Tape #73
Both sides

OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 2

Fifth Meeting, May 3, 1969

Minutes

Members Present: Representative Wallace P. Carson, Chairman
Senator Berkeley Lent (Delayed)
Representative Harl H. Haas

Absent: Attorney General Robert Y. Thornton

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

The meeting was convened at 9:30 a.m. by Chairman Carson in Room 401, Capitol Building, Salem.

Sexual Offenses: P.D. No. 1; January 1969 (Article 13)

Chairman Carson asked Mr. Paillette to go through the draft section by section, explaining the provisions of the draft.

Mr. Paillette advised that the draft had been drawn by Miss Jeannie Lavorato and reflects some ideas that are a departure from the way sex crimes are presently looked at in the State of Oregon. He felt that the draft was arranged in such a manner that it becomes necessary to look at the whole draft in order to see how it fits together.

Mr. Paillette referred the members to the Reporter's Note appearing on pages 1 and 2 of the draft. In this statement Miss Lavoratto sets out what the draft tries to accomplish. The draft seeks to protect two interests: (1) protection of the individual against all nonconsensual and forcible sex acts and (2) protection of the young from sexual advances. It also attempts to discard some of the old notions that are, as a practical matter, unenforceable.

The proposed draft would not proscribe any sexual activities engaged in between spouses or any sexual conduct engaged in between consenting adults. This would eliminate homosexual conduct as a source for a criminal charge. It would not proscribe any consensual sexual activity engaged in by adolescents where the parties involved are within four years of age of each other. Mr. Paillette felt that this would probably be one of the most technical parts of the draft--trying to see how the relationships are distinguished on the basis of age.

Mr. Paillette outlined the provisions in the proposed draft as follows: Definition of Terms; Provisions Generally Applicable to

the Sexual Offenses Article; Rape (3 degrees); Sodomy (3 degrees); and Sexual Abuse (2 degrees). He noted that the sections relating to rape, sodomy and sexual abuse are divided into degrees based on the age of the victim and the age of the actor; or the mental or physical condition of the victim; or the use of force or threats. He pointed out that as the age span between the defendant and the victim increases the liability increases proportionately.

Senator Lent now present.

Section 1. Sexual Offenses; Definitions.

Mr. Paillette noted that the definitions used throughout the draft are set out in this section and read the definitions for sexual intercourse, deviate sexual intercourse, sexual contact, mentally defective, mentally incapacitated, physically helpless and forcible compulsion appearing in the draft. (See Sexual Offenses, P.D. No. 1, pp. 1 and 2.)

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

Mr. Paillette explained that section 2 sets out some general provisions that apply throughout the Article.

Subsection (1), Lack of Consent--Mr. Paillette noted that whether or not specifically stated, it is an element of every offense defined in this Article that the sexual act was committed without the consent of the victim. Presumptions are set out that the individual is deemed incapable of consenting when he is less than sixteen years of age or mentally defective or mentally incapacitated or physically helpless.

Subsection (2), Mistake as to Age--Mr. Paillette advised that "in any prosecution under this Article in which the criminality of conduct depends on a child's being below the age of ten, it is no defense that the actor did not know the child's age or that he reasonably believed the child to be older than the age of ten. When criminality depends on the child's being below a specified age other than ten, it is a defense for the actor to prove that he reasonably believed the child to be above the specified age at the time of the act giving rise to the charge." Mr. Paillette observed that this would work quite a change in existing law.

Subsection (3), Mistake as to Consent--Mr. Paillette pointed out that it is a defense for the actor to prove that at the time he engaged in the conduct he did not know the facts or conditions responsible for such incapacity to consent.

Subsection (4), Spouse Relationships--Mr. Paillette advised that husband and wife relationships would be excluded as well as persons living together as man and wife.

Subsection (5), Sexually Promiscuous Complainants--He noted that proof that the alleged victim was a prostitute is the only evidence that can come in.

Subsection (6), Prompt Complaint--Mr. Paillette noted that this was a new provision although some of the cases have considered this from the standpoint of raising some inference if there has been an unreasonable delay. This subsection would spell it out. Three months would be the cut-off point unless the victim were a child less than sixteen. In this situation it would be up to the parent or guardian to notify the authorities and they would have three months after learning of the offense from the child.

Section 3. Rape in the third degree.

Mr. Paillette advised that in third degree rape there was the element of age--the female is less than sixteen years of age. There is a new element, also, requiring that the male be at least four years older than the female.

An optional subsection (2) is set out in brackets for consideratior by the subcommittee and the Commission.

Section 4. Rape in the second degree.

Mr. Paillette noted that this offense involved the elements of "mental defect, mental incapacitation, or physical helplessness." Here the age is less than fourteen for the female and the male is eighteen or older.

Section 5. Rape in the first degree.

This section covers the highest degree of the offense and involves the element of force or the female is less than ten years of age or involves family relationships. Subsection (3) of section 5 is retained from existing law.

Senator Lent asked if under present statute there was an enhanced penalty for rape on a sister.

Mr. Paillette read from ORS 163.220: "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....".

Mr. Paillette suggested that perhaps it would be best to pause in the discussion of the over-all draft to consider the three sections on rape. He noted that sections 6, 7 and 8 covered sodomy and while some of the considerations with respect to force, etc., are the same as those in the sections relating to rape, it might be well to consider the sections on rape first.

Section 1. Sexual Offenses; Definitions.

