See: Minutes of Subcommittee on
Grading & Sentencing
4/5/70, p. 45, Vol. X
Tape #56

CRIMINAL LAW REVISION COMMISSION
311 Capitol Building
Salem, Oregon

ARTICLE 13. SEXUAL OFFENSES

Tentative Draft No. 1; February 1970

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ARTICLE 13. SEXUAL OFFENSES

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

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

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

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

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

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

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

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

(8) "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.

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

COMMENTARY - SEXUAL OFFENSES; DEFINITIONS

This section contains definitions for nine terms that are used in the draft in later sections. Each will be discussed further within the context of the other sections.

Subsection (1) is designed to remove any uncertainty as to what conduct falls within the meaning of "deviate sexual intercourse." It includes all acts of anal or oral intercourse (fellatio, cunnilingus and sodomy) between human beings but does not include sexual conduct between married persons or intercourse with animals (bestiality) or with dead bodies (necrophilia). Source of this definition is Michigan Revised Criminal Code section 2301 (b).

Subsection (2) defines "female" as a female person who is not married to the actor. This excludes sexual activity between husband and wife from this Article. If there is a decree of separation from bed and board, a couple is considered not married for the purposes of the definition. The matter of sexual conduct between two persons living together as husband and wife without benefit of legal marriage is not covered by the definition but is dealt with as an affirmative defense under section 4, infra. The definition is drawn from Michigan Revised Criminal Code section 2301 (d).

"Forcible compulsion" is defined in subsection (3) to include threats that place the victim in fear of immediate death, 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 for a sex crime based upon forcible compulsion. Thus a person who submits to a sexual act because of, for example, a threat made by the actor to expose a theft the victim had committed, is not forcibly compelled within the meaning of this definition. Such an act, however, might constitute assault or coercion. The definition is derived from Michigan Revised Criminal Code section 2301 (h).

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. The definition is taken from Michigan Revised Criminal Code section 2301 (e).

Subsection (5) defines 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 other 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 it be administered without the victim's consent. If the victim is rendered completely unconscious, he then falls within the definition of "physically helpless" in subsection (6). Source of this definition is Michigan Revised Criminal Code section 2301 (f).

"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. Examples of persons covered by the definition would be one who is in a state of sleep as a result of drugs or one who is a total paralytic. The definition is the same as Michigan Revised Criminal Code section 2301 (g).

Subsection (7) defines "public place," a term used in the statements of the crimes of accosting for deviate purposes and public indecency (ss. 16, 17, infra). The definition also appears in Article ___, Riot, Disorderly Conduct and Related Offenses. With minor changes, the definition is taken from New York Revised Penal Law section 240.00 (1).

The term "sexual contact" defined in subsection (8) applies to acts of heterosexual or homosexual genital manipulation, and to acts such as the nonconsensual fondling of a woman's breast. The term does not include the inadvertent touching of the intimate parts of another person. The definition includes the phrase "for the purpose of arousing or gratifying the sexual desire of either party." Under this definition, for the crime of sexual abuse the prosecution will need to prove (1) the touching and (2) that the touching was for the purpose of gratifying sexual desire.

Subsection (9) defines the term "sexual intercourse" as having its ordinary meaning. Thus, it may occur without orgasm or complete penetration of the penis into the vagina. Emission is not required. The definition is from Michigan Revised Criminal Code section 2301 (a).

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Section 2. Lack of consent. A person is considered incapable of consenting to a sexual act if he is:

(1) Less than 18 years of age; or

(2) Mentally defective; or

(3) Mentally incapacitated; or

(4) Physically helpless.

COMMENTARY - LACK OF CONSENT

A. Summary

Lack of consent is the common denominator for all the crimes proscribed in this Article. This section 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 considered to be incapable of consenting as a matter of law; and (3) when the victim does not acquiesce in the actor's conduct.

A person is less than 18 years of age, within the meaning of subsection (2) (a) if he has not reached his 18th birthday, that is, up to and including the day before his 18th birthday. This age sets the basic dividing line between criminal and noncriminal conduct of both a heterosexual and a homosexual character.

B. Derivation

This section is adapted from section 130.05 of the New York Revised Penal Law. Subsection (2) of that section has not been incorporated into this draft because in the instances other than where the victim is considered incapable of giving consent the question of lack of consent would be determined by the trier of fact.

C. Relationship to Existing Law

The effect of the draft is to provide 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, sexual abuse or sexual misconduct, 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 nonconsent, 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 P2d 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 16 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. Other sex offenses involving youthful victims are discussed in the commentary to section 14 infra.

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," (section 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," (section 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," (section 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 classify a person as "feeble minded" was discussed in the annotation at 93 ALR 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 NW 225 (1919), or so defective as to lack power to give or withhold consent, Lee v. State, 43 Tex Crim Rep 285, 64 SW 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 CJS, Rape, s. 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."

The section 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 require 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 P2d 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.

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

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

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

COMMENTARY - IGNORANCE OR MISTAKE AS A DEFENSE

A. Summary

(1) 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 10 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 12 years of age at the time of the act giving rise to the charge, no defense is allowed since:

(a) A child of such age would be considerably below the age of sexual pursuit by normal males;

(b) Sexual conduct with a child below this age can be extremely dangerous, both physically and mentally to the child;

(c) In such cases there is high probability that the actor has some mental aberration.

(2) 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. A defense under either subsection (2) or subsection (3) is an "affirmative defense," which, as defined in the proposed code, requires the defendant to prove the defense by a preponderance of the evidence.

