Tapes #33 and 34

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OREGON CRIMINAL LAW REVISION COMMISSION
Room 315 Capitol Building
Salem, Oregon

July 19, 1969

A G E N D A

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OREGON CRIMINAL LAW REVISION COMMISSION
Eleventh Meeting, July 19, 1969

Minutes

Members Present: Senator Anthony Yturri, Chairman
Judge James M. Burns
Representative Wallace P. Carson, Jr.
Mr. Robert Chandler
Representative David G. Frost
Attorney General Lee Johnson
Mr. Frank D. Knight
Mr. Bruce Spaulding

Delayed: Mr. Donald E. Clark

Excused: Senator John D. Burns
Senator Berkeley Lent

Absent: Representative Douglas Graham
Representative Harl H. Haas

Staff: Mr. Donald L. Paillette, Project Director
Mr. Roger D. Wallingford, Research Counsel

Also Present: Professor Courtney Arthur, Willamette University College of Law
Mr. Donald R. Blensly, Yamhill County District Attorney; Member, District Attorneys' Association Criminal Law Revision Committee
Dr. George Suckow, Oregon State Hospital
Mr. Jacob Tanzer, Solicitor General, Department of Justice; Chairman, Oregon State Bar Committee on Criminal Law and Procedure
Mr. Clarence Zaitz, UPI

AGENDA: Report by Mr. Paillette on attendance at Seminar on Criminal Code Revision conducted at University of Michigan

Sexual Offenses; P. D. No. 1, January 1969, with amendments proposed by Subcommittee No. 2

The meeting was called to order by the Chairman, Senator Anthony Yturri, at 10:00 a.m. in Room 315, Capitol Building, Salem.

Report by Mr. Paillette on Criminal Code Revision Seminar

Mr. Paillette advised that during the week of June 23 through 27 he had attended a seminar on criminal code revision conducted at the University of Michigan under the joint sponsorship of the Institute of Continuing Legal Education and the Council of State Governments with his participation arranged and financed by the Law Enforcement Planning Section of the Governor's office.

Mr. Paillette explained the varying approaches used in criminal code revision by the 16 states represented at the seminar and outlined some of the problems encountered by certain states. In conclusion, he stated that the Oregon Act establishing the Criminal Law Revision Commission followed closely the concensus reached in the seminar workshops that the ideal revision organization would contain 13 to 15 members comprised of a representation from the state legislature, district attorneys, judges and the Attorney General balanced with a representation of public members and members of the Bar. The lecturers at the seminar, who were University faculty members and authorities in the field of criminal code revision, were agreed that there was much to be gained by attempting to maintain as much uniformity as possible with other recent code revisions, and the most intelligent approach was to take advantage of the language adopted by the Model Penal Code and the recodifications of other states wherever possible.

Mr. Chandler commented that in view of some of the problems other states had encountered in getting their criminal code revisions adopted by legislatures, it might be worthwhile to plan to conduct a seminar for the benefit of news media throughout the state to apprise and educate them concerning the basic philosophy of Oregon's proposed revision before it was called to the attention of the general public.

Absence of Professor Platt

Chairman Yturri explained that the draft on Responsibility, originally scheduled to be discussed at today's meeting, had been removed from the agenda because Professor Platt, Reporter for the Responsibility Article, had laryngitis and was unable to speak to the Commission.

Sexual Offenses; Preliminary Draft No. 1, January 1969

Mr. Paillette commented that the subject of sexual offenses was one of the most politically sensitive areas to be dealt with in the criminal code revision. Regardless of the Commission's ultimate decision on this Article, he said, the staff was of the opinion that they would not be fulfilling their responsibility if they failed to present a draft outlining the current trend in the law in this country, as well as other countries, which was to recognize that the

attempts of legislatures throughout the years to legislate morality and ethics had been abysmal failures. The Model Penal Code and recent code revisions recognized this fact and the principal change from existing law contained in this draft was the underlying premise that private, consensual sexual activity between consenting adults, whether heterosexual or homosexual, was not criminal.

Section 1. Sexual offenses; definitions. Mr. Paillette read section 1 of the draft and suggested that the Commission go through the subsequent sections to see how the definitions were applied before spending time in discussing the specific wording.

Following the discussion of section 2 Judge Burns called attention to subsection (5) of section 1 and asked what kind of situation was intended to be covered by the phrase "or to any other act committed upon him without his consent." Mr. Paillette replied that a person under hypnosis would constitute one example.

Mr. Spaulding asked why the subsection was limited to temporary incapability and was told by the Chairman that it was intended to refer to incapacity caused by hypnosis, narcotics or alcohol, all of which would be temporary in nature. Mr. Spaulding contended that if someone were able to permanently incapacitate another person with, for example, an overdose of narcotics, he too should be guilty of the offense.

