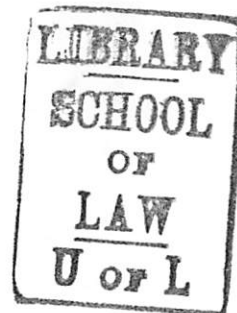


Kentucky Crime Commission
Legislative Research Commission
Frankfort, Kentucky

Kentucky Penal Code
Final Draft
November, 1971

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Project Director

099554 *c.v.*



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INTRODUCTION

GROWTH AND CONFUSION

Kentucky's substantive criminal laws — definitions of crimes and penalties attached to them — have never been the subject of a complete revision. They have simply grown over the generations. The growth has come from two sources: laws passed by legislators and court decisions.

Through the decades, well-meaning and honorable men reacted to the needs of their times by passing laws or making court decisions. But as the times changed, the laws remained.

The result? Haphazard coverage, with gaping loopholes in some areas and overlapping coverage in other areas. Law beset by shortcomings, inequities and, in some cases, nonsense.

MEETING A VITAL NEED

Kentucky's General Assembly saw the problem. Knowing that the laws governing criminal procedures had been reworked and enacted by the 1962 legislature, the 1968 General Assembly ordered a revision of the state's substantive criminal laws. The Kentucky Crime Commission and the Legislative Research Commission were ordered to do the job.

For more than three years the two commissions worked together to prepare the historic revision. First, the Crime Commission prepared a two-volume outline identifying problems and legal issues. Then the Legislative Research Commission and the Crime Commission jointly named a distinguished 12-member advisory panel.

Panel members were chosen on recommendation of the presidents of such statewide groups as the Kentucky Bar Association, Commonwealth's Attorneys Association, County Attorneys Association, Kentucky Judicial Conference and the County Judges Association. In addition, the late Morris C. Montgomery, Chief Justice of the Kentucky Court of Appeals, chose Judge John S. Palmore to serve as chairman of the panel. Law school deans from the University of Louisville and the University of Kentucky were also asked to serve.

Panel members were aided in the drafting of the law revision by a team of legal scholars. The approach was thorough. Painstaking research was done. Proposed drafts were written, rewritten and rewritten again. Regular work sessions were held and a word-by-word examination made of every proposal.

The Model Penal Code, prepared by the American Law Institute from 1953 to 1962, was used extensively. Recent criminal law revisions by several states were also used, for revision is a growing movement. Some one dozen states have already enacted revised codes, 15 others have completed the revision process.

Haste was avoided. The research, the scholarship—the debates to assure fairness to all Kentuckians—continued for more than three years.

Now the task is done. This Penal Code for Kentucky is ready for submission to the 1972 General Assembly.

FORMAT

The code is divided into three main parts — General Provisions, Specific Offenses and Disposition of Offenders — containing 36 separate chapters. Generally, the initial section in a chapter, ending in 00, contains the definitions applicable to that chapter. Definitions from other chapters are cross referenced. Other sections follow in a logical sequence. A commentary accompanies each section. Whenever necessary, the commentary is subdivided into a general description of the effect of the proposed section and the relationship of the proposed section to existing law.

Offenses under the code are classified into four felony degrees and three misdemeanor degrees. The penalty clause of each offense designates the degree of punishment to be imposed. Actual penalties, together with criteria for imposing sentences are contained in the last three chapters.

The classification of offenses and the possible maximum penalties are:

Class A felony	Death, life imprisonment without parole, imprisonment for 20 years to life.
Class B felony	Ten to twenty years imprisonment or a fine or both.
Class C Felony	Five to ten years imprisonment or a fine or both.
Class D Felony	One to five years imprisonment or a fine or both.
Class A misdemeanor	Up to one year of imprisonment or a fine or both.
Class B misdemeanor	Up to ninety days imprisonment or a fine or both.
Violation	Fine only.

The code is now being prepared in bill form for introduction to the General Assembly. The bill will not contain the commentary. It is anticipated that although the code will be put into the regular Kentucky Revised Statutes style upon enactment, the present format will be retained as much as possible.

CHAPTER 11. SEXUAL OFFENSES

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1100	Definition of Terms
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Sec. 1100

[Definition of Terms]

The following definitions apply in this chapter:

- (1) "Deviate sexual intercourse" means any act of sexual gratification between persons not married to each other involving the sex organs of one person and the mouth or anus of another.
- (2) "Forcible compulsion" means physical force that overcomes earnest resistance or a threat, express or implied, that overcomes earnest resistance by placing a person in fear of immediate death or physical injury to himself or another person or in fear that he or another person will be immediately kidnapped.
- (3) "Marriage" means persons living together as man and wife regardless of the legal status of their relationship. Spouses living apart under a decree of judicial separation are not married to one another for purposes of this chapter.
- (4) "Mentally defective" means that a person suffers from a mental disease or defect which renders him incapable of appraising the nature of his conduct.
- (5) "Mentally incapacitated" means that a person is rendered temporarily incapable of appraising or controlling his conduct as a result of the influence of a controlled or intoxicating substance administered to him without his consent or as a result of any other act committed upon him without his consent.
- (6) "Physically helpless" means that a person is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

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

(8) "Sexual intercourse" means sexual intercourse in its ordinary sense but is limited to sexual intercourse between persons not married to each other. Sexual intercourse occurs upon any penetration, however slight; emission is not required.

Cross References

- (1) "Controlled substance" is defined in Section 2900.
- (2) "Defense" is defined in Section 135.
- (3) "He" is defined in Section 140.
- (4) "Physical force" is defined in Section 400.
- (5) "Physical injury" is defined in Section 140.
- (6) "Serious physical injury" is defined in Section 140.

Commentary

Subsection (8) states that the term "sexual intercourse" is used in its ordinary sense but is limited to acts of sexual intercourse between persons not married to each other. Any penetration, however slight, is sufficient, and emission is not required. Under this definition, sexual intercourse may occur without orgasm or complete penetration of the penis into the vagina.

Subsection (1) defines "deviate sexual intercourse" to include any act of fellatio, cunnilingus or anal intercourse. Such acts committed by persons married to each other are excluded from this definition.

Subsection (7) defines the term "sexual contact" as any touching of the sexual or other intimate parts of a person not married to the actor for the purpose of gratifying the sexual desire of either party. An actual touching is required, but the contact need not be directly with the body. For example, touching another person's sex organs through clothing would be within the purview of this definition. The contact must be with either the victim or the actor but need not be contact between them. Thus, subjecting another to sexual contact with a third person or with an animal would be covered by this definition. The defi-

nition requires contact with the sexual or other intimate parts of a person not married to the actor. This would obviously include such acts as the manipulation of genitals, digital penetration of the vagina, and non-consensual fondling of a woman's breast; it would also include such acts as removing a child's undergarments. However, the touching must be done for the purpose of sexual gratification. Acts commonly expressive of familial or friendly affection are excluded in order to avoid criminal liability for an ordinary kiss, hug or pat which is as consistent with overly-familiar friendship as with lust. The definition would also exclude an inadvertent touching of the intimate parts of another person.

Subsection (3) defines "marriage." For the purpose of this chapter, persons living together as husband and wife are considered married regardless of the legal validity of their marital status whereas spouses living apart under a decree of judicial separation are not considered to be married. This separation, however, must be de jure and not merely de facto. This provision protects a spouse who is legally separated from unwanted sexual advances. Where the definition of the offense excludes conduct with a

spouse, this shall not preclude conviction of a spouse as an accomplice in a sexual act which he causes another person, not within the exclusion, to perform. Thus, a husband who forces his wife to have intercourse with another man may be convicted of rape.

Subsection (4) defines the term "mentally defective" as a person who suffers from a mental disease or defect which renders him incapable of appraising the nature of his conduct. The phrase "incapable of appraising the nature of his conduct" means that the person does not know that a sexual act is being performed. In cases of the mentally ill, there must be a substantially complete lack of judgment and self-control resulting in substantially complete incapacity. The definition does not include a mental illness or mental defect which makes the person more willing to participate or which upsets his moral values, nor does it include the person whose inhibitions are softened by the voluntary consumption of alcohol. Present Kentucky law defines such incapacity as being destitute of mind from infancy or having such a weak or feeble mind from birth as not to know right from wrong or to be unable to resist the suggestion of intercourse. *Jones v. Commonwealth*, 159 S.W. 568 (Ky. 1913). Section 1100(4) does not substantially change present Kentucky law but rather states the same abnormality in language employed by contemporary psychiatry. The term is used in describing a person who is deemed incapable of consenting to a sexual act.

Subsection (5) describes a person as being "mentally incapacitated" when he is rendered temporarily incapable of appraising or controlling his conduct as a result of the influence of a controlled or intoxicating substance administered to him without his consent or as a result of any other act committed upon him without his consent. It is not necessary that the defendant administer or cause the controlled or intoxicating substance to be administered to the victim. It is sufficient that it was administered by

someone without the victim's consent. This might seem unduly harsh, but under Section 1110 the defendant may raise the defense that at the time he engaged in the conduct constituting an offense he did not know of the facts and conditions responsible for such incapacity to consent. While it is not necessary that the defendant administer the incapacitating substance, he must knowingly take advantage of the situation before an offense is committed. The definition is not intended to include the innocent situation in which men invite women to drink more than they should, nor it is intended to cover the situation in which the actor and the complainant engage in a joint bout of drinking or using controlled substances. The victim's lack of consent is essential. When a person is rendered completely unconscious by such an incapacitating substance, that condition is described by the term "physically helpless" as opposed to the use of the term "mentally incapacitated" to describe a person who is deemed incapable of consenting to a sexual act.

Under Subsection (6) a person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act is deemed "physically helpless." This would include the situation where a person is in a deep sleep as a result of barbiturates, unconscious because of excessive alcohol consumption, or a total paralytic. Here again, the defendant must knowingly take advantage of this situation, and he may raise the defense which is set forth in Section 1110. The term is used in describing a person who is deemed incapable of consenting to a sexual act, but the condition of being "physically helpless" is an aggravating factor in rape, sodomy and sexual abuse.