Chairman Carson suggested the discussion return to the section on definitions.

Mr. Paillette pointed out that the definition of "Deviate sexual intercourse" is limited to conduct between persons; it would not include the human-animal type of situation.

Senator Lent also noted that it made another change--that involving whether or not the persons were married.

Chairman Carson advised that he was not closing the door on further consideration of the definitions in section 1 but suggested going on to section 2.

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

Senator Lent observed that in several places in the section it is stated that "it is a defense for the actor to prove..." and wondered if there would be any problem arising from Supreme Court rulings on proving defenses. He cited the instance of the Leland case and asked for information regarding the present status of "proving defenses".

Mr. Paillette replied that at the time the Leland case was decided, the burden was on the defendant to prove "beyond a reasonable doubt" and that burden was sustained by the Court. He noted that there is a lesser burden now--"by a preponderance",but the burden is still on the defendant. The present proposal covering the insanity defense retains the burden "by a preponderance of the evidence". In a couple of other instances, he added, because of the nature of the knowledge (being peculiarly within the knowledge of the defendant), the burden has been placed on the defendant, i.e., Professor Platt's draft on Inchoate Crimes, the defense of renunciation in the charge of an attempt to commit the crime of solicitation or conspiracy. Here the burden is placed on the defendant because presently it is not even a defense recognized in this State. The MPC writes it in as an exemption in their Attempt Drafts--this not only makes it a defense but makes it an exemption which keeps the burden on the state. Professor Platt's feeling was that if the revised code moved in this direction and allowed the defense to be raised by the defendant, it is not an undue burden to make the defendant prove it by a preponderance of the evidence. Mr. Paillette said that he agreed with Professor Platt's thinking on this.

Senator Lent stated that, policy-wise, he tended to agree with this. He felt that the State would be put in a position of having to proved negatives beyond a reasonable doubt and this would be an almost insurmountable burden.

Mr. Paillette added that, as a practical matter, when it is said that the defendant "has the burden by a preponderance", if he puts in any evidence, he is "home" because the burden is shifted back to the state to overcome this, anyway. He did not feel there would be a constitutional problem involved with this approach. Actually, the approach set out in the draft is more of a break for the defendant than is allowed under the insanity defense because it is just stated as a defense in the draft on Sexual Offenses; nothing is indicated as to the burden of proof. The MPC approach is that when it is stated in terms of merely a defense, the burden is still on the state. It really amounts to what Michigan calls "the burden of injecting the issue". Whenever they have an instance where they allow the defense (sometimes called an exemption), they state it as "the burden of injecting the issue is on the defendant but this does not shift the burden of proof". Mr. Paillette felt that the language employed in the Sex Offenses Draft would be construed to mean that the burden is on the defendant to raise the issue and once he does this, the burden would be on the state to overcome it; the state would still have the burden of proving the case beyond a reasonable doubt.

Chairman Carson asked the significance of the age of ten years; why not twelve, for instance.

Mr. Paillette admitted that whenever ages are discussed, it is somewhat arbitrary. Ten, he advised, was the common law age for rape—those below the age of ten were considered below the age of consent. Over the age of ten, the victim was not considered raped unless force was used. The MPC uses the age of eleven.

Chairman Carson indicated he would favor raising the age specified to twelve.

Senator Lent was inclined to agree with Chairman Carson. He felt that until children get out of grade school they are quite unworldly and at twelve they would be reaching the seventh grade level.

Chairman Carson noted that, also, this was about the age most girls reach puberty.

Mr. Paillette observed that the commentary on page 6 of the draft discusses this and notes that it is generally held that a reasonable mistake of age does not constitute a defense. The MPC, he advised, dug into this quite thoroughly when working on this question and the draft "mistake as to age" provisions are taken from the MPC.

Senator Lent moved that wherever "ten" is used in this context it be amended to "twelve". The motion carried unanimously.

Senator Lent referred to section 2, subsection(4), Spouse Relationships, to the language, "...the exclusion extends to persons living

as man and wife,..." and asked if this were defined anywhere. Would going to a motel for the night and registering as man and wife be sufficient.

Mr. Paillette replied that this was not defined but that it contemplates what would presently be thought of as lewd cohabitation, common law relationships--actual living together, holding themselves out to be man and wife. What the draft is trying to get at is the personal relationship with one another; whether or not they are legally married would not be controlling.

Chairman Carson tended to agree with Senator Lent that there could be problems created where there is no time limit spelled out regarding the period the persons lived together as man and wife.

Senator Lent commented that more and more frequently individuals are and will be living together without getting married. It may be a relationship that lasts a few weeks or several years. He would be reluctant to put those people in a different position for this type of law than a man and wife.

Chairman Carson asked if the crime of lewd cohabitation was being eliminated and Representative Haas also wondered where this would come into play.

Mr. Paillette replied that the provisions would not come into play in respect to the sex offenses; lewd cohabitation is not covered in this particular draft. Section 2, general provisions, makes it clear that the draft provisions on sodomy, rape, etc., do not apply to what individuals do in their own home as husband and wife, to spouse relationships.

Chairman Carson added that the draft provisions would apply to a girlfriend-boyfriend relationship if they meet whatever the requisite period is.

Senator Lent did not feel that it was so much a period of time that should be looked at but rather a matter of intent. He indicated he would be willing to take the approach taken in England just a few years back--that no act is criminal if done between consenting adults in private. Representative Haas also indicated he would support this route.