Mr. Johnson moved adoption of the following language: "'Mentally incapacitated' means that a person is rendered incapable of appraising or controlling his conduct at the time of the offense because of the influence of a narcotic or intoxicating substance administered to him without his consent or because of any other act committed upon him without his consent." The motion was seconded and carried.

Section 2. Provisions generally applicable to Article ---, Sexual Offenses. Mr. Paillette read section 2 and called attention to the amendments to subsections (2) and (3) approved by Subcommittee No. 2 relating to mistake as to age and mistake as to consent.

Subsection (1). Lack of consent. Judge Burns referred to the phrase "deemed incapable of consenting" in subsection (1) and noted that the commentary reflected the fact that "deemed incapable" in this context was a conclusive presumption and not a disputable presumption. Because "deemed" had been a problem in the past, he suggested the commentary should clearly state that the phrase was intended to refer to a conclusive presumption.

Chairman Yturri suggested that "deemed" be deleted from the draft. Judge Burns so moved, Representative Frost seconded and the motion carried.

Subsection (4). Spouse relationships. Representative Frost referred to the phrase "under a decree of judicial separation" in subsection (4) and noted that this language would not cover, for example, a preliminary order of the court. After a brief discussion, Representative Frost moved that the sentence be amended to read: "The exclusion is inoperative as respects spouses living apart under an order or decree of judicial separation." The motion carried without opposition.

Judge Burns suggested that "under" might not be the precise word which should be used in the sentence just amended. He asked if the meaning was intended to be that the spouses were living apart "because of" or living apart "where there exists" an order or decree of judicial separation. Mr. Paillette replied that the intent was that the spouses were living apart "because of" the order or decree which had been entered by the court, thereby legally separating the couple. Where an informal separation existed, he said, they were still considered to be spouses.

Representative Carson commented that the court seldom interfered when the parties were under reconciliation although an order of separation was customarily in existence. Under the draft, he said, a spouse could conceivably commit a crime during the period of judicial reconciliation by raping his wife. Representative Frost remarked that the draft was changing the existing law which provided that a man could not be found guilty of raping his wife. Mr. Paillette agreed that if the spouses were legally separated, under the draft a man could be guilty of forcible rape upon his wife whereas this was not possible under present law.

Mr. Chandler suggested that the draft read "judicial order or decree of separation" rather than "order or decree of judicial separation". Representative Carson remarked that a "decree of judicial separation" was rare, with the restraining order being more commonly used by the courts.

The Commission discussed the use of "because of", "pursuant to" and "after" in place of "under". Representative Frost moved to insert "pursuant to a decree" in place of "under an order or decree". He believed it was a mistake to include "order" in the subsection and expressed the view that the exclusion in subsection (4) should apply only to a decree.

Mr. Paillette pointed out that the present statutory language was "a decree of separation from bed and board". Mr. Frost amended his motion to include the language suggested by Mr. Paillette: "pursuant to a decree of separation from bed and board". The motion was seconded and carried.

At a later point in the meeting Representative Frost noted that ORS 107.110 (1) stated: " . . . the decree shall not be effective in so far as it affects the marital status of the parties until the

expiration of 60 days from the date of the decree . . ." This, he said, constituted an ambiguity in the language approved by the Commission in subsection (4).

Mr. Paillette commented that since the subsection referred to the decree and the decree had legal effect by statute, the decree itself would govern.

Representative Carson maintained that it was impossible to resolve the problem raised by Representative Frost because ORS 107.110 was Oregon's attempt at an interlocutory decree. ORS 107.110, he said, discussed marital status, marital relationship and in effect made the state a party to an appeal, a situation which had never before been known in Oregon law. The statute had been frequently amended but the legislature had never faced or resolved the problem entirely. He expressed the view that the Commission would be wasting its time to try to make subsection (4) correspond to ORS 107.110, the parallel statute.

After further discussion, the Commission agreed that subsection (4) was intended to apply only to a decree of divorce that affected the marital status of the parties and the exclusion would not extend to the 60 day appeal period referred to in ORS 107.110.

Subsection (5). Sexually promiscuous complainants. Mr. Chandler inquired if the phrase "prior to the time of the offense charged" would refer to a reformed prostitute. Mr. Knight said he would interpret the phrase to mean that once the girl had been a prostitute, she was no longer under any protection of the law so far as this section was concerned.

Mr. Paillette called attention to the commentary on subsection (5) on pages 7 and 8 of the draft and indicated that the attempt was not to harass prostitutes; the provision was included to recognize that if the female's character was to be an issue in the case, the showing would be limited to proof that she had been a prostitute. The subsection, he added, did not apply to situations in which force was involved.

Chairman Yturri remarked that if subsection (5) were to be approved as drafted, the showing that the female had at one time been a prostitute should be limited to a period of time reasonably close to the time of the act.