Subsection (2) defines "forcible compulsion" as physical force that overcomes an earnest resistance. The term also includes a threat, express or implied, that overcomes earnest resistance by placing a person in fear of immediate death or physical injury to him-

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self or to another person or in fear that he or another person will be immediately kidnapped. The threat must be communicated, and it must be the cause of the submission. The definition does not require that the victim's fear be "reasonable." One who takes advantage of a victim's unreasonable fears of violence should not escape punishment any more than the swindler who cheats gullible people by false statements which they should have found incredible. The definition extends the concept of "forcible compulsion" to include threats that place the victim in fear of immediate death or physical injury or kidnapping not only of himself but also of another person. For example, such other person would obviously include the victim's child, escort or fiancé. Extending this concept beyond the victim's immediate family to include "another person" broadens the present law. As the relationship becomes more tenuous, the factfinders must determine whether the threatened harm was in fact the cause of the victim's submission.

In brief, a person is not deemed

"forcibly compelled" to submit to a sexual act unless there is physical force sufficient to overcome "earnest resistance," or intimidation involving a threat of physical injury or kidnapping. The phrase "earnest resistance" requires more than token initial resistance but less than a showing that the victim was physically incapable of additional struggle against his assailant. Where additional struggle would obviously be useless and dangerous, the failure to struggle should not absolve the accused. Force falling short of these standards, while possibly establishing some form of assault or coercion, does not render the victim's submission nonconsensual for purposes of a sex crime prosecution based on "forcible compulsion." Thus, when a victim submits to a sexual act because of a threat made by the defendant to expose a theft that the victim had previously committed or to disclose a previously illicit sexual relationship or to foreclose a mortgage or to cost the victim his job, the victim has not been "forcibly compelled" within the meaning of this definition.

Sec. 1105

[Sexual Offenses: Lack of Consent]

- (1) Whether or not specifically stated, it is an element of every offense defined in this chapter that the sexual act was committed without consent of the victim.
- (2) Lack of consent results from:
 - (a) Forcible compulsion; or
 - (b) Incapacity to consent; or
 - (c) If the offense charged is sexual abuse, any circumstances in addition to forcible compulsion or incapacity to consent in which the victim does not expressly or impliedly acquiesce in the actor's conduct.
- (3) A person is deemed incapable of consent when he is:
 - (a) Less than 16 years old; or
 - (b) Mentally defective; or
 - (c) Mentally incapacitated; or
 - (d) Physically helpless.

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Commentary

Subsection (1) provides that it is an element of every offense defined in this chapter that the sexual act was committed without consent of the victim. This is so whether or not the section defining the particular offense specifically states that nonconsent of the victim is an element of the offense. Since "lack of consent" is the common denominator for all of the crimes prohibited by this chapter, Subsections (2) and (3) seek to define it with precision.

Generally speaking, a sexual act is committed upon a person "without his consent" under two types of circumstances: (i) when the victim is "forcibly compelled" to submit; and (ii) when, regardless of actual acquiescence, the victim is deemed by law to be "incapable of consenting" thereto. Subsection (2) provides that lack of consent results from one of three factors: (i) "forcible compulsion" as that term is defined in Section 1100(2); or (ii) "incapacity to consent" which is established by one of the four provisions listed in Subsection (3); or (iii) where the offense charged is sexual abuse, any circumstances in addition to "forcible compulsion" or "incapacity to consent" in which the victim does not expressly or impliedly acquiesce in the actor's conduct.

Subsection (2)(c) is expressly limited to the offense of sexual abuse. With respect to this crime, the term "with-

out consent" is broadened beyond its meaning as applied to rape and sodomy. The latter crimes are committed with the victim's literal nonconsent only when submission is accomplished by "forcible compulsion" which is limited to physical force or intimidation. To restrict the prohibited conduct to forcible compulsion would not be adequate for the less serious crime of sexual abuse which is designed to encompass not only genuinely forcible attacks but also all other sexual advances taken without the victim's acquiescence. For example, this would include the taking of indecent liberties in a crowded public place. Accordingly, in Subsection (2)(c) the concept of "lack of actual consent" is extended to any circumstances in which the victim does not expressly or impliedly acquiesce in the actor's conduct.

Subsection (3) sets forth four conditions under which a person is deemed incapable of consenting to a sexual act: (i) the victim is less than 16 years of age; or (ii) the victim is mentally defective as that term is defined in Section 1100(4); or (iii) the victim is mentally incapacitated as that term is defined in Section 1100(5); or (iv) the victim is physically helpless as that term is defined in Section 1100(6). A person is "less than 16 years old" within the meaning of Subsection (3)(a) up to and including the day before his 16th birthday.

Sec. 1110

[Sexual Offenses: Defense]

In any prosecution under this chapter in which the victim's lack of consent is based solely on his incapacity to consent because he was less than 16 years old, mentally defective, mentally incapacitated or physically helpless, it is a 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.

Commentary

Section 1110 refers to a prosecution for an offense under this chapter in which the victim is deemed incapable of consenting solely because he was less than 16 years old, mentally defective, mentally incapacitated or physically helpless. In such prosecutions, it is a 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.

The prosecution is not required affirmatively to establish knowledge of incapacity to consent because this would place an unduly heavy burden on the state. The defendant must raise lack of knowledge of the particular condition as a defense. For example, if the victim had an established but not marked mental retardation and the defendant was unaware of such condition, he should be given an opportunity to exculpate himself by asserting that fact as a defense. The statute does not expressly require that the mistake be "reasonable." Since the accused must raise the defense and since usually there is no source of information about his mistake other than the accused himself, this means that as a practical matter the accused will

need to take the stand to testify in his own behalf. At this point the fact-finders should be competent to judge his credibility, so that no express requirement of "reasonable mistake" is necessary.

This position appears to be consistent with present Kentucky law which in a prosecution for rape of an insane person or idiot requires that the accused know and take advantage of that fact. *Wilson v. Commonwealth*, 160 S.W.2d 649 (Ky. 1942). However, Section 1110 provides a defense for mistake as to the age of the victim. Present Kentucky law does not provide for such a defense.

In any prosecution for an offense under this chapter in which the victim is deemed "incapable of consent" because he is less than 16 years old, evidence relating to prior unchastity on the part of the victim shall not be admissible in mitigation of the offense charged. This determination is consistent with present Kentucky law. However, in any prosecution under this chapter in which the victim is 16 or older, evidence of prior unchastity on the part of the victim would be admissible on the question of consent.

Sec. 1115

[Rape in the First Degree]

(1) A person is guilty of rape in the first degree when:

- (a) He engages in sexual intercourse with another person by forcible compulsion; or
- (b) He engages in sexual intercourse with another person who is incapable of consent because he:
 - (i) Is physically helpless; or
 - (ii) Is less than 12 years old.

(2) Rape in the first degree is a Class B felony unless the victim is under 12 years old or receives a serious physical injury in which case it is a Class A felony.

Sec. 1116 [Rape in the Second Degree]

- (1) A person is guilty of rape in the second degree when, being 18 years old or more, he engages in sexual intercourse with another person less than 14 years old.
- (2) Rape in the second degree is a Class C felony.

Sec. 1117 [Rape in the Third Degree]

- (1) A person is guilty of rape in the third degree when:
 - (a) He engages in sexual intercourse with another person who is incapable of consent because he is mentally defective or mentally incapacitated; or
 - (b) Being 21 years old or more, he engages in sexual intercourse with another person less than 16 years old.
- (2) Rape in the third degree is a Class D felony.

Commentary

Rape under present Kentucky law consists of two stated degrees (rape of child under 12 and rape of female over 12) and one implied degree (carnal knowledge of a female child under 18 with her consent or of a male child under 18). Sections 1115, 1116, 1117 and 1130 divide the crime into three stated degrees (first, second or third degree rape) and one implied degree (sexual misconduct). Although substantively the crime of rape has not been changed, this revision achieves a more equitable formulation of the elements of each degree with a consonant equity of punishment.

Rape in the first degree: Section 1115 presents three factual situations in which an accused is deemed guilty of rape in the first degree. Section 1115(1)(a) prohibits sexual intercourse with another person by forcible compulsion as that term is defined in Section 1100(2). The essential element under Subsection (1)(a) is the use of force. Force is not restricted to

physical force but includes a threat that overcomes earnest resistance and places the victim in fear of immediate death, physical injury or kidnapping of himself or another person. The ages of the defendant and the victim are immaterial. Except in cases of statutory rape, evidence of the victim's prior unchastity is relevant and admissible on the question of consent.

Section 1115(1)(b)(i) prohibits sexual intercourse with a person who is incapable of consent by reason of being physically helpless as that term is defined in Section 1100(6). The essential element under Subsection (1)(b)(i) is that the victim must be physically helpless. Force is not an essential element of this offense, and the ages of the defendant and the victim are immaterial. The victim is statutorily incapable of consent; therefore, evidence relating to the victim's prior unchastity would not be relevant or admissible. However, it is a defense under Section 1110 that the defendant at the time he

§ 1117

engaged in the sexual intercourse did not know of the facts or conditions responsible for the physical helplessness.

Section 1115(1)(b)(ii) prohibits sexual intercourse with a person who is less than 12 years old. The mere act of sexual intercourse with a child under 12 completes the offense. The age of the defendant is immaterial, but the victim must be less than 12 years old. Conduct of this character is so dangerous to the child that severe penalty is imposed. Neither the use of force nor the lack of consent need to be proved by the state. The victim is statutorily incapable of consenting, and evidence relating to the victim's prior unchastity is not relevant or admissible. However, mistake as to age is a defense under Section 1110.

Rape in the first degree is classified primarily as a Class B felony; this is in line with the other modern codes. However, where the victim is under twelve or receives a serious physical injury, Section 1115(2) increases the penalty to a Class A felony.

