone; or

(b) he has substantially impaired the other person's power to appraise or control his conduct, by administering or employing without the knowledge of the other person drugs, intoxicants or other means for the purpose of preventing resistance; or

(c) the other person is unconscious; or

(d) the other person is less than 10 years old.

(2) By Other Imposition. A person who engages in deviate sexual intercourse with another person, or who causes another to engage in deviate sexual intercourse, commits a felony of the third degree if:

(a) he compels the other person to participate by any threat that would prevent resistance by a person of ordinary resolution; or

(b) he knows that the other person suffers from a mental disease or defect which renders him incapable of appraising the nature of his conduct; or

(c) he knows that the other person submits because he is unaware that a sexual act is being committed upon him.

Section 213.3. Corruption of Minors and Seduction.

(1) Offense Defined. A male who has sexual intercourse with a female not his wife, or any person who engages in deviate sexual intercourse or causes another to engage in deviate sexual intercourse, is guilty of an offense if:

(a) the other person is less than [16] years old and the actor is at least [4] years older than the other person; or

(b) the other person is less than 21 years old and the actor is his guardian or otherwise responsible for general supervision of

TEXT OF REVISIONS OF OTHER STATES

Text of Model Penal Code, Cont'd.

his welfare; or

(c) the other person is in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over him; or

(d) the other person is a female who is induced to participate by a promise of marriage which the actor does not mean to perform.

(2) Grading. An offense under paragraph (a) of Subsection (1) is a felony of the third degree. Otherwise an offense under this section is a misdemeanor.

TEXT OF REVISIONS OF OTHER STATES

Text of Model Penal Code

Section 213.4 Sexual Assault.

A person who has sexual contact with another not his spouse, or causes such other to have sexual contact with him, is guilty of sexual assault, a misdemeanor, if:

(1) he knows that the contact is offensive to the other person; or

(2) he knows that the other person suffers from a mental disease or defect which renders him or her incapable of appraising the nature of his or her conduct; or

(3) he knows that the other person is unaware that a sexual act is being committed; or

(4) the other person is less than 10 years old; or

(5) he has substantially impaired the other person's power to appraise or control his or her conduct, by administering or employing without the other's knowledge drugs, intoxicants or other means for the purpose of preventing resistance; or

(6) the other person is less than [16] years old and the actor is at least [four] years older than the other person; or

(7) the other person is less than 21 years old and the actor is his guardian or otherwise responsible for general supervision of his welfare; or

(8) the other person is in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over him.

Sexual contact is any touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire, ...

TEST OF REVISIONS OF OTHER STATES

Text of the Model Penal Code

Section 213.6 Provisions Generally Applicable to Article 213.

(1) Mistake as to Age. Whenever in this Article the criminality of conduct depends on a child's being below the age of 10, it is no defense that the actor did not know the child's age, or reasonably believed the child to be older than 10. When criminality depends on the child's being below a critical age other than 10, it is a defense for the actor to prove by a preponderance of the evidence that he reasonably believed the child to be above the critical age.

(2) Spouse Relationships. Whenever in this Article the definition of an offense excludes conduct with a spouse, the exclusion shall be deemed to extend to persons living as man and wife, regardless of the legal status of their relationship. The exclusion shall be inoperative as respects spouses living apart under a decree of judicial separation. Where the definition of an offense excludes conduct with a spouse or conduct by a woman, this shall not preclude conviction of a spouse or woman as accomplice in a sexual act which he or she causes another person, not within the exclusion, to perform.

(3) Sexually Promiscuous Complainants. It is a defense to prosecution under Section 213.3. and paragraphs (6), (7) and (8) of Section 213.4 for the actor to prove by a preponderance of the evidence that the alleged victim had, prior to the time of the offense charged, engaged promiscuously in sexual relations with others.

(4) Prompt Complaint. No prosecution may be instituted or maintained under this Article unless the alleged offense was brought to the notice of public authority within [3] months of its occurrence or, where the alleged victim was less than [16] years old or otherwise incompetent to make complaint, within [3] months after a parent, guardian or other competent person specially interested in the victim learns of the offense.