Mr. Knight commented that subsection (5) was basically saying that if a 15 year old prostitute were involved, the crime would not be statutory rape; if it were forcible rape, the crime would fall under section 5 and the fact that she had been a prostitute would not be applicable.

Mr. Spaulding was of the opinion that subsection (5) would invite every defendant charged with statutory rape to destroy the character of the girl involved, particularly if she had been delinquent at an earlier age. The provision, he said, would make prosecution more difficult in every case. Mr. Knight agreed, adding that whenever there was physical evidence to prove the rape, the door would be opened to convince the court that the girl was not telling the truth.

Mr. Paillette indicated the ALI approach was that the purpose of a statutory rape statute was defeated by saying that the underage victim's chastity or her social reputation should be allowed to enter the case. The ALI recognized that there were a growing number of 14 year old girls engaged in prostitution who were the victimizers rather than the victims and the subsection was attempting to avoid the situation of a 14 year old prostitute being permitted to prosecute a man for statutory rape.

In reply to a question Mr. Paillette explained that "prostitute" was not defined in the Article on Sexual Offenses but would be defined in the Article on Prostitution and Related Offenses. Chairman Yturri read the proposed definition: "'Prostitute' means a male or female person who engages in sexual conduct for a fee."

Chairman Yturri pointed out that the discussion raised the policy question of whether it was better to eliminate the defense of consent to those under 16 years of age or to permit a man to be prosecuted successfully for having had relations with a known prostitute under 16.

Mr. Knight commented that assuming the Commission approved subsection (2), making a reasonable mistake as to age a defense, a man would have a good defense from that standpoint even if the 14 year old girl were a prostitute. If on the other hand the girl were obviously 11 or 12 years old, he was of the opinion that a defense of prostitution should not be available to a man even though she was in fact a prostitute.

Chairman Yturri noted that subsections (2) and (5) could constitute an inconsistency. Under this draft a man having relations with a 14 year old previously chaste girl who appeared to be 18 could be successful with his defense of mistake as to age whereas a man having relations with a 14 year old girl who looked 13 but who was actually a prostitute would not have the defense of mistake as to age and yet he could be found guilty of having relations with a prostitute under those circumstances. Mr. Knight reiterated his belief that a man 20 years old, for example, should not be having relations with a girl who was obviously 13 or 14 years old, whether or not she was a prostitute, and Mr. Spaulding agreed.

Chairman Yturri said that the Commission needed to make a decision as to whether the defense of mistake as to age should be retained. Representative Frost urged that this defense be retained

to avoid the many injustices which had occurred in the past because of mistake as to age, and other members expressed concurrence with this point of view.

Under questioning by the Chairman it was determined that the general concensus of the Commission was that in the situation where there was consent and the girl was under 16 years of age, the mistake as to age defense should be retained with no defense where the girl was under 12. On the other hand, in the under 16 category the fact that the girl was or had been a prostitute should not be a defense.

Mr. Chandler indicated that his chief concern with subsection (5) was that it opened the door to every defendant to give perjured testimony involving the past conduct of the alleged victim regardless of how much time had elapsed since the girl allegedly engaged in prostitution. Mr. Frost suggested that the problem Mr. Chandler expressed might be solved by amending subsection (6) to specify that the time would be limited to the time alloted for a prompt complaint which would be three months in the average case. Representative Carson agreed with Representative Frost and Mr. Chandler that the defense in subsection (5) should be limited to a relevant period of time but said he would not concur with Representative Frost's "prompt complaint" suggestion because the draft would then refer to a three month period after the act had been performed.

Mr. Johnson moved that reference to sections 3, 4, 6 and 7 be deleted from subsection (5) noting that all these sections involved underage individuals. He indicated he would prefer to reserve judgment on the deletion of sections 9 and 10 from subsection (5) inasmuch as those two sections dealt with the subject of sexual abuse.

Mr. Paillette observed that if the Commission were in favor of Mr. Johnson's motion, it would be better draftsmanship to delete subsection (5) in its entirety and add the defense contained therein to sections 9 and 10 if the Commission decided that defense should be included where sexual abuse was concerned.

Mr. Johnson then withdrew his previous motion and moved to delete subsection (5) of section 2 and renumber subsection (6) accordingly. The motion was seconded and carried.

Subsection (6). Prompt complaint. Mr. Spaulding advised that subsection (6) provided that a prosecution could not be instituted or maintained under any circumstances unless the victim complained within three months from the time of the act. He stated that there could be a case where the girl did not make a complaint but the authorities uncovered a situation six months after the act which was clearly a crime requiring prosecution, whether or not the girl or her parents wanted to complain. He contended that the public should be protected in such instances regardless of the victim's desires. The proposed subsection, he said, amounted to a statute of limitations.