Section 1115 will make little substantive change in present Kentucky law. The penetration requirement is the same, and no corroboration is required. However, Section 1110 allows a defense that the defendant at the time he engaged in the sexual intercourse did not know of the facts or conditions responsible for the victim's incapacity to consent, including age.

Rape in the second degree: Section 1116 presents another form of statutory rape. This provision prohibits sexual intercourse between a defendant who is 18 years old or more and a victim who is less than 14 years old. Under Section 1116 the ages of both the defendant and the victim are material. The defendant must be at least 18 years old. The victim must be 12 or 13 years old, therefore statutorily incapable of consent. Evidence relating to the victim's prior unchastity is not relevant or admissible. Force is not an essential element of this offense. Under Section 1116 the victim is not mentally defective, mentally incapacitated or physically helpless. However, it is a

defense under Section 1110 that the defendant did not know that the victim was less than 14 years old.

If the victim is less than 12 years old, such conduct constitutes rape in the first degree. If the victim is 14 or 15 years old and the defendant is 21 years old or more, the offense constitutes rape in the third degree. If the defendant is less than 18 years old and the victim is 12 to 15 years old or if the defendant is 18 to 20 years old and the victim is 14 or 15 years old, the conduct constitutes sexual misconduct.

Section 1116 makes little substantive change in present Kentucky law. The victim is statutorily incapable of consent, and evidence relating to the victim's prior unchastity is not admissible. Force is not an element of this offense and need not be established by the state. However, Section 1110 provides a defense for mistake as to age.

Rape in the third degree: Section 1117(1)(a) prohibits sexual intercourse with another person who is incapable of consent because he is mentally defective as that term is defined in Section 1100(4) or because he is mentally incapacitated as that term is defined in Section 1100(5). The victim is statutorily incapable of consenting. Therefore, evidence relating to the victim's prior unchastity is not admissible. The ages of the defendant and the victim are immaterial. Force is not an element of this offense, and the victim need not be physically helpless. Under Section 1110 it is a defense that the defendant at the time he engaged in the sexual intercourse did not know the facts or conditions responsible for the victim's mental defect or mental incapacity.

Section 1117(1)(b) prohibits sexual intercourse between an actor who is 21 years old or more and a victim who is less than 16 years old. The difference in age present in this situation is substantial enough so that intercourse of this nature should be escalated from sexual misconduct into the rape category. The ages of both the defendant and the victim are material. The defendant must be 21 years old or more,

the victim 14 or 15 years old. The victim is statutorily incapable of consenting; therefore, evidence relating to the victim's prior unchastity is not admissible. Force is not an essential element of this offense, nor is the fact that the victim is mentally defective, mentally incapacitated or physically helpless. However, it is a defense under Section 1110 that the defendant at the time he engaged in the sexual intercourse did not know that the victim was less than 16 years old.

If the victim is less than 12 years old, such conduct constitutes rape in the first degree. If the victim is less

than 14 years old, such conduct constitutes rape in the second degree.

Section 1117 makes some significant changes in present Kentucky law. The age of consent is reduced to 16. When the victim is deemed incapable of consent by statute, evidence relating to the victim's prior unchastity is not admissible as a mitigating factor as is allowed under certain conditions by present Kentucky law. However, it is a defense under Section 1110 that the defendant at the time he engaged in the sexual intercourse did not know the facts or conditions responsible for the victim's incapacity to consent.

Sec. 1120

[Sodomy in the First Degree]

- (1) A person is guilty of sodomy in the first degree when:
 - (a) He engages in deviate sexual intercourse with another person by forcible compulsion; or
 - (b) He engages in deviate sexual intercourse with another person who is incapable of consent because he:
 - (i) Is physically helpless; or
 - (ii) Is less than 12 years old.
- (2) Sodomy in the first degree is a Class B felony unless the victim is under 12 years old or receives a serious physical injury in which case it is a Class A felony.

Sec. 1121

[Sodomy in the Second Degree]

- (1) A person is guilty of sodomy in the second degree when, being 18 years old or more, he engages in deviate sexual intercourse with another person less than 14 years old.
- (2) Sodomy in the second degree is a Class C felony.

Sec. 1122

[Sodomy in the Third Degree]

- (1) A person is guilty of sodomy in the third degree when:
 - (a) He engages in deviate sexual intercourse with another person

who is incapable of consent because he is mentally defective or mentally incapacitated; or

(b) Being 21 years old or more, he engages in deviate sexual intercourse with another person less than 16 years old.

(2) Sodomy in the third degree is a Class D felony.

Commentary

The structure of the stated and implied degrees of sodomy parallel the stated and implied degrees of rape. The age factors and types of consensual incapacity are presented in an identical structure with identical penalties.

The essence of sodomy is "deviate sexual intercourse" as that term is defined in Section 1100(1). Although the primary concern is with homosexual contacts, the definition of deviate sexual intercourse includes nonvaginal heterosexual intercourse other than between spouses. Sections 1120, 1121 and 1122 are designed primarily to prohibit criminal homosexual activities based on compulsion or perpetrated on a young person or on anyone incapable of resisting the deviate sexual advance. A violent homosexual assault is as dangerous to the victim as a heterosexual attack. A homosexual attack on an intoxicated or physically helpless person produces the same fear, anger and resentment as does a heterosexual assault. There is as much need to protect a mental incompetent against homosexual or otherwise aberrant contact as against heterosexual contact. Further, homosexual activity with a child going through the transition from prepubertal sexuality to mature sexual adjustment exposes him to much greater danger of lasting psychological damage than does a heterosexual contact, except perhaps for an incestuous relationship.

The code does not penalize consensual sodomy. There is no more reason to penalize private, consensual homosexual acts between adults than there is to penalize private, consensual, nonmarital heterosexual intercourse between adults. However, any act of this nature committed in public would constitute disorderly conduct.

Sodomy in the first degree: Section 1120 presents three factual situations in which a defendant is guilty of sodomy in the first degree. Section 1120(1)(a) prohibits deviate sexual intercourse with another person by forcible compulsion as that term is defined in Section 1100(2). The essential element under Subsection (1)(a) is the use of force. The ages of the defendant and the victim are immaterial. Except in cases in which the victim is less than 16 years old, evidence relating to the victim's prior unchastity is admissible on the question of consent.

Section 1120 (1)(b)(i) prohibits deviate sexual intercourse with a person who is incapable of consent by reason of being physically helpless as that term is defined in Section 1100(6). The essence of Subsection (1)(b)(i) is the victim's physical condition. Force is not an essential element. The ages of the defendant and the victim are immaterial. The victim is statutorily incapable of consent; therefore, evidence relating to the victim's prior unchastity is not admissible. However, it is a defense under Section 1110 that the defendant at the time he engaged in the deviate sexual intercourse did not know the facts or conditions responsible for the victim's physical condition.

Section 1120 (1)(b)(ii) prohibits deviate sexual intercourse with a person who is less than 12 years old. This provision creates a form of statutory sodomy. The age of the defendant is immaterial, but the victim must be less than 12 years old. Force is not an element of this offense. This victim is statutorily incapable of consent; therefore, evidence relating to the victim's prior unchastity is not admissible. However, mistake as to age is a defense

under Section 1110. Such activity with a pre-pubertal child involves such great danger of lasting psychological damage that it deserves a severe penalty. Sodomy in the first degree is a Class B felony unless the victim is under twelve or receives a serious physical injury in which case the penalty is increased to a Class A felony.

Section 1120 will make significant changes in present Kentucky law. Private, consensual acts of this nature between adults are not prohibited by the code. Under present Kentucky law, consent is not a defense; the one consenting is considered to be an accomplice. Under the code consent is relevant only in first degree sodomy involving forcible compulsion. Otherwise, if the act falls within the purview of one of the three degrees of sodomy, the victim is statutorily incapable of consent. Under the code the one consenting is not treated as an accomplice. Under present Kentucky law, penetration of the mouth is not sufficient. By definition, the code includes oral copulation. Corroboration is not required by present Kentucky law and is not required by the code.

Sodomy is the second degree: Section 1121 constitutes another form of statutory sodomy. This section prohibits deviate sexual intercourse between a defendant who is 18 years old or more and a victim who is less than 14 years old. The ages of the defendant and the victim are essential. The defendant must be at least 18 and the victim must be less than 14 years old. Force is not an essential element of this offense. The victim is statutorily incapable of consent; therefore, evidence relating to the victim's prior unchastity is not admissible. However, it is a defense under Section 1110 that the defendant did not know that the victim was less than 14 years old.

If the victim is less than 12 years old, the conduct constitutes sodomy in the

first degree. If the defendant is less than 18 years old and the victim is 12 to 15 years old, the conduct constitutes sexual misconduct.

Sodomy in the third degree: Section 1122(1)(a) prohibits deviate sexual intercourse with another person who is incapable of consent because he is mentally defective or mentally incapacitated as those terms are defined in Section 1100(4) and (5). The essence of Subsection (1)(a) is the victim's mental defect or mental incapacity. The ages of the defendant and the victim are immaterial. Force is not an essential element of the offense. The victim is statutorily incapable of consent. However, it is a defense under Section 1110 that the defendant at the time he engaged in the deviate sexual intercourse did not know the facts or conditions responsible for the victim's incapacity to consent.

Section 1122(1)(b) prohibits deviate sexual intercourse between an actor who is 21 years old or more and a victim who is less than 16 years old. The ages of both the defendant and the victim are essential. The defendant must be 21 years old or more and the victim must be less than 16 years old. Force is not an element of this offense. The victim is statutorily incapable of consent. However, it is a defense under Section 1110 that the defendant at the time he engaged in the deviate sexual intercourse did not know that the victim was less than 16 years old.