(5) Testimony of Complainants. No person shall be convicted of any felony under this Article upon the uncorroborated testimony of the alleged victim. Corroboration may be circumstantial. In any prosecution before a jury for an offense under this Article, the jury shall be instructed to evaluate the testimony of a victim or complaining witness with special care in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private.

TEXT OF REVISION OF OTHER STATES

Michigan Revised Criminal Code. The following definitions apply in this chapter:

Section 2301 [Definitions]

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

(b) "Deviate sexual intercourse" means any act of sexual gratification between persons not married to each other, involving the sex organs of one person and the mouth or anus of another.

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

(d) "Female" means any female person who is not married to the actor. Persons living together as man and wife are married for purposes of this chapter, regardless of the legal status of their relationship otherwise. Spouses living apart under a decree of judicial separation are not married to one another for purposes of this chapter.

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

(f) "Mentally incapacitated" means that a person is rendered temporarily incapable of appraising or controlling his conduct owing to the influence of a narcotic or intoxicating substance administered to him without his consent, or to any other act committed upon him without his consent.

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

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

TEXT OF REVISIONS OF OTHER STATES

Text of Michigan Revised Criminal Code

Section 2330. Lack of Consent

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

(2) Lack of consent results from:

(a) Forcible compulsion.

(b) Incapacity to consent.

(c) If the offense charged is sexual abuse, any circumstances, in addition to forcible compulsion or incapacity to consent, in which the victim does not expressly or impliedly acquiesce in the actor's conduct.

(3) A person is deemed incapable of consent if he is:

(a) Less than 16 years old.

(b) Mentally defective.

(c) Mentally incapacitated.

(d) Physically helpless.

Section 2331. Mistake as to Consent

(1) An actor does not commit a crime under any of the sections of this chapter if the other person did not in fact consent, but if the actor at the time he engaged in the conduct constituting the offense did not know of the facts or conditions responsible for the incapacity to consent, including the age of the other person.

(2) The burden of injecting the issue of mistake under this section is on the defendant, but this does not shift the burden of proof.

(NOTE: The above quoted material does not constitute the entire chapter on Sexual Offenses. Only those sections of the Michigan Revised Criminal Code (final draft, 1967) referred to in the Commentary to this Article are herewith set out for reference purposes).

TEXT OF REVISIONS OF OTHER STATES

New York Revised Penal Law. The following definitions are applicable to this Article:

Section 130.00. Sex Offenses; Definitions of Terms

1. "Sexual intercourse" has its ordinary meaning and occurs upon any penetration, however slight.

2. "Deviate sexual intercourse" means sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and penis, or the mouth and the vulva.

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

4. "Female" means any female person who is not married to the actor.

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

6. "Mentally incapacitated" means that a person is rendered temporarily incapable of appraising or controlling his conduct owing to the influence of a narcotic or intoxicating substance administered to him without his consent, or to any other act committed upon him without his consent.

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

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

TEXT OF REVISIONS OF OTHER STATES

Text of New York Revised Penal Law

Section 130.05 Sex offenses; lack of consent

1. Whether or not specifically stated, it is an element of every offense defined in this article, except the offense of consensual sodomy, that the sexual act was committed without consent of the victim.

2. Lack of consent results from:

(a) Forcible compulsion; or

(b) Incapacity to consent; or

(c) Where the offense charged is sexual abuse, any circumstances, in addition to forcible compulsion or incapacity to consent, in which the victim does not expressly or impliedly acquiesce in the actor's conduct.

3. A person is deemed incapable of consent when he is:

(a) less than seventeen years old; or

(b) mentally defective; or

(c) mentally incapacitated; or

(d) physically helpless.

Section 130.10 Sex offenses; defense

In any prosecution under this article in which the victim's lack of consent is based solely upon his incapacity to consent because he was mentally defective, mentally incapacitated or physically helpless, it is an affirmative defense that the defendant, at the time he engaged in the conduct constituting the offense, did not know of the facts or conditions responsible for such incapacity to consent.

Section 130.15 Sex offenses; corroboration

A person shall not be convicted of any offense defined in this article, or of an attempt to commit the same, solely on the uncorroborated testimony of the alleged victim. This section shall not apply to the offense of sexual abuse in the third degree.

TEXT OF REVISIONS OF OTHER STATES

Text of New York Revised Penal Law, Cont'd.