Mr. Paillette explained that the Model Penal Code rationale concerning subsection (6) was that a period longer than three months, except in the case of immature children or persons incapable of complaining, suggested strongly that there was consent to the act. Mr. Knight affirmed that a delay of even one or two days in filing the complaint suggested that consent was present and made such cases very difficult to prosecute.

Representative Carson commented that one of the matters discussed by the subcommittee was that when a woman waited six months to complain, during that entire period she had a hold over the man by threatening to file a complaint if he did not conform to her wishes.

In reply to a question by Mr. Johnson, Mr. Knight stated that district attorneys would not prosecute a case where the complaint was not promptly filed unless there was a very good reason why the incident was not immediately reported. When a case was reported two or three days after the act, he said, it played havoc with the prosecution in cases where consent was material.

Mr. Johnson moved that subsection (6) be deleted from section 2. Mr. Spaulding seconded, noting that it was impossible to eliminate blackmail attempts and it was of little benefit to limit the blackmail period to three months.

Mr. Frost pointed out that the effect of the motion was to restore the present three year statute of limitations, and Mr. Chandler expressed disapproval of the motion. Chairman Yturri stated that the purpose of the section was to prevent the possibility of blackmail and to eliminate the possibility of someone filing a complaint just to be spiteful. Retention of the subsection, Mr. Tanzer said, would also serve as a bar to prosecution in cases where there was an exceptional reason to prosecute after the three month period had expired.

Mr. Knight was of the opinion that the subsection would have no effect whatsoever on blackmail attempts. If a girl were the kind who would blackmail a man, she would be perfectly willing to say that the rape had been committed on the previous day even though it had actually been committed more than six months earlier. He added that when a woman complained at the present time that she was raped the previous week, the district attorney was in a position to tell her that the case did not merit prosecution inasmuch as the jury would believe that she had given her consent to the act because of the lapse of time between the act and the issuance of the complaint. If subsection (6) were in the statute, the woman could point to that provision and say that the complaint was made within three months and the district attorney was under obligation to prosecute. Mr. Paillette replied that the subsection would not destroy the district attorney's discretion and would not force him to prosecute.

Mr. Tanzer commented that since the purposes of the statute were served by the proof as brought out at trial and inasmuch as there would be a coercion statute to punish the conduct of blackmail, he could see no reason to include a statute that was difficult of application and would bar the exceptions that should be prosecuted.

Vote was then taken on Mr. Johnson's motion to delete subsection (6) and the motion carried. Voting for the motion: Judge Burns, Mr. Johnson, Mr. Knight, Mr. Spaulding and Mr. Chairman. Voting no: Representative Carson, Mr. Chandler and Representative Frost.

Mr. Paillette commented that the Commission could again examine the policy decision embodied in the deletion of subsection (6) when the statute of limitations was considered.

The Commission recessed for lunch and reconvened at 1:30 p.m. with the same nine members present as were in attendance at the morning session. Also present were Mr. Paillette, Mr. Wallingford, Professor Arthur and Mr. Tanzer.

Mr. Paillette indicated that before the Commission discussed subsequent sections of the sexual offenses draft, he would like to call to the attention of the members certain portions of the commentary. Page 17, he said, pointed out that the draft contained no provision requiring corroborating evidence and worked no change in existing law with respect to rape prosecutions. The commentary on page 18 noted that section 2 of the proposed draft did not consider the defense of impotency and explained that Oregon at the present time followed the doctrine that there was a conclusive presumption of incapacity of males under the age of 14. The draft made no change in this presumption. Page 19 of the commentary explained that the third area of general application to sex offenses which was not considered in section 2 was the indeterminate sentence for certain sex offenders; that subject would be dealt with when the Commission considered classification and grading of crimes.

Section 3. Rape in the third degree. Section 4. Rape in the second degree. Section 5. Rape in the first degree. Mr. Paillette explained that present Oregon law contained just one degree of the crime of rape with enhanced penalty provisions if the rape involved a daughter or stepdaughter, but no distinctions were made with respect to age. The draft under consideration would make a substantial change in existing law in this respect. At the present time, Mr. Paillette said, Oregon was in the minority of states in having just one category of rape. A number of states divided rape into two classes in which they distinguished between intercourse with female victims below a minimum age and forcible rape. The draft followed a triple classification scheme, adopted in a majority of the states, and while the offense itself was not changed, the proposal attempted to distinguish

rationally and equitably between the more serious crimes of rape as opposed to the less serious acts. Mr. Paillette placed the following chart on the blackboard to aid the members in distinguishing between the three degrees of rape and sodomy as set forth in the draft:

Offense	Victim's Age	△'s Age
3d degree rape) sodomy)	Under 16	At least four years older
2d degree rape) sodomy)	Under 14	Over 18
1st degree rape) sodomy)	Under 12	Any

Mr. Paillette noted that subsection (2) of section 3 was included as an optional provision in the original draft when it was presented to Subcommittee No. 2 to attempt to take care of the situation where there was a false impersonation of a husband, but the subcommittee was not enthusiastic about its inclusion and had voted to delete the provision.