If the victim is less than 14 years old, the conduct constitutes sodomy in the second degree. If the victim is less than 12 years old, the conduct constitutes sodomy in the first degree. If the defendant is 18 to 20 years old and the victim is 14 or 15 years old or if the defendant is under 18 years of age and the victim is 12 to 15 years old, then the offense constitutes sexual misconduct.

§ 1125

Sec. 1125

[Sexual Abuse in the First Degree]

- (1) A person is guilty of sexual abuse in the first degree when:
 - (a) He subjects another person to sexual contact by forcible compulsion; or
 - (b) He subjects another person to sexual contact who is incapable of consent because he:
 - (i) Is physically helpless; or
 - (ii) Is less than 12 years old.
- (2) Sexual abuse in the first degree is a Class D felony.

Sec. 1126

[Sexual Abuse in the Second Degree]

- (1) A person is guilty of sexual abuse in the second degree when:
 - (a) He subjects another person to sexual contact who is incapable of consent because he is mentally defective or mentally incapacitated; or
 - (b) He subjects another person who is less than 14 years old to sexual contact.
- (2) Sexual abuse in the second degree is a Class A misdemeanor.

Sec. 1127

[Sexual Abuse in the Third Degree]

- (1) A person is guilty of sexual abuse in the third degree when:
 - (a) He subjects another person to sexual contact without the latter's consent.
 - (b) In any prosecution under this section, it is a defense that:
 - (i) The other person's lack of consent was due solely to incapacity to consent by reason of being less than 16 years old; and
 - (ii) The other person was at least 14 years old; and
 - (iii) The actor was less than 5 years older than the other person.
- (2) Sexual abuse in the third degree is a Class B misdemeanor.

Commentary

The three degrees of sexual abuse contained in Sections 1125, 1126 and 1127 roughly parallel the structure for rape and sodomy. The offenses apply to both adults and children. Presently the proscribed behavior when committed upon an adult is generally prosecuted under an assault provision. However, under the code an actual physical injury must be inflicted to constitute an assault. Since the conduct dealt with in the offense of sexual abuse seldom results in physical injury, a gap would exist if this conduct were not proscribed. Thus, these three sections constitute a special codified sexual assault.

Sexual abuse is based on "sexual contact" as that term is defined in Section 1100(7). An actual touching must occur. Indecent proposals or obscene gestures would constitute disorderly conduct or harassment.

"Lack of consent" is an element of each degree of sexual abuse. However, in a prosecution for sexual abuse the term "lack of consent" has a broader meaning than in a prosecution for rape or sodomy. "Lack of consent" in any prosecution for sexual abuse includes any circumstances in addition to "forcible compulsion" or "incapacity to consent" in which the victim does not expressly or impliedly acquiesce in the actor's conduct.

Sexual abuse in the first degree: Section 1125 presents three factual situations in which a defendant is guilty of sexual abuse in the first degree. Section 1125(1)(a) prohibits sexual contact with another person by forcible compulsion as that term is defined in Section 1100(2). The essential element under Subsection (1)(a) is the use of force. The ages of both the defendant and the victim are immaterial. Except when the victim is less than 16 years old, evidence relating to the victim's prior unchastity is relevant and admissible on the issue of consent.

Section 1125(1)(b)(i) prohibits sexual contact with a person who is incapable of consent by reason of being physical-

ly helpless as that term is defined in Section 1100(6). The essential element under Subsection (1)(b)(i) is the victim's physical helplessness. Force is not an essential element of this offense, and the ages of the defendant and the victim are immaterial. The victim is statutorily incapable of consent. However, it is a defense under Section 1110 that the defendant at the time he engaged in the sexual contact did not know of the facts or conditions responsible for the victim's physical helplessness.

Section 1125(1)(b)(ii) prohibits sexual contact with a person who is less than 12 years old. The defendant may be of any age, but the victim must be less than 12. Force is not an essential element of this offense. The victim is statutorily incapable of consent. However, mistake as to age is a defense under Section 1110.

Present Kentucky law prohibits "indecent or immoral practices with another" and "taking or detaining a woman against her will." The sexual abuse provisions preserve the essence of these offenses. Nonconsensual sexual contact is prohibited except for petting between contemporaries. The offense, however, is graded according to the age of the victim, the reason for the incapacity to consent, and the use of force. The age of consent is lowered to 16.

The essence of "detaining" would be preserved except that sexual abuse requires an actual touching. The concept of detention by implied threat of force is preserved by the definition of forcible compulsion in Section 1100(2), and the use of force per se constitutes sexual abuse in the first degree. No corroboration is required. However, the defense of mistake under Section 1110 would appear to change present Kentucky law.

Sexual abuse in the second degree: Section 1126(1)(a) prohibits sexual contact with another person who is incapable of consent because he is mentally defective or mentally incapacitated as

§ 1130

those terms are defined in Section 1100 (4) and (5). The essential element under Subsection (1)(a) is the victim's mental defect or mental incapacity. The ages of the defendant and the victim are immaterial. Force is not an element of this offense. The victim is statutorily incapable of consent. However, it is a defense under Section 1110 that the defendant did not know of the victim's mental defect or mental incapacity.

Section 1126(1)(b) prohibits sexual contact with a person less than 14 years old. The age of the defendant is immaterial, but the victim must be less than 14 years old. Force is not an element of this offense. The victim is statutorily incapable of consent. However, mistake as to age is a defense under Section 1110.

Sexual abuse in the third degree: Section 1127 prohibits any nonconsensual sexual contact. Sexual contact is defined in Section 1100(7). Force is not

an element of this offense. The ages of the defendant and the victim are immaterial. Except in prosecutions in which the victim is less than 16 years old, evidence relating to the victim's prior unchastity is relevant and admissible on the issue of consent.

Section 1127(1)(b) sets forth a defense when three factors are present: (i) the victim is statutorily incapable of consent because he is less than 16 years old; (ii) the victim is at least 14 years old; and (iii) the defendant is less than 5 years older than the victim.

The purpose of this defense is to exclude petting between contemporaries from criminal sanctions. In this area private morals must be relied upon to regulate personal behavior, and criminal sanctions are inappropriate to punish a breach of the moral law. The defense would apply whether the contact was heterosexual or homosexual.

Sec. 1130

[Sexual Misconduct]

(1) A person is guilty of sexual misconduct when he engages in sexual intercourse or deviate sexual intercourse with another person without the latter's consent.

(2) Sexual misconduct is a Class A misdemeanor.

Commentary

Section 1130 represents the basic crimes of rape and sodomy and, therefore, includes all of the higher degrees of each of these crimes. Section 1130 provides a useful plea-bargaining tool for the prosecutor in certain cases even though some degree of forcible compulsion or incapacity to consent may be present.

But the basic purpose of Section 1130 is to preserve the concept of statutory rape and statutory sodomy. When read in conjunction with Sections 1115-17 and 1120-22, Section 1130 is designed

primarily to prohibit nonconsensual sexual intercourse or deviate sexual intercourse under two circumstances: (i) when the victim is 14 or 15 and the defendant is less than 21; or (ii) when the victim is 12, 13, 14 or 15 and the defendant is less than 18 years of age. In this context the ages of the defendant and the victim are critical. Force is not an element of this offense. The victim is statutorily incapable of consent. However, mistake as to age is a defense under Section 1110.

The purpose in denominating such

conduct between persons within the specified age groups as sexual misconduct rather than rape or sodomy is to eliminate an undesirable stigma. In such cases the defendant may well have been persuaded by the "victim" to engage in the proscribed conduct. It seems unnecessarily harsh to have a defendant within the prescribed age limitation who has been convicted of such a statutory offense to bear a criminal record labeling him as a "rapist" or "sodomist." Section 1130

takes a more realistic approach to the penalty imposed while at the same time prohibiting the undesirable conduct.

If the accused is 21 or over and the victim is less than 16, the offense constitutes third degree rape. If the accused is 18 or older and the victim is under 14, the offense constitutes second degree rape. Any sexual intercourse with a person less than 12 years old constitutes first degree rape regardless of the age of the accused.

Sec. 1135

[Indecent Exposure]

(1) A person is guilty of indecent exposure when, with intent to arouse or gratify sexual desire of himself or of any person other than his spouse, he exposes his genitals under circumstances in which he knows his conduct is likely to cause affront or alarm.

(2) Indecent exposure is a Class B misdemeanor.

Commentary

Section 1135 prohibits any exposure of the genitalia done with intent to arouse or gratify the actor's sexual desire or that of another to whom he is not married under circumstances in which he knows his act will probably cause affront or alarm. Thus, three elements must be shown: (i) an exposure of the genitalia; (ii) intent to arouse or gratify the sexual desire of the actor or of another person to whom he is not married (an inadvertent or accidental exposure is excluded); and (iii) knowledge that under the circumstances his conduct is likely to cause affront or alarm.

Under Section 1135, it is not the place but the purpose of the exposure and the likelihood of affront or alarm to others that determines the actor's criminality. The offense can be committed in any place where the conduct may reasonably be expected to be viewed by others. It is the probability of public view that is critical rather than the ownership or use of the particular real estate on which the act

occurs. For example, a person standing nude before a window in his private apartment which is adjacent to a well-traveled sidewalk would fall within the purview of Section 1135. On the other hand, a couple in a parked car on a lonely, country road would probably be excluded.

Exhibitionism is an emotional illness resulting in compulsive behavior. It is questionable whether penal sanctions are effective in controlling this illness. The offense is penalized in Chapter 11 because the resulting social harm is sufficiently serious to warrant penal sanctions.

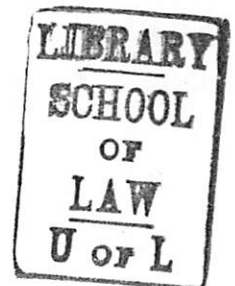
Under present Kentucky law indecent exposure is treated as a common law offense or prosecuted under a municipal ordinance. Section 1135 merely codifies this prohibition. Section 1135 would also replace KRS 436.140 which prohibits a person from appearing on a highway or upon a city street that has no police protection when clothed in ordinary bathing garb.