Chairman Carson was of the opinion that, effectively, this is what would be achieved under the draft provisions.

Mr. Paillette agreed that this is what the draft now says. Sexual activity between these people would not be criminal under the draft provisions but the question might come up with respect to forcible sexual intercourse or sodomy, etc.

Mr. Wallingford cited an example of a young couple who are running away from home and living as man and wife. Ordinarily, they would be young enough to come under one of the rape sections. Would they be exempt because they are living together as man and wife. He noted they would not be consenting adults but consenting minors.

Representative Haas noted that as to married, consenting adults, there was no problem. He understood, however, that as to unmarried, consenting adults, sodomy would still be a crime under the draft--if the relationship between the individuals were a weekend liason as opposed to renting an apartment together.

Mr. Paillette agreed that this statement was generally right. He noted that the definition of sodomy in the third degree was "deviate sexual intercourse with a person not his spouse...".

Senator Lent noted that the "living together" is the very crux of the matter. He did not think any of the subcommittee members felt it should be necessary that the consenting adults be legally married or even de facto married.

Chairman Carson cited the instance where some sheriff knocks down a motel door and the question is then presented to the district attorney as to whether or not the individuals involved were living as man and wife. He questioned how this would be determined--the only true way of determining this would be whether or not they were in fact married. He felt the subcommittee might be opening a "Pandora's Box" and thought that if the point the revision was going to was that of "consenting adults" then he felt they should not hide behind the language presently contained in the draft.

Senator Lent pointed out that if the committee went to the "consenting adults" approach, Mr. Paillette would have to do some revising in regard to situations where the individuals involved had not reached the age of majority.

Representative Haas agreed with Chairman Carson's comments and felt that presently the draft provisions were hypocritical. He observed, also, that if medical studies were available as to what is deviate sexual behavior and what is not, he doubted that the draft definition would meet the medical definition.

Mr. Paillette agreed that the draft imposed separate standards of sexual conduct for spouses as opposed to unmarried, consenting adults.

Chairman Carson felt that except for the situation involving minors, he would be inclined to raise no differences between standards for consenting adults, married or unmarried.

Senator Lent asked if the budget for the Criminal Law Revision Commission carried on through the next Legislative session; whether or not Mr. Paillette would be available for consultation by the House and Senate Committees studying the proposals submitted.

Mr. Paillette replied that the budget approved for the Commission would carry through to July 1, 1971.

Mr. Paillette asked if it was the desire of the subcommittee to continue consideration of the draft or to try to amend section 2.

Chairman Carson suggested that Mr. Paillette work on the amendments. Senator Lent suggested the subcommittee take up that part of the proposed draft considered still valid, bearing in mind that there would be some basic redrafting necessary.

Chairman Carson agreed with this approach noting that the members could bear in mind that "spouse relationships" will be redefined as meaning "consenting adults".

Senator Lent pointed out that from a drafting standpoint it might be best for Mr. Paillette to review the entire draft and then perhaps do something with the sections, carrying through the whole idea. This might be better than patching the draft in one place and then finding that it falls apart in another.

Chairman Carson and Mr. Paillette agreed that this might be the better way to handle the problem.

Representative Haas referred the members to section 2 subsection (5), Sexually Promiscuous Complainants, and noted that he had seen trials where evidence has been admitted as to the conduct of the complainant. It was his understanding that this kind of evidence would not be admissible nor be a defense now.

Mr. Paillette replied that a majority of the states do not allow this. In common law the prior unchastity of the female was not a defense. While some states have allowed this evidence, he pointed out that problems arise because when you get into the area of promiscuity and begin discussing chastity it become quite nebulous. In regard to sexually promiscuous complainants, under the draft the only thing that would be allowed to come in would be a question as to whether or not she was a prostitute.

Representative Haas asked if this would be defined in the statutes.

Mr. Paillette replied that "prostitute" has not been defined and Chairman Carson observed that the Supreme Court had just defined "common prostitute".

Senator Lent asked if under the draft the defendant would be allowed to bring in evidence, not of specific acts, but of general reputation in the community for promiscuous behavior by the complainant.

Mr. Paillette answered that he could not bring in evidence of just promiscuous behavior but he thought the defendant could bring in evidence of general reputation as a prostitute.

Senator Lent thought this brought up a serious policy decision--are either specific acts of promiscuity or a general reputation for promiscuity to be cut out. This evidence really only goes to bear on her credibility in connection with a particular act; the evidence is not a defense since the defendant is not allowed to rape a girl simply because she has been promiscuous in the past. He asked Mr. Paillette for the policy behind the draft approach.

Mr. Paillette replied that the MPC comments to their §207.4 are helpful on this issue:

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

Mr. Paillette referred, again, to commentary appearing on page 8 of the Draft and read: "This subsection recognizes a defense when the victim is an underage prostitute whose lack of consent is based solely on the fact of legal incapacity to consent...".

Senator Lent understood, then, that section 2 subsection (5) refers only to someone under sixteen. Mr. Paillette agreed this was correct and Senator Lent stated that his concern, then, had been in error.

Mr. Paillett# called attention to section 2 subsection (2), Mistake as to Age, noting that this subsection should be discussed quite thoroughly. The subsection, in effect, states that if the defendant engages in sexual activities with a child below the age of 12, a defense of mistake as to age will not be allowed since this is considered pretty abnormal behavior. From a technical, drafting stand-

point, he noted, these are tough problems to try to spell out. The MPC approach and that of other states has been to try to distinguish and say that when you get to the teenage category there must be quite an age span before the law becomes too harsh, recognizing that young people today are much more sophisticated than they were a few years ago.