B. Derivation

Subsections (1) and (2) are adapted from Model Penal Code section 213.6 (1).

Subsection (3) is derived from New York Revised Penal Law section 130.10.

C. Relationship to Existing Law

Section 3 provides for the limited defense of mistake as to age. Until the decision in People v. Hernandez, 61 Cal 2d 529, 39 Cal Rptr 361, 393 P2d 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.

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 does not disrupt Oregon case law and provides a clear legislative showing of the intent to allow such a defense. See 44 Or L Rev 243 for possibility of following the Hernandez decision under the present Oregon statutory scheme.

Section 3 also 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.

Sexually promiscuous complainants. Preliminary Draft No. 1 contained a provision allowing the limited defense that the alleged victim was, prior to the time of the offense charged, a prostitute. (P. D. No. 1, s. 2 (5), pp. 5, 6). This provision has been deleted by action of the Commission.

Prompt complaint. Preliminary Draft No. 1 provided that no prosecution could be instituted or maintained under the Sex Offenses Article unless the alleged offense was brought to the notice of public authority within three months after its occurrence or, where the victim was less than 16 years old or otherwise incompetent, within three months after a parent, guardian or other competent person learned of the offense. (P. D. No. 1, s. 2 (6), p. 6). This provision has been deleted by action of the Commission.

Corroboration. 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 s. 2061 (3d ed 1940); 60 ALR 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.

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

COMMENTARY - RELATIONSHIP OF PARTIES AS A DEFENSE

The foundation of this section was recognized in State v. Blackwell, 241 Or 528, 407 P2d 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 666, 7 P2d 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." At 529-531.

Section 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. (See section 1, subsection (2), supra).

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.

The section is intended to provide a defense if the defendant is charged with personally committing the act, but is not meant to change the rule in the Blackwell case that a husband can be guilty of rape by forcing his wife to have intercourse with another. A husband or a man cohabiting with a woman in a "husband and wife" relationship can be criminally liable for the conduct of another, and, consequently, guilty of rape or other sexual offense under the provisions of the Article on Parties to Crime if he aids or abets another person in committing the offense.

Section 4 would repeal ORS 167.015, lewd cohabitation.

A defense under section 4 is an "affirmative defense," which, as defined in the proposed code, requires the defendant to prove the defense by a preponderance of the evidence.

# # #

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

COMMENTARY - DEFENDANT'S AGE AS A DEFENSE

A. Summary

This section allows the age of the defendant to be a defense to a prosecution for certain sex offenses in which the victim's lack of consent was due solely to incapacity by reason of being less than a specified age. The defense would apply to the following:

Rape in the third degree (section 6 infra). An example of the application of the defense would be in the case of a 15 year old female victim and a 17 year old defendant.

Rape in the second degree (section 7 infra). For instance, it would be a good defense to such a charge if the female victim were 13 1/2 and the defendant were 16.

Sodomy in the third degree (section 9 infra) and Sodomy in the second degree (section 10 infra). The same principles that allow the defense to second and third degree rape would apply.

Note that the defense of age is not available in any prosecution for first degree rape or first degree sodomy (sections 8, 11 infra) or for a prosecution brought under subsection (1) of section 7 or subsection (1) of section 10, where the basis for the second degree offense is not the

victim's age, but rather, incapacity by reason of mental defect, mental incapacitation or physical helplessness. Nor would the defense be available in a prosecution for contributing to the sexual delinquency of a minor (section 14, infra) or for sexual misconduct (section 15, infra).

Contrary to sections 4 and 5 in which the burden of proof is placed on the defendant to establish reasonable mistake or relationship of the parties by a preponderance of the evidence, this section is cast in terms that would require the defendant to raise the defense and go forward with the evidence, but the burden of proof would not shift from the state.

B. Derivation

This section is new. It embodies the same rationale as the Model Penal Code (ss. 213.3, 213.4), New York Revised Penal Law (ss. 130.25, 130.30, 130.40, 130.45) and Michigan Revised Criminal Code (ss. 2311, 2312, 2316, 2317, 2322), all of which require the defendant to be of a specified age in relation to the age of the victim. However, the technique of casting the defendant's age in terms of a defense, instead of as part of the definitive statement of the crime itself, permits a simpler format and should leave no doubt that the defendant's age is not intended to be an element of the crime to be pleaded by the state.

The purpose of the section is to attempt to avoid punishing adolescent sexual experimentation as a felony where the actor is less than three years older than the minor and where there is no forcible compulsion or mental or physical incapacity involved.

C. Relationship to Existing Law

Under Oregon case law it is not necessary in a prosecution for statutory rape to allege the age of the defendant as being over 16 years because it is considered as being a matter of defense. State v. Knighten, 39 Or 63, 64 P 866 (1900); State v. Nesmith, 136 Or 593, 330 P 356 (1931); State v. Cole, 244 Or 455, 418 P2d 844 (1966).

Sexual Impotency. An area not considered in the proposed draft is the defense of impotency. 75 CJS, Rape, s. 6, pp. 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 ALR 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 14. 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 14. In State v. Knighten, 39 Or 63, 64 P 866 (1900), 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."

# # #

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

Existing Law
ORS 163.210
163.220
167.050

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

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

(2) The female is less than 14 years of age.

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

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

(2) The female is less than 12 years of age; or

(3) The female is less than 16 years of age and is the male's sister, of the whole or half blood, his daughter or his wife's daughter.