Kentucky Crime Commission
Legislative Research Commission
Frankfort, Kentucky

Kentucky Penal Code
Final Draft
November, 1971

Leslie E. Renkey
Kentucky Crime Commission
Project Director

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existing law and the provisions of this code is that the existing provisions do not conceptually distinguish between threats used for purposes of theft and those used for other purposes. In this code, threats used for purposes of theft are proscribed by Section 1535 while threats used for other purposes are covered by Section 1030.

There are several special interest statutes that presently deal with threatening conduct of limited types. Examples are KRS 433.310 (Enticing another to breach contract to labor), KRS 433.380 (Hindering transportation by coercion, intimidation, trespass), and KRS 435.250 (Sending threatening letter). Absorption of these statutes into the more general provisions of Section 1030 should increase their utility and make uniformity in application possible.

The principal statutes that are replaced by Section 1030 are KRS 435.260 (Demand of thing of value by menace or threat of violence), KRS 435.270 (Blackmail), and KRS 435.280

(Oral threat similar to blackmail). While the first of these statutes is principally a theft by extortion statute, its use of the phrase "anything else of value" leaves open the possibility of a broader use. The main defect in this offense is in its limitation of the types of prohibited threats to only threats of violence. Blackmail, as defined in KRS 435.270, provides sanctions for threatening conduct that is used to illegally gain property or to procure any wrongful act. It may be committed with threats to do injury, to accuse of crime, to publish any libel, or to expose any disgrace. The major defect in this statute is its requirement that the threat be in writing. The third offense, contained in KRS 435.280, is defined to cover oral threats but at the same time is restricted to the "theft by extortion" situation. Section 1535, in its definition of theft by extortion, and Section 1030, in its definition of coercion, substantially alter these provisions by proscribing all forms of threat that warrant criminal punishment.

CHAPTER II. SEXUAL OFFENSES

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Sec. 1100

[Definition of Terms]

The following definitions apply in this chapter:

- (1) "Deviate sexual intercourse" means any act of sexual gratification between persons not married to each other involving the sex organs of one person and the mouth or anus of another.
- (2) "Forcible compulsion" means physical force that overcomes earnest resistance or a threat, express or implied, that overcomes earnest resistance by placing a person in fear of immediate death or physical injury to himself or another person or in fear that he or another person will be immediately kidnapped.
- (3) "Marriage" means persons living together as man and wife regardless of the legal status of their relationship. Spouses living apart under a decree of judicial separation are not married to one another for purposes of this chapter.
- (4) "Mentally defective" means that a person suffers from a mental disease or defect which renders him incapable of appraising the nature of his conduct.
- (5) "Mentally incapacitated" means that a person is rendered temporarily incapable of appraising or controlling his conduct as a result of the influence of a controlled or intoxicating substance administered to him without his consent or as a result of any other act committed upon him without his consent.
- (6) "Physically helpless" means that a person is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

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

(8) "Sexual intercourse" means sexual intercourse in its ordinary sense but is limited to sexual intercourse between persons not married to each other. Sexual intercourse occurs upon any penetration, however slight; emission is not required.

Cross References

- (1) "Controlled substance" is defined in Section 2900.
- (2) "Defense" is defined in Section 135.
- (3) "He" is defined in Section 140.
- (4) "Physical force" is defined in Section 400.
- (5) "Physical injury" is defined in Section 140.
- (6) "Serious physical injury" is defined in Section 140.

Commentary

Subsection (8) states that the term "sexual intercourse" is used in its ordinary sense but is limited to acts of sexual intercourse between persons not married to each other. Any penetration, however slight, is sufficient, and emission is not required. Under this definition, sexual intercourse may occur without orgasm or complete penetration of the penis into the vagina.

Subsection (1) defines "deviate sexual intercourse" to include any act of fellatio, cunnilingus or anal intercourse. Such acts committed by persons married to each other are excluded from this definition.

Subsection (7) defines the term "sexual contact" as any touching of the sexual or other intimate parts of a person not married to the actor for the purpose of gratifying the sexual desire of either party. An actual touching is required, but the contact need not be directly with the body. For example, touching another person's sex organs through clothing would be within the purview of this definition. The contact must be with either the victim or the actor but need not be contact between them. Thus, subjecting another to sexual contact with a third person or with an animal would be covered by this definition. The defi-

inition requires contact with the sexual or other intimate parts of a person not married to the actor. This would obviously include such acts as the manipulation of genitals, digital penetration of the vagina, and non-consensual fondling of a woman's breast; it would also include such acts as removing a child's undergarments. However, the touching must be done for the purpose of sexual gratification. Acts commonly expressive of familial or friendly affection are excluded in order to avoid criminal liability for an ordinary kiss, hug or pat which is as consistent with overly-familiar friendship as with lust. The definition would also exclude an inadvertent touching of the intimate parts of another person.

Subsection (3) defines "marriage." For the purpose of this chapter, persons living together as husband and wife are considered married regardless of the legal validity of their marital status whereas spouses living apart under a decree of judicial separation are not considered to be married. This separation, however, must be de jure and not merely de facto. This provision protects a spouse who is legally separated from unwanted sexual advances. Where the definition of the offense excludes conduct with a

spouse, this shall not preclude conviction of a spouse as an accomplice in a sexual act which he causes another person, not within the exclusion, to perform. Thus, a husband who forces his wife to have intercourse with another man may be convicted of rape.

Subsection (4) defines the term "mentally defective" as a person who suffers from a mental disease or defect which renders him incapable of appraising the nature of his conduct. The phrase "incapable of appraising the nature of his conduct" means that the person does not know that a sexual act is being performed. In cases of the mentally ill, there must be a substantially complete lack of judgment and self-control resulting in substantially complete incapacity. The definition does not include a mental illness or mental defect which makes the person more willing to participate or which upsets his moral values, nor does it include the person whose inhibitions are softened by the voluntary consumption of alcohol. Present Kentucky law defines such incapacity as being destitute of mind from infancy or having such a weak or feeble mind from birth as not to know right from wrong or to be unable to resist the suggestion of intercourse. *Jones v. Commonwealth*, 159 S.W. 568 (Ky. 1913). Section 1100(4) does not substantially change present Kentucky law but rather states the same abnormality in language employed by contemporary psychiatry. The term is used in describing a person who is deemed incapable of consenting to a sexual act.

Subsection (5) describes a person as being "mentally incapacitated" when he is rendered temporarily incapable of appraising or controlling his conduct as a result of the influence of a controlled or intoxicating substance administered to him without his consent or as a result of any other act committed upon him without his consent. It is not necessary that the defendant administer or cause the controlled or intoxicating substance to be administered to the victim. It is sufficient that it was administered by

someone without the victim's consent. This might seem unduly harsh, but under Section 1110 the defendant may raise the defense that at the time he engaged in the conduct constituting an offense he did not know of the facts and conditions responsible for such incapacity to consent. While it is not necessary that the defendant administer the incapacitating substance, he must knowingly take advantage of the situation before an offense is committed. The definition is not intended to include the innocent situation in which men invite women to drink more than they should, nor is it intended to cover the situation in which an actor and the complainant engage in a joint bout of drinking or using controlled substances. The victim's lack of consent is essential. When a person is rendered completely unconscious by such an incapacitating substance, that condition is described by the term "physically helpless" as opposed to the use of the term "mentally incapacitated" to describe a person who is deemed incapable of consenting to a sexual act.

Under Subsection (6) a person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act is deemed "physically helpless." This would include the situation where a person is in a deep sleep as a result of sedatives, unconscious because of excessive alcohol consumption, or rendered paralytic. Here again, the actor must knowingly take advantage of the situation, and he may raise the defense which is set forth in Section 1110. The term is used in describing a person who is deemed incapable of consenting to a sexual act, but the condition of being "physically helpless" is an aggravating factor in rape, sodomy or sexual abuse.

Subsection (2) defines "forcible compulsion" as physical force that overcomes an earnest resistance. The term also includes a threat, expressed or implied, that overcomes earnest resistance by placing a person in fear of immediate death or physical injury to himself

self or to another person or in fear that he or another person will be immediately kidnapped. The threat must be communicated, and it must be the cause of the submission. The definition does not require that the victim's fear be "reasonable." One who takes advantage of a victim's unreasonable fears of violence should not escape punishment any more than the swindler who cheats gullible people by false statements which they should have found incredible. The definition extends the concept of "forcible compulsion" to include threats that place the victim in fear of immediate death or physical injury or kidnapping not only of himself but also of another person. For example, such other person would obviously include the victim's child, escort or fiancé. Extending this concept beyond the victim's immediate family to include "another person" broadens the present law. As the relationship becomes more tenuous, the factfinders must determine whether the threatened harm was in fact the cause of the victim's submission.

In brief, a person is not deemed

"forcibly compelled" to submit to a sexual act unless there is physical force sufficient to overcome "earnest resistance," or intimidation involving a threat of physical injury or kidnapping. The phrase "earnest resistance" requires more than token initial resistance but less than a showing that the victim was physically incapable of additional struggle against his assailant. Where additional struggle would obviously be useless and dangerous, the failure to struggle should not absolve the accused. Force falling short of these standards, while possibly establishing some form of assault or coercion, does not render the victim's submission nonconsensual for purposes of a sex crime prosecution based on "forcible compulsion." Thus, when a victim submits to a sexual act because of a threat made by the defendant to expose a theft that the victim had previously committed or to disclose a prior illicit sexual relationship or to foreclose a mortgage or to cost the victim his job, the victim has not been "forcibly compelled" within the meaning of this definition.

Sec. 1105

[Sexual Offenses: Lack of Consent]

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

(2) Lack of consent results from:

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

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

- (a) Less than 16 years old; or
- (b) Mentally defective; or
- (c) Mentally incapacitated; or
- (d) Physically helpless.