Mr. Paillette cited the case of People v. Hernandez, a 1964 California case, noting this case made quite a departure in the law with respect to mistake of age. Until this case, it was quite universally accepted that mistake of age of the victim with respect to statutory rape was not a defense. California allowed the defense of a "reasonable" mistake and the test was objective rather than subjective. Mr. Paillette read from the Draft Commentary, page 13: "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."

Senator Lent directed attention to section 2 subsection (2), to the language, "When criminality depends on the child's being below a specified age other than twelve, it is a defense for the actor to prove that he reasonably believed..." and asked if this test was subjective to the defendant. He asked if it would simply be a matter of semantics if the language were changed to "...for the actor to prove that a reasonable man in the same or similar circumstances would have believed...".

Mr. Paillette felt that the way the draft was written made the test subjective.

Senator Lent felt a decision should be made as to whether the committee wanted the test phrased as a subjective or objective test. He favored leaving the subsection as drafted but felt a decision should be made by the subcommittee as the way in which the test is applied and the manner in which it is phrased could make the difference between conviction or acquittal at one level and whether or not an appellate court would say there was error.

Mr. Paillette thought this might be expanded in the commentary, also, to make the intent clear. He added that to allow the defense at all is quite a departure from the traditional view that when the actor engages in sexual activity with certain age girls that he does so at his own risk. With this in mind, it might be felt it was going too far to allow the test to be just what the defendant reasonably believed and that since the defense was to be allowed at all, that it would not be a burden to make it a "reasonable man" test.

Representative Haas said he would go along with this, feeling that the mental abilities, the capacity of the defendant, would be part of the evidence admitted under that test.

Senator Lent understood that the subsection would then read to the effect that "it is a defense for the actor to prove that a reasonable man in the same or similar circumstances would have believed the child to be above the specified age..." and asked if the defendant would be entitled to an instruction from the trial court that the mental ability, the capacity of the defendant, is one circumstance that the jury may take into consideration. He thought that if the present draft language were retained, the defendant would be entitled to such instruction while if the language were changed to a "reasonable man" test, he was not certain the defendant would be entitled to it.

Mr. Paillette pointed out that the first question to be answered was whether or not the defendant should be entitled to the defense at all.

Representative Haas thought all would agree that where a girl looks and acts nineteen, there should be this defense for the defendant.

Representative Carson pointed out that this would really be trying the girl, her appearance. Actually, he continued, the issue would be decided on how old the girl looked to the jury, not on the dullness or mental capacity of the defendant.

Representative Haas moved that as a policy matter the subcommittee adopt the "reasonable man" test as opposed to a subjective test. He noted that the approaches are intermingled but explained that the conduct of the complainant would be viewed as well as the circumstances surrounding the act to determine whether or not the defendant was reasonable in the mistake as to age. The motion carried unanimously.

Mr. Paillette asked if the subcommittee wanted this spelled out specifically in the statute.

Senator Lent thought this could be done easily by changing the language to: "..it is a defense for the actor to prove that a reasonable man in the same or similar circumstances would have believed the child to be...".

Mr. Paillette asked the feeling of the subcommittee with respect to the burden of proof. If the subsection language is left as it is (just saying "it is a defense"), the burden will be on the state.

Senator Lent said that the burden is on the state in all criminal cases anyway. If the defendant remains silent and puts on no defense, the state still has the burden. He noted that the amended subsection would allow the defendant to inject the issue and would not be changing anything in regard to the burden of proof.

Chairman Carson asked Mr. Paillette if he thought it should be as it is under the issue of insanity--placing the burden on the defendant after he injects the issue.

Mr. Paillette replied that he was not certain--he felt something could be said for requiring the defendant to prove by a preponderance that there was a reasonable mistake in age. However, in the case of insanity, he noted, there is a presumption of sanity to begin with. This situation is different, also, he said, from renunciation where there are facts peculiarly within the knowledge of the defendant.

Senator Lent recalled the Leland case and while his memory was somewhat hazy, felt there was a case following Leland on which the Court got into the whole question of provisions where guilt must be proved beyong a reasonable doubt, placing the burden of proof, etc. Senator Lent thought that the Supreme Court in the second case went toward the position taken by those who dissented on the Leland case. This, he noted, would color the thinking as to the burden of proof provision in section 2 subsection (2).

Senator Lent noted that part of the problem comes from the fact that the State of Oregon treats presumptions differently than the majority of the states. A presumption, he said, is of a higher order in Oregon than in most states; in most states there is very little difference between an inference and a presumption. A presumption can disappear completely from a case when overcome. In Oregon, however, in the law of evidence a presumption does not disappear completely. He wondered if subsection (2) required the defendant to prove a defense by a preponderance of the evidence if this would be requiring the defendant to come forward.

Representative Haas felt there was a difference. For example, in a situation where the defendant is accused of driving while intoxicated, if he wants to present a defense that he is an epileptic he must present that evidence. The state does not have to negate, they are just going to have to prove facts to get the case to a jury. In subsection (2), however, if the state proves the elements of the crime, if the defendant is going to assert that there were unusual circumstances, such as that the defendant appeared to be of an age to give consent, the defendant must present those facts.