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 Model Penal Code:

> "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, s. 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; 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
3rd degree	(rape (sodomy	Under 16
2nd degree	(rape (sodomy	Under 14
1st degree	(rape (sodomy	Under 12

Rape in the third degree is committed if a male has sexual intercourse with a female less than 16 years of age. The age difference is substantial enough to designate intercourse of this nature as rape. If the female is less than 14 years of age it is rape in the second degree, and if the female is less than 12 years of age the offense is raised to rape in the first degree.

Rape in the second degree also 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 1 of the draft are directly incorporated into section 7. "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. (See section 3 supra).

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. There seems to be no logical reason for such a distinction and the disparity in sentencing which could result from such a distinction would be unjustified and indefensible. 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 14 years of age. 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 14 years of age at the time the offense was committed.

Rape in the first degree is limited to the following forms of rape:

(1) Where the female is subjected to forcible compulsion by the male.

(2) Where the female is less than 12 years of age.

(3) Where the female is less than 16 and is the male's sister, of the whole or half blood, or his daughter or stepdaughter.

In 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 (3)) is directly incorporated into this section. No defense of mistake of age is allowed where the victim is less than 12 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 Model Penal Code 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 aggression 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, s. 207.4, T. D. #4, pp. 256-257).

B. Derivation

Section 6 is adapted from section 130.25 of the New York Revised Penal Law and section 213.3 (1) (a) of the Model Penal Code. The age of the female was set at 16.

Section 7 is adapted from sections 130.25 (1), 130.30 and 130.35 (2) of the New York Revised Penal Law.

Section 8 is adapted from section 130.35 of the New York Revised Penal Law. The age of the female was raised by the Commission from 11 to 12.

C. Relationship to Existing Law

The proposed draft divides the crime of rape into three degrees. In the absence of statute there are no degrees to the crime of rape. 75 CJS, Rape, s. 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 10 years forcibly and without her consent. 75 CJS, Rape, s. 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, PC (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. CJS, supra at 471.

Only one of these elements, sexual intercourse or carnal knowledge, is required by section 6 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 10 to 16 and it modifies the present statutory definition to the extent that the age of the male is not set out in the statement of the crime.

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 present law, proof of some penetration is necessary. State v. Poole, 161 Or 481, 90 P2d 472 (1939); State v. Hoffman, 236 Or 98, 385 P2d 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 P2d 1116 (1958); State v. Pace, 187 Or 498, 212 P2d 755 (1949). 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 P2d 172 (1964).

Section 7 (2) of the proposed draft differs from common law also in that only intercourse between a female of 14 and a male is required. Force and lack of consent are not required. Thus, with the modification of the age difference, sections 6 and 7 (2) are essentially the same.

Section 7 (1) 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 8 (1) and (2) in part restates the common law definition of rape, i.e., sexual intercourse with a female by forcible compulsion and against her will. (At common law sexual intercourse with a female under 10 was rape. The draft raises the age to 12.) 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:

> " . . . 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 P2d 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 section 1 (9) 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 418 (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 existence 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, s. 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., s. 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 'the 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 P2d 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 RCL 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 in Oregon as constituting "forcible compulsion." See section 1 (3) of the proposed draft. Its allowance of the threat or 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 8 makes intercourse with a female under 12 years of age rape in the first degree regardless of force or consent. This modifies 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 constituent 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. (See commentary to section 14, infra).

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. Gauthier, supra; State v. Hilton, 119 Or 441, 249 P 1103 (1926); State v. Nesmith, supra. The proposed draft, because of the definition of "female," would require that such an allegation be stated in the indictment.

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 16 years. 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 P2d 844 (1966).

Subsection (3) of section 8 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 8 would not state two crimes, rape and incest.

The crime of incest is not covered in this Article, but for purposes of organization of the proposed code, is placed in the Article on Offenses Against the Family.

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 16. As punishment for a father or stepfather who takes advantage of a consenting daughter or stepdaughter, this is not an excessive classification. State v. Gidley, 231 Or 89, 371 P2d 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 9. Sodomy in the third degree. A person commits the crime of sodomy in the third degree if he engages in deviate sexual intercourse with another person less than 16 years of age or causes that person to engage in deviate sexual intercourse.

Existing Law
ORS 167.040

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

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

(2) The victim is less than 14 years of age.

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

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

(2) The victim is less than 12 years of age; or

(3) The victim is less than 16 years of age and is the actor's brother or sister, of the whole or half blood, his son or daughter or his spouse's son or daughter.

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 lawmaker 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 is covered by sections 16 and 17, infra, or by the Articles dealing with prostitution and disorderly conduct.

The proposed draft, therefore, excludes from the criminal law all sexual practices not involving force, adult corruption of minors, or public offenses and all sexual practices between married persons and consenting adults. As stated in the comments to section 207.5 of the Model Penal Code:

> "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, s. 207.5, T. D. #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 nonmarital 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 Model Penal Code 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, s. 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 6, rape in the third degree, parallels section 9, 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 Model Penal Code 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 (1), 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 Ann Stat, Commentary to ch 38, s 11-2.

B. Derivation

Section 9 is adapted from section 130.40 of the New York Revised Penal Law and section 213.3 (1) (a) of the Model Penal Code.

Section 10 is adapted from sections 130.40 (1), 130.45 and 130.50 (2) of the New York Revised Penal Law.

Section 11 is adapted from section 130.50 (1) and (3) of the New York Revised Penal Law.

The age of the victim was raised by the Commission from 11 to 12.