Commentary

Subsection (1) provides that it is an element of every offense defined in this chapter that the sexual act was committed without consent of the victim. This is so whether or not the section defining the particular offense specifically states that nonconsent of the victim is an element of the offense. Since "lack of consent" is the common denominator for all of the crimes prohibited by this chapter, Subsections (2) and (3) seek to define it with precision.

Generally speaking, a sexual act is committed upon a person "without his consent" under two types of circumstances: (i) when the victim is "forcibly compelled" to submit; and (ii) when, regardless of actual acquiescence, the victim is deemed by law to be "incapable of consenting" thereto. Subsection (2) provides that lack of consent results from one of three factors: (i) "forcible compulsion" as that term is defined in Section 1100(2); or (ii) "incapacity to consent" which is established by one of the four provisions listed in Subsection (3); or (iii) where the offense charged is sexual abuse, any circumstances in addition to "forcible compulsion" or "incapacity to consent" in which the victim does not expressly or impliedly acquiesce in the actor's conduct.

Subsection (2)(c) is expressly limited to the offense of sexual abuse. With respect to this crime, the term "with-

out consent" is broadened beyond its meaning as applied to rape and sodomy. The latter crimes are committed with the victim's literal nonconsent only when submission is accomplished by "forcible compulsion" which is limited to physical force or intimidation. To restrict the prohibited conduct to forcible compulsion would not be adequate for the less serious crime of sexual abuse which is designed to encompass not only genuinely forcible attacks but also all other sexual advances taken without the victim's acquiescence. For example, this would include the taking of indecent liberties in a crowded public place. Accordingly, in Subsection (2)(c) the concept of "lack of actual consent" is extended to any circumstances in which the victim does not expressly or impliedly acquiesce in the actor's conduct.

Subsection (3) sets forth four conditions under which a person is deemed incapable of consenting to a sexual act: (i) the victim is less than 16 years of age; or (ii) the victim is mentally defective as that term is defined in Section 1100(4); or (iii) the victim is mentally incapacitated as that term is defined in Section 1100(5); or (iv) the victim is physically helpless as that term is defined in Section 1100(6) if the person is "less than 16 years old" in the meaning of Subsection (3)(a), up to and including the day before his 16th birthday.

Sec. 1110

[Sexual Offenses: Defense]

In any prosecution under this chapter in which the victim's consent is based solely on his incapacity to consent because he is less than 16 years old, mentally defective, mentally incapacitated or physically helpless, it is a 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.

Commentary

Section 1110 refers to a prosecution for an offense under this chapter in which the victim is deemed incapable of consenting solely because he was less than 16 years old, mentally defective, mentally incapacitated or physically helpless. In such prosecutions, it is a 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.

The prosecution is not required affirmatively to establish knowledge of incapacity to consent because this would place an unduly heavy burden on the state. The defendant must raise lack of knowledge of the particular condition as a defense. For example, if the victim had an established but not marked mental retardation and the defendant was unaware of such condition, he should be given an opportunity to exculpate himself by asserting that fact as a defense. The statute does not expressly require that the mistake be "reasonable." Since the accused must raise the defense and since usually there is no source of information about his mistake other than the accused himself, this means that as a practical matter the accused will

need to take the stand to testify in his own behalf. At this point the fact-finders should be competent to judge his credibility, so that no express requirement of "reasonable mistake" is necessary.

This position appears to be consistent with present Kentucky law which in a prosecution for rape of an insane person or idiot requires that the accused know and take advantage of that fact. *Wilson v. Commonwealth*, 160 S.W.2d 649 (Ky. 1942). However, Section 1110 provides a defense for mistake as to the age of the victim. Present Kentucky law does not provide for such a defense.

In any prosecution for an offense under this chapter in which the victim is deemed "incapable of consent" because he is less than 16 years old, evidence relating to prior unchastity on the part of the victim shall not be admissible in mitigation of the offense charged. This determination is consistent with present Kentucky law. However, in any prosecution under this chapter in which the victim is 16 or older, evidence of prior unchastity on the part of the victim would be admissible on the question of consent.

Sec. 1115

[Rape in the First Degree]

- (1) A person is guilty of rape in the first degree when:
 - (a) He engages in sexual intercourse with another person by forcible compulsion; or
 - (b) He engages in sexual intercourse with another person who is incapable of consent because he:
 - (i) Is physically helpless; or
 - (ii) Is less than 12 years old.
- (2) Rape in the first degree is a Class B felony unless the victim is under 12 years old or receives a serious physical injury in which case it is a Class A felony.

Sec. 1116

[Rape in the Second Degree]

- (1) A person is guilty of rape in the second degree when, being 18 years old or more, he engages in sexual intercourse with another person less than 14 years old.
- (2) Rape in the second degree is a Class C felony.

Sec. 1117

[Rape in the Third Degree]

- (1) A person is guilty of rape in the third degree when:
 - (a) He engages in sexual intercourse with another person who is incapable of consent because he is mentally defective or mentally incapacitated; or
 - (b) Being 21 years old or more, he engages in sexual intercourse with another person less than 16 years old.
- (2) Rape in the third degree is a Class D felony.

Commentary

Rape under present Kentucky law consists of two stated degrees (rape of child under 12 and rape of female over 12) and one implied degree (carnal knowledge of a female child under 18 with her consent or of a male child under 18). Sections 1115, 1116, 1117 and 1130 divide the crime into three stated degrees (first, second or third degree rape) and one implied degree (sexual misconduct). Although substantively the crime of rape has not been changed, this revision achieves a more equitable formulation of the elements of each degree with a consonant equity of punishment.

Rape in the first degree: Section 1115 presents three factual situations in which an accused is deemed guilty of rape in the first degree. Section 1115(1)(a) prohibits sexual intercourse with another person by forcible compulsion as that term is defined in Section 1100(2). The essential element under Subsection (1)(a) is the use of force. Force is not restricted to

physical force but includes a threat that overcomes earnest resistance and places the victim in fear of immediate death, physical injury or kidnapping of himself or another person. The ages of the defendant and the victim are immaterial. Except in cases of statutory rape, evidence of the victim's prior unchastity is relevant and admissible on the question of consent.

Section 1115(1)(b)(i) prohibits sexual intercourse with a person who is incapable of consent by reason of being physically helpless as that term is defined in Section 1100(6). The essential element under Subsection (b)(i) is that the victim must be physically helpless. Force is not an essential element of this offense, and the ages of the defendant and the victim are immaterial. The victim is statutorily incapable of consent; therefore, evidence relating to the victim's prior unchastity would not be relevant or admissible. However, it is a defense under Section 1110 that the defendant at the time he

engaged in the sexual intercourse did not know of the facts or conditions responsible for the physical helplessness.

Section 1115(1)(b)(ii) prohibits sexual intercourse with a person who is less than 12 years old. The mere act of sexual intercourse with a child under 12 completes the offense. The age of the defendant is immaterial, but the victim must be less than 12 years old. Conduct of this character is so dangerous to the child that severe penalty is imposed. Neither the use of force nor the lack of consent need to be proved by the state. The victim is statutorily incapable of consenting, and evidence relating to the victim's prior unchastity is not relevant or admissible. However, mistake as to age is a defense under Section 1110.

Rape in the first degree is classified primarily as a Class B felony; this is in line with the other modern codes. However, where the victim is under twelve or receives a serious physical injury, Section 1115(2) increases the penalty to a Class A felony.

Section 1115 will make little substantive change in present Kentucky law. The penetration requirement is the same, and no corroboration is required. However, Section 1110 allows a defense that the defendant at the time he engaged in the sexual intercourse did not know of the facts or conditions responsible for the victim's incapacity to consent, including age.

Rape in the second degree: Section 1116 presents another form of statutory rape. This provision prohibits sexual intercourse between a defendant who is 18 years old or more and a victim who is less than 14 years old. Under Section 1116 the ages of both the defendant and the victim are material. The defendant must be at least 18 years old. The victim must be 12 or 13 years old, therefore statutorily incapable of consent. Evidence relating to the victim's prior unchastity is not relevant or admissible. Force is not an essential element of this offense. Under Section 1116 the victim is not mentally defective, mentally incapacitated or physically helpless. However, it is a

defense under Section 1110 that the defendant did not know that the victim was less than 14 years old.

If the victim is less than 12 years old, such conduct constitutes rape in the first degree. If the victim is 14 or 15 years old and the defendant is 21 years old or more, the offense constitutes rape in the third degree. If the defendant is less than 18 years old and the victim is 12 to 15 years old or if the defendant is 18 to 20 years old and the victim is 14 or 15 years old, the conduct constitutes sexual misconduct.

Section 1116 makes little substantive change in present Kentucky law. The victim is statutorily incapable of consent, and evidence relating to the victim's prior unchastity is not admissible. Force is not an element of this offense and need not be established by the state. However, Section 1110 provides a defense for mistake as to age.

Rape in the third degree: Section 1117(1)(a) prohibits sexual intercourse with another person who is incapable of consent because he is mentally defective as that term is defined in Section 1100(4) or because he is mentally incapacitated as that term is defined in Section 1100(5). The victim is statutorily incapable of consenting. Therefore, evidence relating to the victim's prior unchastity is not admissible. The ages of the defendant and the victim are immaterial. Force is not an element of this offense, and the victim need not be physically helpless. Under Section 1110 it is a defense that the defendant at the time he engaged in the sexual intercourse did not know the facts or conditions responsible for the victim's mental defect or mental incapacity.

Section 1117(1)(b) prohibits sexual intercourse between an actor who is 21 years old or more and a victim who is less than 16 years old. The difference in age present in this situation is substantial enough so that intercourse of this nature should be escalated from sexual misconduct into the rape category. The ages of both the defendant and the victim are material. The defendant must be 21 years old or more,

the victim 14 or 15 years old. The victim is statutorily incapable of consenting; therefore, evidence relating to the victim's prior unchastity is not admissible. Force is not an essential element of this offense, nor is the fact that the victim is mentally defective, mentally incapacitated or physically helpless. However, it is a defense under Section 1110 that the defendant at the time he engaged in the sexual intercourse did not know that the victim was less than 16 years old.