Chairman Carson felt the state would be put in an impossible position--the state would have to prove that the defendant looked below twelve years of age.

Senator Lent posed the situation where the defendant presents no evidence except the appearance of the girl in the courtroom, leaving it up to the jury to judge her appearance. How could the appellate court handle the case?

Representative Haas did not feel the defendant would get the instruction because the trial court would say there had been no evidence put in the record in this case which would justify a reasonably prudent man making a mistake as to age.

Mr. Paillette agreed; he did not think there would be an instruction by the court unless something was placed in the record. As a practical matter, he noted, the appearance of the plaintiff affects the decision of the jury--although this cannot be argued. Mr. Paillette was not too satisfied with the language contained in the subsection with respect to defense. In previous drafts, for instance, it has been described as an "affirmative defense" or it is made clear that the defendant has to come forward. The proposed draft simply reads "it is a defense" and then by using the words "for the actor to prove" implies the defendant has the burden of proof and does not designate the kind of burden.

Representative Haas indicated he felt it should be "proof by a preponderance of the evidence".

Mr. Paillette noted that the draft language was taken from the MPC but the MPC adds that the actor must prove the defense by "a preponderance of the evidence".

Senator Lent wondered if the adoption of the objective, reasonable man test wrote out the particular defendant who actually knew the girl's age. He thought language would have to be added to provide that such a test would not be a defense if the particular defendant actually had knowledge of the plaintiff's age.

Representative Haas did not think this would be a problem since the test would be for "a reasonable man in the same or similar circumstances would have believed..." and one of the circumstances would be that the defendant knew the plaintiff's age.

Senator Lent suggested inserting the following language in section 2, subsection (2), "did not know the true age of the child and that a reasonable man in similar circumstances would have believed" so that the sentence would read: "When criminality depends on the child's being below a specified age other than twelve, it is a defense for the actor to prove that he did not know the true age of the child and a reasonable man in the same or similar circumstances would have believed the child to be above the specified age at the time of the act giving rise to the charge."

Representative Haas noted this would make the defendant testify.

Mr. Paillette felt that no matter what language was placed in the subsection it would make the defendant testify; if the defendant wants to take the defense, he will have to testify.

Mr. Paillette observed, also, that when the whole code is fitted together there would be sections where it will read "it is a defense" or "it is an affirmative defense", etc., and it may result in a hodge-podge unless care is exercised.

Representative Haas asked Mr. Paillette how he viewed the difference between "affirmative defense" and just "defense".

Mr. Paillette thought that if it read just "defense" it would be analogous to what Michigan calls "injecting the issue"--the burden of injecting the issue is on the defendant and he has to bring it up. This is all the defendant has to do; the burden is not on him to prove it. The burden is still on the state to prove everything, including that issue, beyond a reasonable doubt.

Chairman Carson was of the opinion that if the test were left objective, it would not require the defendant to come forward himself. He felt the defendant's attorney could draw the attention of the jury to the appearance of the witness with the intent of raising the defense of mistake as to age. If the test is put subjectively, it would require the defendant to appear on the stand to prove what he reasonably believed. The only way he could avail himself of the defense would be by taking the stand.

Senator Lent pointed out that if the language "by a preponderance of the evidence" were inserted in the subsection, it would be going much farther than the Michigan interpretation.

Mr. Paillette advised the MPC has been very reluctant about placing the burden on the defendant anywhere throughout their code. In respect to mistake as to age, however, they do spell out that the burden is upon the defendant to prove by a preponderance of the evidence.

Chairman Carson asked if there had been a distinction drawn between excuse, defense, affirmative defense, and various categories of duties.

Mr. Paillette said that it had not really been spelled out.

Representative Haas added that a defense just has to be raised but an affirmative defense has to be proved by a preponderance.

Senator Lent thought it would be sufficient for section 2, subsection (2) to read "...it is a defense for the actor to prove..." without adding "by a preponderance of the evidence".

Chairman Carson indicated he would go along with Senator Lent and favor leaving the language as drafted.

Mr. Paillette noted that the MPC has a section (and he anticipated the Oregon Revised Code would have something comparable) which contains the following approach on affirmative defenses:

> "(1) No person may be convicted of an offense unless each element of such offense is proved beyond a reasonable doubt. In the absence of such proof, the innocence of the defendant is assumed.
>
> (2) Subsection (1) of the Section does not:
>
> (a) require the disproof of an affirmative defense unless and until there is evidence supporting such defense; or" (MPC, Section 1.12)

Mr. Paillette observed, then, that once the evidence is injected, there must be evidence to disprove this.

Representative Haas noted that the state must prove their case beyond a reasonable doubt and asked if the defendant came forth with the defense of mistake as to age, is the state put in a "beyond a reasonable doubt" position to rebut or is negative proving of that defense enough. He felt that if the defendant presents some evidence of mistake as to age, there should not then be an instruction that the state must disprove this defense beyond a reasonable doubt.

Senator Lent commented that just by allowing the defense it might have to be disproved beyond a reasonable doubt by the state. He felt the only other way to handle it would be to return to the old law and not allow a defense, to allow no excuse.

Mr. Paillette pointed out that the jury is instructed on any criminal case that the burden is on the state to prove each and every material allegation beyond a reasonable doubt and this defense would not be a material allegation; the prosecutor would not plead this in his indictment. The age of the child is an element but not what the defendant believed and the reasonableness of it is not an element.