C. Relationship to Existing Law

Sections 9, 10 and 11 of the proposed draft define 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 P2d 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 latter two paragraphs of this statement from State v. Start present 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 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 CJS, 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 statue 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 synonymous, 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 page 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 intentionally 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 P2d 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 intention of the draft 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, 240 Or 310, 312, 401 P2d 30 (1965).

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 P2d 1152 (1936); State v. Ewing, 174 Or 487, 149 P2d 765 (1944); State v. Nice, 240 Or 343, 401 P2d 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 13 year old was an accomplice to the crime of sodomy. The court applied the common law rebuttable presumption that children between seven and 14 years of age are without criminal capacity. The court then ruled that whether an infant prosecuting witness of 13 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 the jury did determine that he was an accomplice, it was then to apply the evidentiary requirement of corroborative proof of the commission of the crime.

In State v. Stanley, supra, the defendant was convicted of the crime of sodomy committed orally upon or with a 15 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 16 may or may not be an accomplice. However, the court made no reference to the common law 14 year old presumption and ruled that it was a jury question whether the child of 15 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 12 year old participant in a violation of ORS 167.040 may or may not be an accomplice. The court, at pages 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 offenses 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 include cunnilingus whereas sodomy per os or per anum, as implying the necessity of penetration, may not.

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 16 and is not mentally defective, mentally incapacitated or physically helpless. Deviate sexual intercourse with a person over 16 but less than 18 would be covered by section 14, infra. 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 16 as the age of consent would make impossible a finding that a person below that age was an accomplice. This result clearly affects 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 16 the age under which an infant would be deemed incapable of criminal capacity. This would overrule State v. Nice, supra, and State v. Ewing, supra. 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 12 and 16.

# # #

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

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

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

(2) In any prosecution under subsection (1) of this section it is an affirmative defense for the actor to prove that:

(a) The victim's lack of consent was due solely to incapacity to consent by reason of being less than 18 years of age; and

(b) The victim was more than 14 years of age; and

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

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

(1) The victim is less than 12 years of age; or

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

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 Tentative 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 (8) and directly incorporated into sections 12 and 13 proscribes any nonconsensual salacious "touching" of a person's sexual or other intimate parts. An actual touching is required. Indecent proposals and obscene gestures are treated in the Article relating to disorderly conduct. (Also, see accosting for deviate purposes, section 16, infra).

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 12, 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 12 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 "petting party" between a 14, 15 or 16 year old "victim" and another young though criminally responsible person of slightly greater age. The age of criminal responsibility is 14 in the proposed code. (Responsibility; Tent. Draft No. 1).

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

(1) The victim is less than 12 years of age; or

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

B. Derivation

Section 12 is adapted from section 130.55 of the New York Revised Penal Law. Subparagraph (b) of subsection (1) has been added by your reporter to this section.

Section 13 is adapted from section 130.65 of the New York Revised Penal Law.

C. Relationship to Existing Law

Sections 12 and 13 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 Commission 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 P2d 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."

The offense of sexual abuse, insofar as it relates to children as victims, is intended to reach conduct that was held to be violative of ORS 167.210 (contributing to the delinquency of a child) prior to the decision in State v. Hodges. (The Hodges case is discussed further in commentary to section 14, infra.)

Proof of "contributing" previously required only proof of an act which had a "manifest tendency" to cause a child to become delinquent, as that term is defined in ORS 419.476 (c).

State v. Hoffman, 236 Or 98, 385 P2d 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 P2d 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.

The proposed draft places 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 alters the former effect of the contributing statute as applied to sexual contact by providing a defense if the child is between 14 and 18 and the actor is less than four years older than the alleged victim.

# # #

Existing Law

ORS
167.030
167.210

Oregon Laws
1969 ch. 655

Section 14. Contributing to the sexual delinquency of a minor. A person 18 years of age or older commits the crime of contributing to the sexual delinquency of a minor if:

(1) Being a male, he engages in sexual intercourse with a female less than 18 years of age; or

(2) Being a female, she engages in sexual intercourse with a male less than 18 years of age; or

(3) He engages in deviate sexual intercourse with another person less than 18 years of age or causes that person to engage in deviate sexual intercourse.

COMMENTARY - CONTRIBUTING TO THE SEXUAL DELINQUENCY OF A MINOR

A. Summary

This provides for three types of criminal sexual activity by persons over 18 with persons less than 18 years of age. The first is sexual intercourse by a male with a female less than 18 (subsection (1)).

The second subsection covers sexual intercourse by a female with a male who is less than 18.

Subsection (3) deals with deviate sexual intercourse with a person under 18. Deviate sexual intercourse is defined in section 1 of the draft as conduct consisting of contact between the sex organs of one person and the mouth or anus of another. Therefore, the subsection also includes male - female contacts of this nature if a person less than 18 years of age is involved.

The primary purpose of the section is to take care of those situations involving minors who are above the age of 16 and below 18. In the cases where the minor is a female the male could be prosecuted now under the seldom used fornication statute (ORS 167.030) or, before the decision in State v. Hodges was handed down, for contributing to the delinquency of a minor under ORS 167.210. Cases involving males below the age of 18 also were covered by the broad sweep of the latter statute.

B. Derivation

The section is drawn from Michigan Revised Penal Code section 2305 (sexual misconduct); however, the minimum age is raised from 16 to 18 and in subsection (3) the language "or causes that person to engage in deviate sexual intercourse" has been added.

C. Relationship to Existing Law

As noted in earlier commentary, the draft repeals the offense of fornication. State v. Gilson, 113 Or 202, 232 P 621 (1925), 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." At 206.