In third degree rape the subcommittee agreed that the four year age difference was substantial enough that the crime should be classified as rape and Mr. Paillette noted that if the male were four years older than the female and the female was less than 14, the crime would be second degree rape. If the female were less than 12 years of age, the charge would then be rape in the first degree.

Chairman Yturri asked what the offense would be for cohabitation between a 15 year old girl and 17 year old boy and was told by Mr. Paillette that if there was no force, there would be no crime of rape. Judge Burns commented that under existing law this situation would be contributing to the delinquency of a minor and would be handled by the juvenile court.

In reply to a question by Mr. Knight concerning the decision to set the age differential at four years, Mr. Paillette replied that the provision was derived basically from the Model Penal Code and the New York Revised Penal Law. The MPC and New York reporters were of the opinion that four years was a wide enough spread to avoid the situation where two juveniles were involved in relatively harmless sexual activity. At the same time it would provide some protection for the girl and in second degree rape, the differential from the defendant's standpoint would provide protection if no force was involved and the girl was beyond the age where there was danger of permanent injury, either physically or psychologically.

Mr. Johnson said he did not understand the reason for the differential between rape committed upon a 14 year old girl and upon a 16 year old girl and was told by Chairman Yturri that the crime was more serious and more socially abhorrent when committed upon the younger girl.

Mr. Spaulding noted that "or" should be included at the end of section 4, subsection (1). Mr. Paillette agreed this was an oversight and should be corrected.

Mr. Johnson objected to the provisions of subsection (2) of section 4 where the age span between the male and female could be nearly six years and would therefore apply a standard different from the four year age differential set forth in section 3. The argument for the provision, he said, was probably that second degree rape embodied a higher degree of culpability which should not be applied to a person under 18. Judge Burns agreed that under the draft, rape between a 12 year old girl and a 17 year old boy would be rape in the third degree and yet the gravity of the crime by reason of the age differential was as bad as second degree rape.

Mr. Johnson moved that subsection (2) of section 4 be amended by deleting "eighteen years of age or more" and inserting "at least four years older than the female".

Mr. Paillette stated that adoption of Mr. Johnson's motion would reach the 17 year old defendant which was the situation the draft section was attempting to avoid. The draft was not intended to say that a 17 year old should not be guilty of rape but rather that the crime depended upon the age of the victim.

Mr. Spaulding expressed approval of the present law in the 17 - 15 year old situations. Mr. Blensly pointed out that existing law caused some unjust results in this age group, particularly because the 15 year old girl was oftentimes the aggressor.

Mr. Paillette explained that the draft was trying to recognize the variety of situations that would inevitably occur in rape cases and to get away from the present situation where there was one arbitrary age and if the defendant were over 16 and the girl under 16, the crime was statutory rape regardless of any extenuating circumstances.

Mr. Knight asserted that until the girl reached her 16th birthday, existing law recognized that she was not mature enough to consent to intercourse, whether the male was 18, 20 or 50. Under the proposed draft she could consent to having intercourse once she reached her 15th birthday. She could not, however, consent to cohabitation with a 20 year old man but she could consent to

intercourse with a 19 year old. He suggested that rather than retaining the four year age differential in the draft, rape of a girl less than 12 years old should be rape in the first degree; of a girl less than 14 years old, rape in the second degree; and of a girl less than 16 years old, rape in the third degree. Representative Carson asked Mr. Knight if he would propose to make any distinction in the age of the male and received a negative reply. Mr. Knight added that in his view once a girl reached the age of 12 she had not reached the point where she had the capability or maturity to consent to intercourse even within her own age group.

Mr. Spaulding expressed agreement with Mr. Knight's remarks and commented that the draft might further complicate the case for the state by requiring that the age of the defendant be proven.

Mr. Johnson suggested that the four year age differential be retained in the draft as a defense. If the prosecutor alleged that the female was less than 16 years of age, the defendant could then raise the defense of being less than four years older than the victim.

Senator Yturri asked if there was anything wrong with Mr. Knight's earlier suggestion to make the three degrees of rape dependent upon the age of the girl, regardless of the male's age. Mr. Johnson remarked that the proposal would not take care of the situation where a 15 year old girl raped a 12 year old boy and Mr. Spaulding advised that in that situation both participants would be taken to juvenile court which was what happened under existing law in that example.