If the victim is less than 12 years old, such conduct constitutes rape in the first degree. If the victim is less

than 14 years old, such conduct constitutes rape in the second degree.

Section 1117 makes some significant changes in present Kentucky law. The age of consent is reduced to 16. When the victim is deemed incapable of consent by statute, evidence relating to the victim's prior unchastity is not admissible as a mitigating factor as is allowed under certain conditions by present Kentucky law. However, it is a defense under Section 1110 that the defendant at the time he engaged in the sexual intercourse did not know the facts or conditions responsible for the victim's incapacity to consent.

Sec. 1120

[Sodomy in the First Degree]

(1) A person is guilty of sodomy in the first degree when:

- (a) He engages in deviate sexual intercourse with another person by forcible compulsion; or
- (b) He engages in deviate sexual intercourse with another person who is incapable of consent because he:
 - (i) Is physically helpless; or
 - (ii) Is less than 12 years old.

(2) Sodomy in the first degree is a Class B felony unless the victim is under 12 years old or receives a serious physical injury in which case it is a Class A felony.

Sec. 1121

[Sodomy in the Second Degree]

(1) A person is guilty of sodomy in the second degree when, being 18 years old or more, he engages in deviate sexual intercourse with another person less than 14 years old.

(2) Sodomy in the second degree is a Class C felony.

Sec. 1122

[Sodomy in the Third Degree]

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

- (a) He engages in deviate sexual intercourse with another person

who is incapable of consent because he is mentally defective or mentally incapacitated; or

(b) Being 21 years old or more, he engages in deviate sexual intercourse with another person less than 16 years old.

(2) Sodomy in the third degree is a Class D felony.

Commentary

The structure of the stated and implied degrees of sodomy parallel the stated and implied degrees of rape. The age factors and types of consensual incapacity are presented in an identical structure with identical penalties.

The essence of sodomy is "deviate sexual intercourse" as that term is defined in Section 1100(1). Although the primary concern is with homosexual contacts, the definition of deviate sexual intercourse includes nonvaginal heterosexual intercourse other than between spouses. Sections 1120, 1121 and 1122 are designed primarily to prohibit criminal homosexual activities based on compulsion or perpetrated on a young person or on anyone incapable of resisting the deviate sexual advance. A violent homosexual assault is as dangerous to the victim as a heterosexual attack. A homosexual attack on an intoxicated or physically helpless person produces the same fear, anger and resentment as does a heterosexual assault. There is as much need to protect a mental incompetent against homosexual or otherwise aberrant contact as against heterosexual contact. Further, homosexual activity with a child going through the transition from prepubertal sexuality to mature sexual adjustment exposes him to much greater danger of lasting psychological damage than does a heterosexual contact, except perhaps for an incestuous relationship.

The code does not penalize consensual sodomy. There is no more reason to penalize private, consensual homosexual acts between adults than there is to penalize private, consensual, nonmarital heterosexual intercourse between adults. However, any act of this nature committed in public would constitute disorderly conduct.

Sodomy in the first degree: Section 1120 presents three factual situations in which a defendant is guilty of sodomy in the first degree. Section 1120(1)(a) prohibits deviate sexual intercourse with another person by forcible compulsion as that term is defined in Section 1100(2). The essential element under Subsection (1)(a) is the use of force. The ages of the defendant and the victim are immaterial. Except in cases in which the victim is less than 16 years old, evidence relating to the victim's prior unchastity is admissible on the question of consent.

Section 1120 (1)(b)(i) prohibits deviate sexual intercourse with a person who is incapable of consent by reason of being physically helpless as that term is defined in Section 1100(6). The essence of Subsection (1)(b)(i) is the victim's physical condition. Force is not an essential element. The ages of the defendant and the victim are immaterial. The victim is statutorily incapable of consent; therefore, evidence relating to the victim's prior unchastity is not admissible. However, it is a defense under Section 1110 that the defendant at the time he engaged in the deviate sexual intercourse did not know the facts or conditions responsible for the victim's physical condition.

Section 1120 (1)(b)(ii) prohibits deviate sexual intercourse with a person who is less than 12 years old. This provision creates a form of statutory sodomy. The age of the defendant is immaterial, but the victim must be less than 12 years old. Force is not an element of this offense. This victim is statutorily incapable of consent; therefore, evidence relating to the victim's prior unchastity is not admissible. However, mistake as to age is a defense

under Section 1110. Such activity with a pre-pubertal child involves such great danger of lasting psychological damage that it deserves a severe penalty. Sodomy in the first degree is a Class B felony unless the victim is under twelve or receives a serious physical injury in which case the penalty is increased to a Class A felony.

Section 1120 will make significant changes in present Kentucky law. Private, consensual acts of this nature between adults are not prohibited by the code. Under present Kentucky law, consent is not a defense; the one consenting is considered to be an accomplice. Under the code consent is relevant only in first degree sodomy involving forcible compulsion. Otherwise, if the act falls within the purview of one of the three degrees of sodomy, the victim is statutorily incapable of consent. Under the code the one consenting is not treated as an accomplice. Under present Kentucky law, penetration of the mouth is not sufficient. By definition, the code includes oral copulation. Corroboration is not required by present Kentucky law and is not required by the code.

Sodomy in the second degree: Section 1121 constitutes another form of statutory sodomy. This section prohibits deviate sexual intercourse between a defendant who is 18 years old or more and a victim who is less than 14 years old. The ages of the defendant and the victim are essential. The defendant must be at least 18 and the victim must be less than 14 years old. Force is not an essential element of this offense. The victim is statutorily incapable of consent; therefore, evidence relating to the victim's prior unchastity is not admissible. However, it is a defense under Section 1110 that the defendant did not know that the victim was less than 14 years old.

If the victim is less than 12 years old, the conduct constitutes sodomy in the

first degree. If the defendant is less than 18 years old and the victim is 12 to 15 years old, the conduct constitutes sexual misconduct.

Sodomy in the third degree: Section 1122(1)(a) prohibits deviate sexual intercourse with another person who is incapable of consent because he is mentally defective or mentally incapacitated as those terms are defined in Section 1100(4) and (5). The essence of Subsection (1)(a) is the victim's mental defect or mental incapacity. The ages of the defendant and the victim are immaterial. Force is not an essential element of the offense. The victim is statutorily incapable of consent. However, it is a defense under Section 1110 that the defendant at the time he engaged in the deviate sexual intercourse did not know the facts or conditions responsible for the victim's incapacity to consent.

Section 1122(1)(b) prohibits deviate sexual intercourse between an actor who is 21 years old or more and a victim who is less than 16 years old. The ages of both the defendant and the victim are essential. The defendant must be 21 years old or more and the victim must be less than 16 years old. Force is not an element of this offense. The victim is statutorily incapable of consent. However, it is a defense under Section 1110 that the defendant at the time he engaged in the deviate sexual intercourse did not know that the victim was less than 16 years old.

If the victim is less than 14 years old, the conduct constitutes sodomy in the second degree. If the victim is less than 12 years old, the conduct constitutes sodomy in the first degree. If the defendant is 18 to 20 years old and the victim is 14 or 15 years old or if the defendant is under 18 years of age and the victim is 12 to 15 years old, then the offense constitutes sexual misconduct.

[Sexual Abuse in the First Degree]

- (1) A person is guilty of sexual abuse in the first degree when:
- He subjects another person to sexual contact by forcible compulsion; or
 - He subjects another person to sexual contact who is incapable of consent because he:
 - Is physically helpless; or
 - Is less than 12 years old.
- (2) Sexual abuse in the first degree is a Class D felony.

[Sexual Abuse in the Second Degree]

- (1) A person is guilty of sexual abuse in the second degree when:
- He subjects another person to sexual contact who is incapable of consent because he is mentally defective or mentally incapacitated; or
 - He subjects another person who is less than 14 years old to sexual contact.
- (2) Sexual abuse in the second degree is a Class A misdemeanor.

[Sexual Abuse in the Third Degree]

- (1) A person is guilty of sexual abuse in the third degree when:
- He subjects another person to sexual contact without the latter's consent.
 - In any prosecution under this section, it is a defense that:
 - The other person's lack of consent was due solely to incapacity to consent by reason of being less than 16 years old; and
 - The other person was at least 14 years old; and
 - The actor was less than 5 years older than the other person.
- (2) Sexual abuse in the third degree is a Class B misdemeanor.

The three degrees of sexual abuse contained in Sections 1125, 1126 and 1127 roughly parallel the structure for rape and sodomy. The offenses apply to both adults and children. Presently the proscribed behavior when committed upon an adult is generally prosecuted under an assault provision. However, under the code an actual physical injury must be inflicted to constitute an assault. Since the conduct dealt with in the offense of sexual abuse seldom results in physical injury, a gap would exist if this conduct were not proscribed. Thus, these three sections constitute a special codified sexual assault.

Sexual abuse is based on "sexual contact" as that term is defined in Section 1100(7). An actual touching must occur. Indecent proposals or obscene gestures would constitute disorderly conduct or harassment.

"Lack of consent" is an element of each degree of sexual abuse. However, in a prosecution for sexual abuse the term "lack of consent" has a broader meaning than in a prosecution for rape or sodomy. "Lack of consent" in any prosecution for sexual abuse includes any circumstances in addition to "forcible compulsion" or "incapacity to consent" in which the victim does not expressly or impliedly acquiesce in the actor's conduct.

Sexual abuse in the first degree: Section 1125 presents three factual situations in which a defendant is guilty of sexual abuse in the first degree. Section 1125(1)(a) prohibits sexual contact with another person by forcible compulsion as that term is defined in Section 1100(2). The essential element under Subsection (1)(a) is the use of force. The ages of both the defendant and the victim are immaterial. Except when the victim is less than 16 years old, evidence relating to the victim's prior unchastity is relevant and admissible on the issue of consent.