As the quoted language implies, fornication is not a common law crime. [See Perkins, Criminal Law, 328, 330 (1957)].

State v. Mallory, 92 Or 133, 180 P 99 (1919), enumerates 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." At 138.

As noted before, the Supreme Court in State v. Hodges, 88 Or Adv Sh 721, ___ Or ___, 457 P2d 491 (1969), held ORS 167.210 (contributing to the delinquency of a minor) unconstitutional "on its face" because of vagueness.

Although the statute is no longer a viable force in Oregon law, an examination of it and the cases decided under it is necessary for a complete understanding of the far-reaching consequences of the Hodges decision.

Since "delinquency" was unknown to the common law, the court must look exclusively to the statute for the definition of this offense. State v. Dunn, 53 Or 304, 99 P 278 (1909).

ORS 167.210 provides:

> "When a child is delinquent as defined by any statute of this state, any person responsible for, or by any act encouraging, causing or contributing to the delinquency of such child, or any person who by threats, command or persuasion, endeavors to induce any child to perform any act or follow any course of conduct which would cause it to become a delinquent child, or any person who does any act which manifestly tends to cause any child to become a delinquent child, shall be punished upon conviction by a fine of not more than $1,000, or by imprisonment in the county jail for a period not exceeding one year, or both, or by imprisonment in the penitentiary for a period not exceeding five years."

ORS 167.210 fixes a penalty for contributing to delinquency, but it does not itself define delinquency. It instead refers to a " . . . delinquent child as defined by any statute of this state . . . " ORS 418.205 provides that to determine what acts constitute delinquency paragraphs (a) to (e) of subsection (1) of ORS 419.476 must be consulted.

ORS 418.205 (2) provides, unless the context requires otherwise, that the definition of delinquency and dependency is the same as that set out in ORS 419.476 (1) which gives the juvenile court jurisdiction. ORS 419.476 defines as a delinquent a person who is under 18 years of age and:

> "(a) Who has committed an act which is a violation, or which if done by an adult would constitute a violation, of a law or ordinance of the United States or a state, county or city; or
>
> "(b) Who is beyond the control of his parents, guardian or other person having his custody; or
>
> "(c) Whose behavior, condition or circumstances are such as to endanger his own welfare or the welfare of others; or
>
> . . .
>
> "(f) Who has run away from home."

Paragraphs (d) and (e) have been omitted because they deal with the definition of dependency rather than delinquency. State v. Harmon, 225 Or 571, 358 P2d 1048 (1961). Although ORS 418.205 refers to paragraphs (a) through (e) of ORS 419.476 for the definition of delinquency, at the time it was enacted paragraph (e) referred to runaways. Subsequently ORS 419.476 was amended to add what is now paragraph (e) and paragraph (f) which now cover runaways. State v. Day, 242 Or 559, 410 P2d 1018 (1966), points up how this amendment process confused the state of the statute. The court, following the legislative history of the statutes involved, stated:

> "ORS 167.210 makes it a felony to contribute to the delinquency of a minor and provides that we shall look to the other statutes of this state for a definition of 'delinquent child'. ORS 418.205 states that we shall look to paragraphs (a) through (e), Section (1), ORS 419.476 for statements of what acts or conditions make a child delinquent or dependent. ORS 419.476 lists the categories of children within the jurisdiction of the juvenile court. At the time ORS 418.205 was enacted paragraph (e), Section (1), ORS 419.476 read, 'one who has run away from his home.'

> Subsequent to the enactment of ORS 418.205, Section (1), ORS 419.476 was amended to add a new category and the reference to a child 'who has run away from his home' is now paragraph (f). The legislature . . . did not concurrently amend ORS 418.205 to include paragraph (f), Section (1), ORS 419.476. Under the circumstances of this case we need not decide whether a runaway is presently within the definition of a 'delinquent child'." Id. at 560-61.

ORS 167.210 specifies three general kinds of conduct, any one or all of which constitute the crime of contributing. The crime may be committed by: (1) Causing a child to become an actual delinquent; (2) Persuading a child to perform any act or follow a course of conduct that would cause it to become delinquent; or (3) Doing an act which manifestly tends to cause a child to become a delinquent. State v. Palmer, 232 Or 300, 375 P2d 243 (1962).

The word "child" in the contributing statute has been judicially interpreted to mean an unmarried child of either sex under the age of 18. State v. Eisen, 53 Or 297, 99 P 282, 100 P 257 (1909), states the reasons for this construction:

> "Statutes previously enacted permit the marriage, with the consent of her parents, of any female over 15, and under 18, years of age after which all parental control ceases. In other words, the child then loses its legal status as such, and does not come within the term 'child' as contemplated by the juvenile act; the law conclusively presuming the guardianship of the State under such circumstances to be unnecessary." Id. at 302.

State v. Gates, 98 Or 110, 193 P 197 (1920), relied on the decision in Eisen to require an allegation in the indictment that the minor was not married.

The phrase "any person" as used in the statute and defined in ORS 167.205 to include parents, guardians or other persons having the care or custody of the child is not limited in its application to such persons who owe a legal duty to the child. The statute's terms and purposes are sufficiently broad to invoke its protection against the wrongs of those who do not stand in loco parentis. The fact that the definition of "person" includes persons owing a

legal duty to the child does not exclude its application to all others. State v. Eisen, supra; State v. Hutchison, 222 Or 533, 353 P2d 1047 (1960).