Professor Arthur advised that one of the theories of the Model Penal Code approach was that the dangerousness of the offender should be of prime consideration, and the greater the age of the male as opposed to the age of the female, the greater the possibility of violence and danger to the female and the greater the aberration from normal conduct. Mr. Knight was of the opinion this theory would not apply in a consensual situation and Chairman Yturri expressed the opposing view that there was greater effect upon the younger victim, whether or not the act was consensual.

Mr. Knight pointed out that under the draft a 15 year old girl could consent to intercourse with a 19 year old boy but she could not consent to intercourse with a 20 year old boy and the case would revolve around the dates of their birthdays.

Mr. Chandler said his objection to the draft could be met if the same age span were retained between third and second degree rape by varying the degree of the offense on the age of the girl and leaving the age differential constant at four years.

Mr. Clark noted that the social consequences of intercourse with a boy within four years of the girl's age were greatly different than the consequences resulting from a 15 year old girl having intercourse with a 40 year old man.

Mr. Biensly commented that almost all situations pertaining to persons under 17 could be handled under the present juvenile statute relating to endangering the welfare of another. Representative Carson replied that to try to hinge the philosophy of the criminal code on the rationale of the juvenile code was circuitous reasoning. If two 14 year olds committed a crime, it would not answer the problem to leave its resolution to the provisions of the juvenile code.

Mr. Johnson commented that the conduct the draft was seeking to prohibit was that which was socially abhorrent enough to be described as criminal conduct as in the case of an older man having sexual intercourse with a young girl. Cohabitation between persons of their own generation might be socially distasteful but it did not constitute grounds for making the act a crime. Mr. Paillette agreed and added that the theory of the draft was that adolescent sexual experimentation was not rape.

Mr. Clark stated he would favor a statute which would say that if the female were less than 18 and the male at least four years older, the crime would be rape in the third degree. He said he could see great benefit in retaining the four year age differential because the girl was more capable of handling the conduct of a man within her own age group than that of someone much older. Chairman Yturri pointed out that Mr. Clark's proposal would increase the age of consent over the present law and would make a crime of intercourse between 17 and 21 year old participants. Mr. Paillette called attention to the fact that the three degrees of rape were felony crimes, not misdemeanors.

Chairman Yturri suggested that the present law be retained, leaving the age of consent at 16, with the added provision concerning mistake as to age as set forth in section 2 of the draft. Mr. Johnson said he would agree to retention of the present law but would restore the fornication law which had been written out of the draft. After further discussion, he withdrew his earlier motion.

Mr. Knight then moved to amend section 3, subsection (1), by deleting "and the male is at least four years older than the female" and in section 4, subsection (2), deleting "and the male is less than 18 years of age or more." The effect of his motion, he said, would be that if the female were less than 12, the crime would be first degree; less than 14, second degree; less than 16, third degree.

Chairman Yturri contended that the male should be at least 16 years of age if Mr. Knight's motion were adopted in order to take care of situations where the boy was 12 years old and the girl was 15. Mr. Paillette agreed, stating that if the male were less than 14, he would

not have capacity to commit the crime of rape. Chairman Yturri suggested that Mr. Knight's motion be amended by beginning sections 3 and 4 with the language: "Any male over the age of 16 who . . . " Mr. Knight concurred with this suggestion.

Mr. Carson expressed the opposing view, commenting that he was not in favor of clinging to the old law. In most situations involving two teen agers, he said, the girl and the boy were equally guilty and it was hypocrisy to punish the boy and not the girl. He indicated approval of the four year age differential set forth in the draft. Mr. Knight noted that this philosophy did away with the crime of rape within the four year age bracket unless the couple was caught in the act and Mr. Johnson replied that such action was not ordinarily prosecuted as a crime in any event.

Tape 2 begins here:

Chairman Yturri then restated Mr. Knight's amended motion:

> "Section 3. Any male over the age of 16 years who has sexual intercourse with a female not his wife commits the crime of rape in the third degree if the female is less than 16 years of age.
>
> "Section 4. Any male over the age of 16 years who has sexual intercourse with a female not his wife commits the crime of rape in the second degree if:
>
> "(1) (No change from draft.)
>
> "(2) The female is less than 14 years of age."

Judge Burns asked if the age of the male should be limited to those over 16 years of age when applied to subsection (1) of section 4. The Commission discussed this point and decided that although subsection (1) contained a concept different from subsection (2), the same degree of culpability should apply.

Vote was then taken on Mr. Knight's motion which was defeated by a five to four vote.

Mr. Johnson moved to adopt sections 3 and 4 without amendment and draft an additional section making it a misdemeanor for anyone under the age of 16 to engage in sexual intercourse. This latter provision, he said, would give the police at least a minimum amount of authority over intercourse between teen agers. Judge Burns pointed out that the theory of the draft was that adolescent sexual experimentation leading to intercourse was not a felony. The facts were that sexual experimentation between juveniles was widely practiced and difficult to detect, and a law prescribing a heavy penalty for something which could not be enforced would only lead to a breakdown of law enforcement and should not be perpetuated.