Section 1125(1)(b)(i) prohibits sexual contact with a person who is incapable of consent by reason of being physical-

ly helpless as that term is defined in Section 1100(6). The essential element under Subsection (1)(b)(i) is the victim's physical helplessness. Force is not an essential element of this offense, and the ages of the defendant and the victim are immaterial. The victim is statutorily incapable of consent. However, it is a defense under Section 1110 that the defendant at the time he engaged in the sexual contact did not know of the facts or conditions responsible for the victim's physical helplessness.

Section 1125(1)(b)(ii) prohibits sexual contact with a person who is less than 12 years old. The defendant may be of any age, but the victim must be less than 12. Force is not an essential element of this offense. The victim is statutorily incapable of consent. However, mistake as to age is a defense under Section 1110.

Present Kentucky law prohibits "indecent or immoral practices with another" and "taking or detaining a woman against her will." The sexual abuse provisions preserve the essence of these offenses. Nonconsensual sexual contact is prohibited except for petting between contemporaries. The offense, however, is graded according to the age of the victim, the reason for the incapacity to consent, and the use of force. The age of consent is lowered to 16.

The essence of "detaining" would be preserved except that sexual abuse requires an actual touching. The concept of detention by implied threat of force is preserved by the definition of forcible compulsion in Section 1100(2), and the use of force per se constitutes sexual abuse in the first degree. No corroboration is required. However, the defense of mistake under Section 1110 would appear to change present Kentucky law.

Sexual abuse in the second degree: Section 1126(1)(a) prohibits sexual contact with another person who is incapable of consent because he is defective or mentally incapar-

those terms are defined in Section 1100 (4) and (5). The essential element under Subsection (1)(a) is the victim's mental defect or mental incapacity. The ages of the defendant and the victim are immaterial. Force is not an element of this offense. The victim is statutorily incapable of consent. However, it is a defense under Section 1110 that the defendant did not know of the victim's mental defect or mental incapacity.

Section 1126(1)(b) prohibits sexual contact with a person less than 14 years old. The age of the defendant is immaterial, but the victim must be less than 14 years old. Force is not an element of this offense. The victim is statutorily incapable of consent. However, mistake as to age is a defense under Section 1110.

Sexual abuse in the third degree: Section 1127 prohibits any nonconsensual sexual contact. Sexual contact is defined in Section 1100(7). Force is not

an element of this offense. The ages of the defendant and the victim are immaterial. Except in prosecutions in which the victim is less than 16 years old, evidence relating to the victim's prior unchastity is relevant and admissible on the issue of consent.

Section 1127(1)(b) sets forth a defense when three factors are present: (i) the victim is statutorily incapable of consent because he is less than 16 years old; (ii) the victim is at least 14 years old; and (iii) the defendant is less than 5 years older than the victim.

The purpose of this defense is to exclude petting between contemporaries from criminal sanctions. In this area private morals must be relied upon to regulate personal behavior, and criminal sanctions are inappropriate to punish a breach of the moral law. The defense would apply whether the contact was heterosexual or homosexual.

Sec. 1130

[Sexual Misconduct]

- (1) A person is guilty of sexual misconduct when he engages in sexual intercourse or deviate sexual intercourse with another person without the latter's consent.
- (2) Sexual misconduct is a Class A misdemeanor.

Commentary

Section 1130 represents the basic crimes of rape and sodomy and, therefore, includes all of the higher degrees of each of these crimes. Section 1130 provides a useful plea-bargaining tool for the prosecutor in certain cases even though some degree of forcible compulsion or incapacity to consent may be present.

But the basic purpose of Section 1130 is to preserve the concept of statutory rape and statutory sodomy. When read in conjunction with Sections 1115-17 and 1120-22, Section 1130 is designed

primarily to prohibit nonconsensual sexual intercourse or deviate sexual intercourse under two circumstances: (i) when the victim is 14 or 15 and the defendant is less than 21; or (ii) when the victim is 12, 13, 14 or 15 and the defendant is less than 18 years of age. In this context the ages of the defendant and the victim are critical. Force is not an element of this offense. The victim is statutorily incapable of consent. However, mistake as to age is a defense under Section 1110.

The purpose in denominating such

conduct between persons within the specified age groups as sexual misconduct rather than rape or sodomy is to eliminate an undesirable stigma. In such cases the defendant may well have been persuaded by the "victim" to engage in the proscribed conduct. It seems unnecessarily harsh to have a defendant within the prescribed age limitation who has been convicted of such a statutory offense to bear a criminal record labeling him as a "rapist" or "sodomist." Section 1130

takes a more realistic approach to the penalty imposed while at the same time prohibiting the undesirable conduct.

If the accused is 21 or over and the victim is less than 16, the offense constitutes third degree rape. If the accused is 18 or older and the victim is under 14, the offense constitutes second degree rape. Any sexual intercourse with a person less than 12 years old constitutes first degree rape regardless of the age of the accused.

Sec. 1135

[Indecent Exposure]

- (1) A person is guilty of indecent exposure when, with intent to arouse or gratify sexual desire of himself or of any person other than his spouse, he exposes his genitals under circumstances in which he knows his conduct is likely to cause affront or alarm.
- (2) Indecent exposure is a Class B misdemeanor.

Commentary

Section 1135 prohibits any exposure of the genitalia done with intent to arouse or gratify the actor's sexual desire or that of another to whom he is not married under circumstances in which he knows his act will probably cause affront or alarm. Thus, three elements must be shown: (i) an exposure of the genitalia; (ii) intent to arouse or gratify the sexual desire of the actor or of another person to whom he is not married (an inadvertent or accidental exposure is excluded); and (iii) knowledge that under the circumstances his conduct is likely to cause affront or alarm.

occurs. For example, a person standing nude before a window in his private apartment which is adjacent to a well-traveled sidewalk would fall within the purview of Section 1135. On the other hand, a couple in a parked car on a lonely, country road would probably be excluded.

Exhibitionism is an emotional illness resulting in compulsive behavior. It is questionable whether penal sanctions are effective in controlling this illness. The offense is penalized in Chapter 113 because the resulting social harm is sufficiently serious to warrant penalties.

Under Section 1135, it is not the place but the purpose of the exposure and the likelihood of affront or alarm to others that determines the actor's criminality. The offense can be committed in any place where the conduct may reasonably be expected to be viewed by others. It is the probability of public view that is critical rather than the ownership or use of the particular real estate on which the act

Under present Kentucky law indecent exposure is treated as a common law offense or prosecuted under a municipal ordinance. Section 1135 merely codifies this prohibition. Section 1135 would also replace KRS 430.140 which prohibits a person from appearing on a highway or upon a city street that has no police protection when clothed in ordinary bathing or

Summary

The critical ages for offenses prohibited by Chapter 11 are 12, 14 and 16. Age 12 was chosen to protect pre-puberty victims. Sexual intercourse with a child less than 12 years of age indicates a considerable probability of aberration in the aggressor. Age 14 was chosen to protect children in the period of puberty when the child arrives at the physical capacity to engage in intercourse but remains seriously deficient in comprehension of the social,

psychological, emotional and even physical significance of sexuality. It is still realistic to regard a child under 14 years of age as victimized. Age 16 was chosen to cover that period of later adolescence when the chief significance of sexual behavior is its contravention of the moral standards of the community.

The following age chart is included for purposes of clarity:

Age Chart

Offense	Age Of Victim	Age Of Defendant
FIRST DEGREE RAPE OR SODOMY (Class B felony unless the victim is under 12 or receives a serious physical injury in which case it is a Class A felony)	Under 12	Any
SECOND DEGREE RAPE OR SODOMY (Class C felony)	Under 14	Over 17
THIRD DEGREE RAPE OR SODOMY (Class D felony)	Under 16	Over 20
FIRST DEGREE SEXUAL ABUSE (Class D felony)	Under 12	Any
SECOND DEGREE SEXUAL ABUSE (Class A misdemeanor)	Under 14	Any
THIRD DEGREE SEXUAL ABUSE (Class B misdemeanor) UNLESS	Any 14-15	Any Under 18-19
SEXUAL MISCONDUCT (Class A misdemeanor) BUT PRIMARILY	Any 14-15 12-13	Any 18-20 Under 16
INDECENT EXPOSURE (Class B misdemeanor)	Any	Any

Chapter 11 does not penalize consensual heterosexual or homosexual conduct between minors 16 and 17 years old if the "victim" is not mentally defective, mentally incapacitated or

physically helpless. Chapter 11 does not penalize sexual intercourse or deviate sexual intercourse with an animal or dead human body. Conduct of this nature is rare and is, of course, patho-

logical. If a prosecution for this sort of activity is necessary, it can be brought under abuse of corpse in the case of necrophelia and cruelty to animals in case of buggery. Chapter 11 also does not penalize engaging in sexual intercourse with another person under 21 under a promise of marriage. The continuing validity of this offense in today's society is questionable, and it is susceptible to use as an instrument of blackmail by an angry, disappointed or pregnant woman.

Chapter 11 makes some changes in present Kentucky law. The age of consent under Chapter 11 is lowered to 16. Thus, those provisions in present Kentucky law dealing with sexual intercourse between persons 16-20 would no longer be applicable. Also, if the victim is statutorily incapable of consent

because of age, no evidence relating to the victim's prior unchastity is admissible as a mitigating factor as it is under some provisions of present Kentucky law. Chapter 11 is consistent with present Kentucky law in that it does not require corroboration for sexual offenses. While present Kentucky law contains the concept of statutory rape, the inclusion of the concept of statutory sodomy under Chapter 11 would appear to be an innovation. As noted above, Chapter 11 does not specifically penalize buggery or seduction of a female under 21.

The offenses prohibited by Chapter 11 are not defined in terms of male aggression only. Although such offenses are usually perpetrated by the male upon the female, a female can violate the provisions of Chapter