Representative Haas agreed and felt that the state would just have to rebut the evidence presented by the defendant and take it to the jury. The jury would be instructed upon whether or not "a reasonable man in the same or similar circumstances would have believed...".

Senator Lent pointed out that the underlying assumption of the whole thing is based on the fact that the state on something other than the girl's testimony is going to be able to prove she was a certain age, say, under the age of sixteen. He posed a situation

involving an orphaned Korean child perhaps brought over to this country for adoption--where no birth records would be available for proof of age. Any testimony given by the child in this regard would be pure hearsay. How would this be handled.

Chairman Carson agreed that this was one thing that is purely hea say--testifying as to your age.

Senator Lent again stated the problem--whether or not it is a defense for the actor to prove mistake as to age by a preponderance of the evidence or whether it will be left as drafted and left to the courts to handle.

Mr. Paillette referred to the MPC and read: "When criminality depends on the child's age 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." (MPC, §213.6 (1)).

Senator Lent stated that as a policy matter he would be willing to accept this; anything else would put too substantial a burden on the state. He moved, therefore, that in section 2, subsection (2), after the word "prove" the language "by a preponderance of the evidenc be inserted. The motion carried unanimously.

Senator Lent stated, also, that the same language should probably be inserted in subsection (3), Mistake as to consent. He asked Mr. Wallingford's opinion regarding this.

Mr. Wallingford agreed, adding that if anything, it would be stronger in subsection (3) since this might involve some rather difficult situations involving, perhaps, a mentally defective child. He thought perhaps it would be easier for the defendant to raise the defense of mistake as to consent that that of mistake as to age.

Mr. Paillette read from the draft commentary on section 2 (3): "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." In other words, he said, the state just has to prove the lack of consent and does not have to prove that the defendant knew of any particular condition of the plaintiff.

Chairman Carson remarked that apparently a subjective v. objectiv approach would not be a problem in subsection (3) since it is what the

defendant believed to be fact. He asked Mr. Paillette if he felt the language "by a preponderance of the evidence" should be inserted in subsection (3).

Mr. Paillette advised that the MPC did not have a provision for mistake as to consent; this was taken from New York and he read from Section 130.10: "...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."

Representative Haas observed that this area really deals with the adult, principally--the male or female who is intoxicated, under the effects of drugs, mentally diseased or defective, etc. The state is going to have to prove that this adult was not able to consent. The defendant, unless he has unusual evidence, will probably have to take the stand and state that he did not know of this incapability and state facts as to why he did not know this. He felt the state would have to prove non-consent to start with.

Mr. Paillette referred to section 4, Rape in the second degree, and pointed out that incapacity to consent is an element of the crime. If someone is charged with second degree rape, the prosecutor will have to plead "incapacity to consent" in the indictment. If the situation is one where there was no consent, then it becomes a crime of forcible compulsion, rape in the first degree.

Chairman Carson asked if the term "affirmative defense" would be defined.

Mr. Paillette thought perhaps it should be defined. It has not been necessary until now, he said, because everywhere the term has been used its meaning has been spelled out. A problem might arise, however, when the statutes are amended and the original language is changed.

The subcommittee recessed for five minutes.

Mr. Paillette referred to section 2, subsection (3), Mistake as to consent, and suggested the subsection be made consistent by placing the burden of proof by a preponderance of the evidence upon the defendant.

Representative Haas moved that in section 2, subsection (3), after the word "prove" to insert "by a preponderance of the evidence". The motion carried unanimously.

Section 3. Rape in the third degree.

Mr. Paillette advised that there were three degrees of the crime of rape. Because of the way the three degrees of the crime are framed, he did not think they were "lesser included" offenses.

Replying to a question by Chairman Carson, Mr. Wallingford noted that the provisions in sections 3, 4 and 5 did not apply to men.

Senator Lent understood there would be a penalty in the draft, however, applying to forcible sodomy and advised that homosexual rape apparently is becoming quite a problem in the correctional institutions.

Mr. Paillette replied that there was a section in the draft covering this conduct and Representative Haas added that it could also be covered by the charge of assault.

Chairman Carson asked if there was any objection to the language "less than sixteen years of age" contained in section 3.

Representative Haas asked how long the age used in these statutes has been sixteen.

Senator Lent noted that the draft provides that the male must be at least four years older and this gets away from charging a sixteen year old boy with statutory rape when it involves a fifteen year old girl.

Mr. Paillette advised that optional subsection (2) was inserted for consideration by the subcommittee and would take care of infrequent cases involving trickery.

Chairman Carson asked if the draft provisions would, in effect, say that a male nineteen years of age could not commit rape in the third degree.

Mr. Paillette pointed out that it would be rape in the second degree if the female is less than fourteen and the male is eighteen or older.

Chairman Carson asked for the theory behind the four year age span written into section 3. He looked at this provision as opening a gap rather than closing one.

Senator Lent agreed that it was opening a gap in the area of consenting relationships. He thought that the closer the boy and girl were in age, the less chance there was that the boy would be taking advantage of the girl.

Mr. Wallingford remarked that the provision was aimed, primarily, at teenage experimentation.

Chairman Carson felt that when the boy is under sixteen and the girl fifteen, he could agree with this; however, as the male becomes sixteen, seventeen, eighteen and just short of nineteen, he did not have much understanding for a boy of this age experimenting with a girl of fourteen. Under the draft provisions this conduct would not be rape.