Section 130.20. Sexual Misconduct.

A person is guilty of sexual misconduct when:

1. Being a male, he engages in sexual intercourse with a female without her consent; or

2. He engages in deviate sexual intercourse with another person without the latter's consent; or

3. He engages in sexual conduct with an animal or a dead human body.

Sexual misconduct is a class A misdemeanor.

Section 130.25. Rape in the third degree.

A male is guilty of rape in the third degree when:

1. He engages in sexual intercourse with a female who is incapable of consent by reason of some factor other than being less than seventeen years old; or

2. Being twenty-one years old or more, he engages in sexual intercourse with a female less than seventeen years old.

Rape in the third degree is a class E felony.

Section 130.30. Rape in the second degree.

A male is guilty of rape in the second degree when, being eighteen years old or more, he engages in sexual intercourse with a female less than fourteen years old.

Rape in the second degree is a class D felony.

Section 130.35. Rape in the first degree.

A male is guilty of rape in the first degree when he engages in sexual intercourse with a female:

1. By forcible compulsion; or

2. Who is incapable of consent by reason of being physically helpless; or

3. Who is less than eleven years old.

Rape in the first degree is a class B felony.

New York Revised Penal Law, Cont'd.

Section 130.38. Consensual sodomy.

A person is guilty of consensual sodomy when he engages in deviate sexual intercourse with another person.

Consensual sodomy is a class B misdemeanor.

Section 130.40. Sodomy in the third degree.

A person is guilty of sodomy in the third degree when:

1. He engages in deviate sexual intercourse with a person who is incapable of consent by reason of some factor other than being less than seventeen years old; or

2. Being twenty-one years old or more, he engages in deviate sexual intercourse with a person less than seventeen years old.

Sodomy in the third degree is a class E felony.

Section 130.45. Sodomy in the second degree.

A person is guilty of sodomy in the second degree when, being eighteen years old or more, he engages in deviate sexual intercourse with another person less than fourteen years old.

Sodomy in the second degree is a class D felony.

Section 130.50. Sodomy in the first degree.

A person is guilty of sodomy in the first degree when he engages in deviate sexual intercourse with another person:

1. By forcible compulsion; or

2. Who is incapable of consent by reason of being physically helpless; or

3. Who is less than eleven years old.

Sodomy in the first degree is a class B felony.

Text of Revisions of Other States (Cont'd.)

Text of New York Revised Penal Law

Section 130.55. Sexual Abuse in the Third degree.

A person is guilty of sexual abuse in the third degree when he subjects another person to sexual contact without the latter's consent; except that in any prosecution under this section, it is an affirmative defense that (a) such other person's lack of consent was due solely to incapacity to consent by reason of being less than seventeen years old, and (b) such other person was more than fourteen years old, and (c) the defendant was less than five years older than such other person.

Sexual abuse in the third degree is a class B misdemeanor.

Section 130.60. Sexual Abuse in the Second degree.

A person is guilty of sexual abuse in the second degree when he subjects another person to sexual contact and when such other person is:

1. Incapable of consent by reason of some factor other than being less than seventeen years old; or

2. Less than fourteen years old.

Sexual abuse in the second degree is a class A misdemeanor.

Section 130.65. Sexual Abuse in the First degree.

A person is guilty of sexual abuse in the first degree when he subjects another person to sexual contact:

1. By forcible compulsion; or

2. When the other person is incapable of consent by reason of being physically helpless; or

3. When the other person is less than eleven years old.

Sexual abuse in the first degree is a class D felony.

Text of Illinois Criminal Code of 1961.

38 Section 11-1. Rape.

(a) A male person of the age of 14 years and upwards who has sexual intercourse with a female, not his wife, by force and against her will, commits rape. Intercourse by force and against her will includes, but is not limited to, any intercourse which occurs in the following situations:

(1) Where the female is unconscious; or

(2) Where the female is so mentally deranged or deficient that she cannot give effective consent to intercourse.

(b) Sexual intercourse occurs when ther is any penetration of the female sex organ by the male organ.

(c) Penalty. A person convicted of rape shall be imprisoned in the penitentiary for any indeterminate term with a minimum of not less than one year.