The statute apparently was not intended to apply to other juveniles, since the Oregon court has impliedly scoffed at the notion that a juvenile could contribute to the delinquency of a juvenile. State v. Everson, 231 Or 15, 19, 371 P2d 672 (1962). For similar reasons a child is not an accomplice to the crime. State v. Harvey, 117 Or 466, 242 P 440 (1926); State v. DuBois, 175 Or 341, 153 P2d 521 (1944); State v. Holleman, 225 Or 1, 357 P2d 262 (1960). Addressing itself to the issue of whether the child was an accomplice, State v. DuBois, supra at 349, states:

> "Certainly it can not reasonably be contended that the girl could be prosecuted for a violation of the statute governing the delinquency of minors and, after all, that is the test as to whether she was an accomplice."

ORS 167.210 "nowhere requires proof of a specific intent to cause the child to become a delinquent child, even though that intent may exist." State v. Hoffman, 236 Or 98, 285 P2d 741 (1963). Rather the crime denounced requires only a willful act upon the part of the accused and the term "'willful' in connection with such crimes . . . means nothing more than that the accused must have acted wittingly; that is, that there was a union or concert of action between his intent and his act. It does not, however, require an intention upon his part to violate a law or injure another." State v. Doud, 190 Or 218, 225, 225 P2d 400 (1950).

Of the three alternative ways in which before Hodges the statute could have been violated, it is obvious that the third alternative listed by the court in State v. Palmer, supra, covered the broadest range of conduct and required the least nexus between the act of the adult and the potential delinquency of the child. Referring to the necessary elements needed to be established by an indictment drawn under this portion of the statute, the court in State v. Moore, 194 Or 232, 241 P2d 455 (1952), stated:

> " . . . it is necessary to allege and prove the specific act or acts relied upon as manifestly tending to cause delinquency . . . Of course, it is further necessary to prove that the act or acts so established manifestly tended to cause the child to become a delinquent. In other words, it

> is necessary to establish by the evidence: (1) one or more of the acts of misconduct specifically alleged, and (2) that such act or acts manifestly tended to cause the child to become delinquent." Id. at 239-40.

Thus, it was only necessary that the conduct of the adult tended to cause or encourage delinquency. It was not necessary to show that the child had in fact become delinquent. State v. Williams, 236 Or 18, 386 P2d 461 (1963). On the other hand it was not a defense to the charge that the child was in fact a delinquent before the commission of the acts which purportedly tended to cause the child to become delinquent. In State v. Caputo, 202 Or 456, 274 P2d 798 (1954), the indictment charged contributing in that the defendant "did then and there by threats, commands and persuasion induce and persuade the said Lila Victor to engage in prostitution . . . " Id. at 458. The defendant contended and the court found that the girl was a delinquent child 16 years of age when she met the defendant. The defendant, therefore, urged that it was impossible for the defendant to have caused her to "become" what she already was. In rejecting this argument the court stated:

> "A similar argument was considered by the Supreme Court of Washington . . . The court said: 'We think the word 'cause' may well be used with reference to acts which bring about or assist in the continuance of a state of delinquency as well as refer to the acts which bring about the initial delinquency.' State v. Strom, 144 Wash 334, 258 P 15."

Applying this definition of "cause" the court concluded that the prior delinquency of the child was irrelevant, saying:

> "It is unthinkable that the legislature intended that the waywardness of the child should be a defense to a man who attempts to lead her into a life of commercialized degeneracy." State v. Caputo, supra at 466.

It is readily apparent that when one combines the statutory statement of the crime of contributing resulting from the doing of an act which has a manifest tendency to cause a child to become delinquent with the definition of

delinquency found in ORS 419.476 (1), the result is a very broad definition of conduct which is criminal within the contributing statute. The contributing statute was drafted with that intent in order to reach the infinite variety of conduct which might tend to cause delinquency. The reason for such a broad definition was stated in State v. Stone, 111 Or 227, 226 P 430 (1924):

> "The arts of seduction are so varient and insidious, especially when applied to different individuals, that it is impossible as a matter of law to lay down any rule on the subject of what will or will not invariably tend to produce delinquency in all minors. An act which might lure one child into the paths of sin might prove repulsive and abhorrent to another, working an exactly opposite effect.
>
> "The statute has not defined any particular act as one which, as a matter of law, shall be deemed manifestly to tend to cause delinquency in a child. On questions of morals like those which are within the purview of the statute . . . it is not practical in legislation precisely to describe an act which shall be malum prohibitum." Id. at 235.

On the basis of this reasoning the Stone case held that the judge could not supplement the work of the legislature by providing a definition declaring any particular act to be criminal and left the jury to decide whether the particular conduct of the defendant was criminal in the circumstances attendant at the time in question. The court stated at page 236:

> "In view of the diverse factors that enter into such cases, it becomes a question of fact to be left to the jury . . . to determine from all the circumstances of the case as disclosed by the testimony whether the act, charged in the indictment as a fact to be proved, has the tendency condemned by the statute."

If the jury is to determine whether the act alleged in the indictment and proved at trial has the tendency to cause delinquency, the issue arises as to when it can be determined

if the indictment states a crime. State v. Ely, 237 Or 329, 390 P2d 348 (1964), summarizes the law relating to the sufficiency of an indictment charging contributing:

> " . . . State v. Casson . . . holds that the state may in general statutory language charge the crime of contributing to the delinquency of a minor and may then lay under the videlicet (to-wit:) as many specific constituent acts as the grand jury thinks the evidence will prove. Each act, however, must be an act of the character denounced by the statute and each act so pleaded must be part of the same criminal episode (State v. Palmer . . .) or scheme (State v. Casson, supra)." Id. at 331.