Mr. Clark reiterated his belief that the age factor in section 3 (1) and section 5 (3) should be raised to 18 on the theory that most of the law recognized that a person reached adulthood at that age. Several members expressed opposition to Mr. Clark's position indicating that it would be regressive legislation and contrary to all the modern criminal code recodifications. Mr. Tanzer said he did not see how it was possible to make criminal any conduct performed before a person was 16 years of age.

Chairman Yturri indicated that Mr. Johnson's motion contained two parts and asked him if he would be willing to divide the question. Mr. Johnson agreed and amended his motion to contain the further revision in subsection (2) of section 4 to delete "and the male is 18 years of age or more" and insert in its place "at least four years older than the female." The same standard would then apply in sections 3 and 4, he advised.

Following further discussion, Mr. Johnson amended his earlier motion to revise section 3 to read:

> "The female is less than 16 years of age. It is a defense to this offense if the male can prove he is less than four years older than the female."

His motion also stated that section 4 would be revised in like manner.

Mr. Paillette pointed out that the revision thus far included two different kinds of defenses: One where there was a defense and the burden of proof was not placed on the defendant; the other where there was an affirmative defense situation in which the defendant had the burden to come forth with his proof. Mr. Johnson said his motion should be construed to include the affirmative defense situation in sections 3 and 4 where the defendant would bear the burden by a preponderance of evidence to prove that he was less than four years older than the female. This, he said, would preclude the possibility of placing the state in the untenable position of having to prove the defendant's age when the defendant did not have to appear as a witness. In response to a suggestion by Judge Burns, Mr. Johnson said he would be willing to divide the question.

Vote was then taken on Mr. Johnson's motion to amend section 4, subsection (2), to say that the male must be at least four years older than the female. The motion carried.

Vote was next taken on the motion to include an affirmative defense as described above in sections 3 and 4. Motion carried.

Mr. Chandler commented that in setting up a dual age situation the Commission was trying to equalize the emotional and physical maturity of two consenting partners to sexual conduct. The available evidence, he said, was that the age spread between partners in the

vast majority of cases was not as great as four years but was somewhere around two years, particularly since girls tended to mature about two years ahead of boys. He accordingly moved to reduce the age differential in sections 3 and 4 from four to three years. The motion carried.

Representative Frost pointed out that the draft was still perpetuating the illogical legal fiction that the girl bore no responsibility in the sexual act and all the criminal sanction was placed on the boy. He said that society had probably not reached the point where it would approve of a statute placing equal responsibility resulting in an equal charge against both parties. He suggested as an alternative that a fornication statute be included which would make the girl as well as the boy guilty of a misdemeanor. He at least wanted the record to show that the suggestion had been made that women were or could be equally at fault in these situations.

Mr. Paillette noted that the Model Penal Code commentators had no difficulty recognizing this fact and had resolved questions in favor of the male, which was the reason they had reduced their first degree category to ten years of age; they felt the age difference should be substantial to warrant a first degree charge.

Mr. Johnson agreed with Mr. Frost's point of view. They emphasized that the female was not free from blame and some sanction should at least be proposed and considered by the Commission against both participants below the age of 16 years who engaged in carnal acts.

Mr. Johnson's motion to draft an additional section making it a misdemeanor for anyone under the age of 16 to engage in sexual intercourse died for want of a second.

Mr. Chandler moved that section 5 as amended by the subcommittee in subsection (2), changing the age from 10 to 12 years, be approved. Mr. Clark seconded and the motion carried unanimously.

Mr. Clark moved that sections 3 and 4 be approved as amended. Mr. Chandler seconded and the motion carried with Mr. Knight and Mr. Spaulding voting no.

Section 6. Sodomy in the third degree. Section 7. Sodomy in the second degree. Section 8. Sodomy in the first degree. Mr. Paillette called attention to the amendments to section 8 approved by Subcommittee No. 2.

Mr. Chandler moved that sections 6, 7 and 8 be amended to conform to sections 3, 4 and 5, the rape sections, just approved by the Commission and Mr. Clark seconded the motion. The motion would change the age differential to three years, delete the reference to 18 years of age in section 7, subsection (2), and would include the previously approved provisions concerning an affirmative defense in sections 6 and 7. The motion carried.

Mr. Paillette noted that sections 6, 7 and 8 were the provisions which in effect provided that consensual homosexual conduct between adults was not a crime. Mr. Knight remarked that homosexual conduct between juveniles would also be sanctioned under the draft so long as they fell within a certain age group.

Mr. Clark moved to approve sections 6 and 7 and the motion was seconded by Representative Carson.