Mr. Paillette agreed that if the male and female were within the four year age spread it would not be rape.

Senator Lent added that the girl must be over twelve; if she is under twelve it would not matter what the age spread was, it would not be a defense. He observed that a present the male has no defense even when he is sixteen and she is fifteen and the relationship is a consenting one. The problem often does not arise until the girl becomes pregnant.

Chairman Carson referred to optional subsection (2) of section 3 and asked the definition of the language "a sexual act" used in the subsection. He noted that "sexual contact" is included in the definition section but not "a sexual act"; was it meant to mean "sexual intercourse"?

Representative Haas felt the present language in the optional subsection would go well beyond covering just sexual intercourse.

Chairman Carson agreed and asked if rape was intended to cover more than this.

Mr. Paillette felt it was simply a poor choice of terms and that the language "a sexual act" should be replaced by the wording "sexual intercourse".

Senator Lent added that it should read, "...is unaware that sexual intercourse is being performed with her...".

Mr. Wallingford asked what the difference was between the optional sub (2) in section 3 and subsection (1) in section 4.

Senator Lent thought the optional sub (2) in section 1 would give rise to problems involving individuals living together as husband and wife by the use of the language "...because she falsely supposes that he is her husband.". He posed a situation where a woman finds out that her marriage is not valid and out of vindictiveness wants to prosecute the man she falsely supposed to be her husband.

Mr. Paillette thought that the optional section was intended to cover primarily a mistaken identity situation rather than a false supposition of marriage based on a common law relationship. The derivation of the subsection is the MPC, a section entitled "Gross Sexual Imposition" which reads to the effect that a male who has sexual intercourse with a female not his wife commits a felony of the third degree if he compels her by threat; if he knows that she suffers from a mental disease or defect which renders her incapable of appraising the nature of her conduct; or 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.

Mr. Wallingford cited an instance where a defendant had intercourse with a woman who was unconscious because she drank too much. Could he not be prosecuted under either the optional subsection (2) of section 3 or subsection (1) of section 4. There would be an enhanced penalty under section 4, he said, but the defendant would be guilty of both since the female would be "unaware that sexual intercourse was being committed upon her" and she was also "incapable of consent by reason of...mental incapacitation."

Representative Haas asked if this got into the problem of the same act with an enhanced penalty--giving the district attorney the right to choose which he would prosecute under.

Mr. Paillette did not think there would be a problem involving giving a district attorney too much discretion because there is the added element of "knowledge" in section 3. The male "knows that the female is unaware...", while in section 4, rape in the second degree, the female is incapable.

Senator Lent indicated he felt it would not make too much difference whether the optional subsection in section 3 were included or left out.

Representative Haas felt the last part of the optional subsection was needed; that language reading "...that she submits because she falsely supposes that he is her husband." He felt this would cover the situation where several children later the woman finds she is not legally married.

Chairman Carson thought this was what should be avoided--if the couple live as man and wife, this would exclude their conduct from the scope of the draft provisions on rape, sodomy, etc. He objected to the inclusion of the language in the optional subsection if it refers to the legal relationship between the individuals because the subcommittee had previously removed, for all practical purposes, as far as rape, sodomy, etc., are concerned, any legal relationship of

marriage and he would not want to put it back in so that the wife could claim that she supposed they were married but since they are not, the relationship becomes rape.

Representative Haas understood that the earlier amendment had to do with the relationship between consenting adults. He felt that the optional subsection language was, again, getting almost into the area of consent--under the circumstances where the woman felt she was married and she was not, the consent would not be valid.

Representative Haas moved to delete the optional subsection (2) of section 3. The motion carried unanimously.

Section 4. Rape in the second degree.

Mr. Paillette explained that in second degree rape the critical age for the female is less than fourteen while the male is eighteen years of age or more. He recalled that in the Kidnapping Draft when the age of sixteen was discussed the following language was employed, "a person who has not reached his sixteenth birthday". This language was suggested by Judge Sloan because he felt this would clearly indicate to any judge the intent meant.

Senator Lent thought this had been covered in the draft--that the person is deemed a certain age up to and including the day before his next birthday.

Mr. Paillette advised this information was contained in the draft commentary. (See p. 6, Sexual Offenses, P.D. No. 1)

Senator Lent thought the language in the commentary was good and wondered if it could not be made general and be placed in a definition section somewhere so that it would apply wherever ages are mentioned in the statutes.

Mr. Paillette promised to see what he could come up with in this regard.

Chairman Carson noted that the age below which the female is unable to consent had been raised from ten to twelve and asked if the age of fourteen set out in section 4 subsection (2) was still satisfactory. The section would now cover a one year period rather than two years.

Senator Lent understood that in any case, irrespective of age, where there is forcible compulsion, the male would be guilty of rape in the first degree.

Mr. Paillette agreed this was right; this is not changed from present law.

Mr. Wallingford asked if the fact that there was some overlapping between section 3 and section 4 would create any problems. He cited the case where a young couple could be guilty of either third degree or second degree rape because of their age--a thirteen year old girl and an eighteen year old boy, for instance. Under third degree she would be "less than sixteen" and he would be "at least four years older". Under second degree she would be "less than fourteen" and the boy would be "eighteen years of age or more." Could the eighteen year old argue against being charged with second degree rape when he could just as well be charged with third degree which it can be assumed would have a lesser penalty.