38 Section 11-2. Deviate Sexual Conduct.

"Deviate sexual conduct", for the purpose of this Article, means any act of sexual gratification involving the sex organs of one person and the mouth or anus of another.

38 Section 11-3. Deviate Sexual Assault.

(a) Any person of the age of 14 years and upwards who, by force or threat of force, compels any other person to perform or submit to any act of deviate sexual conduct commits deviate sexual assault.

(b) Penalty. A person convicted of deviate sexual assault shall be imprisoned in the penitentiary from one to 14 years.

38 Section 11-4. Indecent Liberties with a Child.

(a) Any person of the age of 17 years and upwards who performs or submits to any of the following acts with a child under the age of 16 commits indecent liberties with a child:

(1) Any act of sexual intercourse; or

(2) Any act of deviate sexual conduct; or

(3) Any lewd fondling or touching of either the child or the person done or submitted to with the intent to arouse or to satisfy the sexual desires of either the child or the person or both.

Text of Illinois Criminal Code of 1961, Cont'd.

(b) It shall be an affirmative defense to indecent liberties with a child that:

(1) The accused reasonably believed the child was of the age of 16 or upwards at the time of the act giving rise to the charge; or

(2) The child is a prostitute; or

(3) The child has previously been married.

(c) Penalty. A person convicted of indecent liberties with a child shall be imprisoned in the penitentiary from one to 20 years.

38 Section 11-5. Contributing to the Sexual Delinquency of a Child.

(a) Any person of the age of 14 years and upwards who performs or submits to any of the following acts with any person under the age of 18 contributes to the sexual delinquency of a child:

(1) Any act of sexual intercourse; or

(2) Any act of deviate sexual conduct; or

(3) Any lewd fondling or touching of either the child or the person done or submitted to with the intent to arouse or to satisfy the sexual desires of either the child or the person or both; or

(4) Any lewd act done in the presence of the child with the intent to arouse or to satisfy the sexual desires of either the person or the child or both.

(b) It shall not be a defense to contributing to the sexual delinquency of a child that the accused reasonably believed the child to be of the age of 18 or upwards.

(c) Penalty. A person convicted of contributing to the sexual delinquency of a child shall be fined not to exceed $1,000 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both.

See: Commission Minutes
7/19/69, p. 2, Vol. IX
Tapes 33 and 34

CRIMINAL LAW REVISION COMMISSION
311 Capitol Building
Salem, Oregon

ARTICLE 13. SEXUAL OFFENSES

AMENDMENTS TO:

Preliminary Draft No. 1; January 1969

(As proposed by Subcommittee No. 2, May 3, 1969)

Reporter: Donald L. Paillette

Subcommittee No. 2

ARTICLE 13 . SEXUAL OFFENSES

Amendments to:
Preliminary Draft No. 1; January 1969

On page 5, subsection (2) of section 2 is amended to read:

(2) Mistake as to age. In any prosecution under this article in which the criminality of conduct depends on a child's being below the age of twelve, it is no defense that the actor did not know the child's age or that he reasonably believed the child to be older than the age of twelve. When criminality depends on the child's being below a specified age other than twelve, it is a defense for the actor to prove by a preponderance of the evidence that he reasonably believed the child to be above the specified age at the time of the act giving rise to the charge.

# # #

On page 5, subsection (3) of section 2 is amended to read:

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

# # #

On page 22, section 3, delete optional subsection (2).

# # #

On page 22, subsection (2) of section 5 is amended to read:

(2) the female is less than twelve years of age; or

# # #

On page 34, subsection (2) of section 8 is amended to read:

(2) the victim is less than twelve years of age.

Add subsection (3) to section 8:

(3) the victim is less than sixteen years of age and is the actor's brother or sister, of the whole or half-blood, his son or daughter or his spouse's son or daughter.

# # #

On page 45, subsection (2) of section 9 is amended to read:

(2) In any prosecution under this section it is a defense for the actor to prove that:

(a) The alleged victim's lack of consent was due solely to incapacity to consent by reason of being less than sixteen years of age; and

(b) The alleged victim was more than fourteen years of age; and

(c) The actor was less than four years older than the alleged victim.

# # #

On page 45, subsection (1) of section 10 is amended to read:

(1) the victim is less than twelve years of age; or

# # #