Mr. Johnson moved to amend the motion by deleting "and the actor is at least three years older than the victim" from section 6. This motion was seconded by Mr. Knight. Mr. Paillette commented that adoption of this motion would in effect say that it was all right to be a homosexual adult but it was not all right to be a homosexual juvenile.

Judge Burns asked what effect adoption of the motion would have on section 7, subsection (2). Mr. Johnson moved to amend section 7, subsection (2), by deleting "and the actor is 18 years of age or more." Adoption of the amended motion, he said, would obviate the problem raised by Judge Burns.

Mr. Wallingford pointed out that because of the definition of "deviate sexual intercourse" the sodomy sections were concerned with conduct other than homosexuality. Much of the conduct covered by these sections would be between young girls and young boys to which the Commission might not want to apply the same standards as those applied to an older man and a younger boy.

Judge Burns commented that adoption of Mr. Johnson's motion would result in the draft saying that consenting homosexual behavior was legal if the persons were over 16 years of age. Mr. Johnson said he would not disapprove of raising the age to 18 for the purposes of sections 6, 7 and 8. These provisions, he said, adopted a revolutionary principle in Oregon law and expressed the view that the same standards could not be applied to sodomy as to sexual intercourse.

Vote was then taken on Mr. Johnson's motion to delete the three year age differential in section 6. Motion carried.

Mr. Spaulding asked if it was necessary to define "victim" in the sodomy sections. There was a question, he said, as to which party was being hurt in this type of activity. Judge Burns agreed that with all the different forms of deviate social behavior, the question of which partner was the victim posed a problem.

Mr. Paillette indicated that in the context in which the sections were originally drafted, one person was the victim because he was below a certain age, because of his incapacity or because he was subjected to force. He was of the opinion that "victim" was the proper term to employ in this context. Mr. Knight agreed that the term was proper when the three year age distinction was included but when that distinction was removed, the problem of which party was the victim did present a serious question. Mr. Johnson indicated that any

person who was less than 16 and who engaged in deviate sexual intercourse became a victim.

Chairman Yturri asked who the victim would be if both parties were less than 16 years of age. Mr. Chandler suggested this problem might be solved by beginning section 6 with "Any person" rather than "A person" and by changing "victim" to "any person".

Chairman Yturri asked what the result would be if one person was just under 14 and the other was just under 16 years of age. He asked if one would be charged with third degree sodomy while the other was charged with second degree sodomy. Judge Burns replied that under the culpability draft the 14 year old could not be charged with a crime.

Mr. Chandler said it appeared that the Commission agreed society was past the stage where deviate sexual conduct between consenting adults was to be regarded by the law as a crime and that the criminal element appeared only below a certain age line, regardless of who was the agressor or who was the victim. Mr. Johnson said it was imperative that the Commission bear in mind how far society would be willing to go in this respect. The average citizen, he said, would probably accept the concept between consenting adults but would not take such a liberal view toward the same behavior between juveniles. Mr. Chandler said he thought the average citizen would accept section 6 if the age limit were raised to 18. Mr. Johnson agreed but was of the opinion that society would not go further than that.

Mr. Wallingford again pointed out that the sodomy sections pertained to conduct other than homosexuality. Under the amendments adopted today he maintained that the rape and sodomy sections were totally inconsistent in that the Commission had decided that intercourse between a 17 year old boy and a 15 year old girl was not rape whereas deviate sexual intercourse between a 17 year old and a 15 year old could result in sodomy charges. Chairman Yturri and Mr. Paillette expressed agreement with Mr. Wallingford's statement that the sodomy and rape sections should be parallel.

Mr. Chandler moved to amend section 6 to read:

> "Any person who engages in deviate sexual intercourse with a person not his spouse or causes another to engage in deviate sexual intercourse commits the crime of sodomy in the third degree if the other person is less than 18 years of age."

After further discussion, several members indicated they were obliged to leave the meeting at this time and a quorum would no longer be present. At Mr. Paillette's suggestion, Chairman Yturri agreed that the sodomy sections should be redrafted in line with the Commission's discussion bearing in mind particularly that the sections should be made as palatable as possible to the general public.

Next Commission Meeting

Chairman Yturri indicated he had heard from enough Commission members to make it apparent that there would be an insufficient number present to constitute a quorum at the regularly scheduled meeting on August 16. He suggested that Mr. Paillette contact the members individually to determine available meeting dates for subcommittee meetings in August. The members agreed to plan to have two Commission meetings in September with the dates to be determined by Mr. Paillette after contacting the members.

The Commission members also agreed that they would prefer to begin their next meeting by completing the Article on Sexual Offenses before going to the Responsibility Article.

The meeting was adjourned at 3:15 p.m.

Respectfully submitted,

Mildred E. Carpenter, Clerk
Criminal Law Revision Commission