Mr. Paillette thought the only way there might be a problem would be if rape in the third degree were to be classed a misdemeanor, but he was of the opinion that all three degrees of rape would be classed as felonies. The Court has said the mere fact that one criminal act violates two felony statutes is not improper.

Senator Lent moved the adoption of section 4 as drafted. The motion carried unanimously.

Section 5. Rape in the first degree.

Chairman Carson reminded the members that in section 5, subsection (2), the age had been changed so that the section reads "the female is less than twelve years...".

Mr. Paillette advised that the language contained in subsection (3) was taken from the present statute.

Senator Lent asked if the language in the section was broad enough so that a husband forcing his wife to have intercourse with another would be guilty of rape.

Mr. Paillette thought this type of conduct would be covered and added that he had just finished a draft on Parties to Crime in which he talks about accomplices. Under the draft, which is no different from the present accomplice concept, the husband would be guilty of rape for conduct of this kind. He noted there is an Oregon case which says a female as an accomplice can commit rape. In Oregon they are all principals.

Senator Lent moved the adoption of section 3 as amended and the adoption of section 5, amended as to age in subsection (2). The motion carried unanimously.

Sections 6,7 and 8, Sodomy in the third, second and first degree.

Mr. Paillette explained that the offense of sodomy was divided into three degrees. The term "deviate sexual intercourse" is used

in defining the crime and this term is defined in section 1 of the draft. In each degree conduct with a "spouse" is excluded--the language "consenting adult" will be incorporated as a result of action by the subcommittee.

Chairman Carson understood that consenting adults no longer, in Oregon, could commit sodomy--male upon male, female upon female, or male upon female. The "consenting adult" would be someone sixteen or above according to the provisions in section 6.

Mr. Paillette agreed this statement was correct. He added that the age of sixteen applies to the present statutory rape provision.

Senator Lent noted that nothing applies to sodomy in the present law.

Mr. Wallingford advised that the only exception is the present fornication statute which would apply to a seventeen year old girl and a boy over eighteen.

Mr. Paillette read from ORS 167.030: "Any male person over the age of 18 years who, without committing rape, carnally knows any female person of previous chaste and moral character, who is over the age of 16 years and under the age of 18 years...". He advised that the provisions of the proposed draft would repeal the present statutes on adultery, fornication and seduction.

Representative Haas referred to section 5, rape in the first degree, and noted that subsection (3) covered the sister, the daughter and step-daughter who is less than sixteen years of age. He asked why this same provision was not included in the section on first degree sodomy. If rape is criminal conduct under those circumstances, he felt sodomy would certainly be, also.

Mr. Wallingford thought the same provision should probably apply to first degree sodomy; statistically, he thought this conduct was more common than rape.

Representative Haas moved the provision contained in section 5, subsection (3) be added to section 8 so that it may be considered by the full Commission.

Mr. Wallingford asked if this were put in under the sodomy statute if it would apply only to females or would it apply also to a male step-son as to his step-mother.

Mr. Paillette thought the language employed in the sodomy section would have to be a little different from that employed in the rape section.

Chairman Carson asked if it would fall within the new "contributing" section.

Mr. Paillette rather doubted that it would.

Senator Lent referred to section 8, subsections (1) and (2), noting the use of the term "victim" and said he did not think the provisions should be confined to just females; the conduct could involve father against son or father against step-son. He suggested language to the effect: "..the victim is less than sixteen years of age and is the actor's brother or sister, of the whole or half-blood, his son or daughter or his spouse's son or daughter."

Representative Haas agreed that this would be his motion and it carried unanimously.

Chairman Carson announced that unless there was objection, sections 6, 7 and 8 would be considered approved as amended. There was no objection.

Section 9. Sexual abuse in the second degree.

Mr. Paillette explained that the key phrase in the section is "sexual contact" which is defined 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." The crime of sexual abuse in the second degree consists of sexual contact plus no consent or the incapacity to consent. It is a defense for the actor to prove the victim's lack of consent was due solely to incapacity by reason of being less than sixteen years of age and the alleged victim was more than fourteen and the actor was less than four years older than the alleged victim. Mr. Paillette thought that if subsection (2) of section 9 were retained, it should be restructured to make it clear that the elements were to be read in the conjunctive--all three elements would have to apply to make the defense available.

Mr. Paillette read from the draft commentary: "It should be noted that consensual sexual contacts between adults are not proscribed. Subsection (2) of section 9 makes a defense available to the defendant when the circumstances are as specified. The purpose of this defense is to exclude from criminal sanction certain activity by adolescents, i.e., 'the necking party' between a 14, 15 or 16 year old 'victim' and another young though criminally responsible person of slightly greater age. It is anticipated that the age of criminal responsibility will be 14 in the final proposed Code." He noted that 14 is the age now appearing in the Responsibility Article.

Section 10. Sexual abuse in the first degree.

There were no questions concerning section 10 and Chairman Carson stated that unless there were objections, sections 9 and 10 would be considered approved. There was no objection raised to this approach.

Senator Lent suggested that the subcommittee go over the draft on Sexual Offenses after Mr. Paillette redrafts it.

The date of the next subcommittee meeting was left open due to the very heavy legislative schedules maintained by the subcommittee members.

The meeting was adjourned at 12:30 p.m.

Respectfully submitted,

Maxine Bartruff, Clerk
Criminal Law Revision Commission