In such a situation, State v. Casson, 223 Or 421, 428, 354 P2d 815 (1960), held that before any evidence can be received on a charge or a specification in a multiple count indictment, the court must first decide that each of the charges states a crime.

State v. Iverson, 231 Or 15, 371 P2d 672 (1962), and State v. Peebler, 200 Or 321, 265 P2d 1081 (1954), establish some guideposts in assisting the judge in making this initial determination. In the Iverson case the court stated that ORS 167.210:

> " . . . requires the State to allege at least enough facts so that if the indictment is true the defendant could not be innocent . . . In the final analysis, however, the statute merely requires the State to allege facts, which, if proven, would entitle a jury to find that the defendant had committed acts prejudicial to the welfare of the child in certain limited particulars . . . " Id. at 17-18.

In Peebler, the court stated:

> "The requirement that the tendency to delinquency must be 'manifest' in the acts charged implies that those acts must be of such a character as to indicate of themselves a tendency to cause delinquency."

The requirement that the acts have a causative tendency toward the child would indicate that there must be some causal relationship between the acts of the adult and the

juvenile delinquency. The strength of this relationship is largely undefined but the Ohio court in State v. Crary, 10 Ohio App2d 26, 155 NE2d 262 (1959), indicated a necessity that they be committed in the "presence" of the child. See 5 Will L J 104, 111.

With the breadth of the definition of delinquency and the scope of the behavior that previously could have been considered as contributing to it, it is to be expected that a wide variety of conduct was prosecuted within its boundaries. However, categorizing this conduct on the basis of cases reported in Oregon, it is discovered that the conduct punished under the statute primarily involved sexual or sexually related acts. Indeed the Oregon legislature apparently viewed contributing to delinquency as a sex crime under ORS 167.050 which provides indeterminate sentences for any persons who have been previously convicted under one or more of several statutes including ORS 167.210. Conduct secondarily involved in contributing prosecutions related to liquor activities. (E.g., State v. Gordineer, 229 Or 105, 366 P2d 161 (1961)). Also, one reported case involved the use of drugs (State v. Holleman, 225 Or 1, 357 P2d 262 (1960)), and one other case related to the child's environmental surroundings (State v. Casson, supra).

The specific sexual conduct involved includes:

(1) Having or attempting to have sexual intercourse with a child, State v. Dunn, supra; State v. DuBois, supra; State v. Harmon, 225 Or 571, 358 P2d 1048 (1961); State v. Hoffman, supra; State v. Day, supra; State v. Gates, supra. It has also been held that one who aids and abets another to have sexual intercourse with a minor is guilty of contributing to the delinquency of that minor. State v. Glenn, 233 Or 566, 379 P2d 550 (1963);

(2) Inducing the child to become a prostitute, State v. Caputo, supra;

(3) Procuring or supplying drugs for the purposes of abortion, State v. Eisen, supra; and State v. DuBois, supra;

(4) Exposing of private parts to a child, State v. Nagel, 185 Or 486, 202 P2d 640 (1949);

(5) Manipulating or private parts of a child or inducing a child to manipulate the private parts of the defendant, or placing of defendant's private parts against

those of the child, State v. Dunn, supra; State v. Harvey, supra; State v. DuBois, supra; State v. Stone, supra; State v. Moore, 194 Or 232, 241 P2d 455 (1952); State v. Schell, 224 Or 321, 356 P2d 155 (1960); State v. Ely, supra; State v. Doud, supra;

(6) Being unclothed in bed with the child, State v. Iverson, supra; Lasly v. Gladden, 244 Or 349, 418 P2d 256 (1966);

(7) Taking the child to the home of a man known to be a promiscuous homosexual, State v. Casson, supra; and

(8) "French kissing", Bonnie v. Gladden, 240 Or 462, 402 P2d 237 (1965). However, an indictment alleging merely that two people slept in a bed in the presence of four children was held not to charge acts manifestly tending to cause the children to become delinquent. State v. Peebler, supra at 327.

State v. Hodges overrules the Peebler-Casson doctrine, characterizing Casson as an attempt to "save" ORS 167.210, but holding that it cannot be saved when considered in the specific context of an assertion that the statute is unconstitutional "on its face." Hodges holds that regardless of what a person is told after he is charged with crime, a law fails to meet the requirements of the due process clause "if it is so vague and standardless that it leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." Supra at 725.

The legislature, anticipating the Hodges decision, enacted House Bill 1897 (Ch. 655, Oregon Laws 1969) in an attempt to cover specifically certain sex oriented misconduct with minors that formerly was within the purview of the catch-all language of ORS 167.210. The new statute reads as follows:

> "(1) Any person who lewdly fondles or manipulates the private parts of a child under the age of 18 or who induces or permits a child under the age of 18 to fondle or manipulate that person's private parts or who by threats, commands or persuasion endeavors to induce any such child to commit any crime or to participate in any act of sexual perversion with himself or with another

person shall be punished by a fine of not more than $1,000 or by imprisonment in the county jail for a period not to exceed one year, or both, or by imprisonment in the penitentiary for a period not to exceed five years.

"(2) Subsection (1) of this section shall not apply to acts between persons who are lawfully married to one another."

Indeterminate sentence for sex offenders. Not covered by the draft, and for present purposes need not be, is the indeterminate sentence for certain sex offenders. ORS 167.050 provides that a person convicted of violating either ORS 163.210, rape; 163.220, rape of daughter; 163.270, assault with intent to commit rape; 167.035, incest; 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 P2d 204 (1964), reveals the procedure for carrying out the commitment authorized by ORS 137.111. In that case the defendant, upon pleading guilty to an offense involving a child under 16 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 P2d 741 (1963). In the instant case a jury was not required."

Kloss v. Gladden, 233 Or 98, 377 P2d 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 P2d 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 P2d 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 144-147.

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 15. Sexual misconduct. A person commits the crime of sexual misconduct if he engages in sexual intercourse or deviate sexual intercourse with an unmarried person less than 18 years of age.

COMMENTARY - SEXUAL MISCONDUCT

The purpose of this section is to discourage premature ventures into sexual experiences by adolescents. The Commission anticipates that the offense will be graded a misdemeanor.

The defendant's age is irrelevant and the defense provided in section 5, supra, is not available in a prosecution under this section.

This section, then, represents the basic dividing line between criminal and noncriminal conduct of either a heterosexual or homosexual nature by prohibiting sexual intercourse or deviate sexual intercourse with an unmarried person less than 18 years of age.

# # #

Section 16. Accosting for deviate purposes. A person commits the crime of accosting for deviate purposes if while in a public place he invites or requests another person to engage in deviate sexual intercourse.

COMMENTARY - ACCOSTING FOR DEVIATE PURPOSES

A. Summary

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

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

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

B. Derivation

The section is based on Model Penal Code section 251.3.

C. Relationship to Existing Law

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

# # #

Section 17. Public indecency. A person commits the crime of public indecency if while in, or in view of, a public place he performs:

(1) An act of sexual intercourse; or

(2) An act of deviate sexual intercourse; or

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

Existing Law
ORS 167.145
161.310

COMMENTARY - PUBLIC INDECENCY

A. Summary

Indecent or lewd exposure of the person to the public view is a common law misdemeanor and it has been made a specific offense under many state statutes.

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

Subsection (3) requires an intent to arouse the sexual desire of the actor or another. An accidental or negligent exposure would not violate this section.

B. Derivation

The section is taken from Connecticut Revised Penal Code section 196 (1969).

C. Relationship to Existing Law

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

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

# # #

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.

ARTICLE 213. SEXUAL OFFENSES

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 MODEL PENAL CODE (Cont'd)

Section 213.1. Rape and Related Offenses.

(1) Rape. A male who has sexual intercourse with a female not his wife is guilty 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. Sexual intercourse includes intercourse per os or per anum, with some penetration however slight; emission is not required.

(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 supposes that he is her husband.

TEXT OF MODEL PENAL CODE (Cont'd)

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.

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.

(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.

TEXT OF MODEL PENAL CODE (Cont'd)

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 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.

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

TEXT OF MODEL PENAL CODE (Cont'd)

Section 213.4. (Cont'd)

(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.

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.

TEXT OF MODEL PENAL CODE (Cont'd)

Section 213.6. (Cont'd)

(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 ILLINOIS CRIMINAL CODE OF 1961

§ 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 there is any penetration of the female sex organ by the male sex 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. 1961, July 28, Laws 1961, p. 1983, § 11–1.

§ 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. 1961, July 28, Laws 1961, p. 1983, § 11–2.

§ 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. 1961, July 28, Laws 1961, p. 1983, § 11–3.

TEXT OF ILLINOIS CRIMINAL CODE OF 1961 (Cont'd)

§ 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.

(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. 1961, July 28, Laws 1961, p. 1983, § 11-4.

§ 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. 1961, July 28, Laws 1961, p. 1983, § 11-5.

# # #

TEXT OF NEW YORK REVISED PENAL LAW

§ 130.00 Sex offenses; definitions of terms

The following definitions are applicable to this article:

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. L.1965, c. 1030, eff. Sept. 1, 1967.

TEXT OF NEW YORK REVISED PENAL LAW (Cont'd)

§ 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.

L.1965, c. 1030; eff. Sept. 1, 1967; amended L.1965, c. 1038, § 1.

§ 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. L.1965, c. 1030, eff. Sept. 1, 1967.

§ 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. L.1965, c. 1030, eff. Sept. 1, 1967.

§ 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. L.1965, c. 1030, eff. Sept. 1, 1967.

TEXT OF NEW YORK REVISED PENAL LAW (Cont'd)

§ 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. L.1965, c. 1030, eff. Sept. 1, 1967.

§ 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. L.1965, c. 1030, eff. Sept. 1, 1967.

§ 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. L.1965, c. 1030, eff. Sept. 1, 1967.

§ 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. Added L.1965, c. 1038, § 2, eff. Sept. 1, 1967.

§ 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. L.1965, c. 1030, eff. Sept. 1, 1967.

TEXT OF NEW YORK REVISED PENAL LAW (Cont'd)

§ 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. L.1965, c. 1030, eff. Sept. 1, 1967.

§ 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. L.1965, c. 1030, eff. Sept. 1, 1967.

§ 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. L.1965, c. 1030, eff. Sept. 1, 1967.

§ 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. L.1965, c. 1030, eff. Sept. 1, 1967.

TEXT OF MICHIGAN REVISED CRIMINAL CODE (Cont'd)

[Lack of Consent]

Sec. 2330. (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.

[Mistake as to Consent]

Sec. 2331. (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.]

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TEXT OF NEW YORK REVISED PENAL LAW (Cont'd)

§ 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. L.1965, c. 1030, eff. Sept. 1, 1957.

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TEXT OF MICHIGAN REVISED CRIMINAL CODE

[Definitions]

Sec. 2301. The following definitions apply in this chapter:

(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.