WAYNE LAW REVIEW

Volume 14

1967-1968

INDEX

WAYNE STATE UNIVERSITY LAW SCHOOL
DETROIT, MICHIGAN 48202

ment of these cases commensurate with the treatment of aiding suicide. The latter, when motivated by mercy, might be further mitigated from a Class B to a Class C felony. Finally, as to criminally negligent homicide, it is suggested that reference be made to ordinances as well as statutes regulating the actor's conduct in determining his negligence.

Though the Proposed Code contains certain problems and ambiguities, this result is almost inherent in the task of comprehensively revising an entire penal system. Generally, it eradicates many of the difficulties presently existing in the law of homicide, and for this reason, is a vast improvement over the present law.

EDWIN W. HECKER, JR.

SEX OFFENSES AND PENAL CODE REVISION IN MICHIGAN

I

INTRODUCTION

The scope of this comment is limited to chapter twenty-three of the Michigan Revised Criminal Code (Proposed Code) entitled Sexual Offenses. Certain offenses that are colloquially referred to as sex offenses do not fall within the ambit of chapter twenty-three. Among those offenses therefore excluded from consideration in this presentation are prostitution, obscenity, bigamy, incest, and adultery. While these offenses are no less important than those included in this discussion, an in depth analysis will render a more significant contribution than would coverage on a broader basis necessarily relegated to superficial treatment. Offenses included in the discussion are rape, sodomy, sexual abuse, and indecent exposure.

II

UNLAWFUL HETEROSEXUAL CONDUCT

A. Existing Michigan Law

Principal among unlawful heterosexual acts is the offense of rape. Forcible intercourse with a woman and intercourse with a child under the age of ten were rape at common law.[1] A series of codifications leading up to the current Michigan rape statute[2] adopt the common law concept of forcible

1. People v. McDonald, 3 Mich. 149 (1861). See generally R. Perkins, Criminal Law 110-11 (1957).

2. Mich. Pub. Acts 1952, No. 73, § 750.520, Mich. Stat. Ann. § 28.788 (1954). Any person who shall ravish and carnally know any female of the age of 16 years, or more, by force and against her will, or who shall unlawfully and carnally know and abuse any female under the full age of 16 years, shall be guilty of a felony, punishable by imprisonment in the state prison for life or for any term of years

rape and raise the age of consent to sixteen. The statute prohibits two separate though related offenses—forcible rape and statutory rape.

The first element of forcible rape is "carnal knowledge,"[3] an archaic designation for the act of sexual intercourse. This element of the crime is satisfied by any "penetration however slight."[4] Since the essence of the crime is the nonconsensual imposition on the woman, the prosecution need only show some penetration,[5] the existence of which is a question of fact for the jury.[6] The gratification of the assailant is irrelevant, and it is universally held that emission is not essential to the completion of the crime.[7]

Although it is not patently clear from the statute, a man does not commit rape by having sexual intercourse with his wife, regardless of her age, even though he uses force against her will.[8] Implicit in the definition of the crime is "unlawful carnal knowledge," an essential component of the common law crime. Unlawful in this context means not authorized by law, and since sexual relations between husband and wife are sanctioned by law a man who takes his wife by force is not guilty of rape.[9]

The act must be "by force and against her will."[10] As is frequently the case with antiquated statutory language, the denotative sense of this phrase is not clear. The import of this constituent of the crime is whether the woman was willing or unwilling. Clearly the element is satisfied where the victim's resistance is overcome by physical violence.[11] However, something more than the physical force necessary to the consummation of the sexual act is required.[12] A corollary of this proposition is the law's requirement that the victim resist to the "utmost."[13] While the law requires "utmost" resistance from the victim, and if she consents or yields prior to penetration there is no rape,[14] the law does not require foolhardy resistance. So if the victim's will is overcome by fear induced through threats of "great bodily harm, or danger

. . . . Such carnal knowledge shall be deemed complete upon proof of any sexual penetration however slight.

3. Id.

4. Id.

5. People v. Rivers, 147 Mich. 643, 111 N.W. 201 (1907); People v. Scouten, 130 Mich. 620, 90 N.W. 332 (1902).

6. People v. Courier, 79 Mich. 366, 44 N.W. 571 (1890).

7. See, e.g., Comstock v. State, 14 Neb. 205, 15 N.W. 355 (1883); cf. People v. Courier, 79 Mich. 366, 44 N.W. 571 (1890).

8. People v. Pizzura, 211 Mich. 71, 178 N.W. 235 (1920) (a common law marriage will suffice). However, a man may be convicted of rape upon his wife as principal to the crime if he aids, abets or procures another to commit the physical act. People v. Chapman, 62 Mich. 280, 28 N.W. 896 (1886); cf. People v. Flynn, 96 Mich. 276, 55 N.W. 834 (1893).

9. See R. Perkins, supra note 1, at 115.

10. Mich. Pub. Acts 1952, No. 73, § 750.502, Mich. Stat. Ann. § 28.788 (1954).

11. Moran v. People, 25 Mich. 355 (1872).

12. Id.

13. People v. Geddes, 301 Mich. 258, 3 N.W.2d 266 (1942); People v. Crosswell, 13 Mich. 427 (1865).

14. Brown v. People, 36 Mich. 203 (1877).

to life or limb" the requirement of force is fulfilled.[15] The prosecution may introduce evidence reflecting on the victim's mental or physical infirmities in order that they be considered in assessing the amount of resistance required of the victim.[16]

The state of the victim's mind with respect to "unwillingness" has led to some interesting consent problems. In a Massachusetts case the defendant argued that his victim was "so drunk as to be utterly senseless," and therefore his act was not "against her will" as required by the statute since her will was inactive.[17] The court dismissed the defendant's argument stating that the essence of the statutory language was "without her consent," and since she was insensible she was not capable of consent.[18] The statutory requirement had been satisfied. While no Michigan case has specifically decided the point,[19] the preceding opinion reflects the general American rule with respect to temporary incapacity.[20]

Lack of capacity of a more permanent character such as idiocy or insanity presents yet a different problem. The weight of authority in this country is that sexual intercourse with a woman incapable of consent by reason of mental infirmity is rape.[21] An early Michigan case, apparently still good law, held that sexual intercourse with a mental incompetent was not rape unless the defendant knew that the woman was mentally deficient.[22] As a result of this requirement Michigan rape coverage is narrower than most American jurisdictions. Intercourse with a female patient of a mental institution is punishable by statute in Michigan.[23] The statute has been interpreted by the Michigan Attorney General to cover any female subsequent to the issuance of a commitment order, regardless of whether she is ever physically confined.[24] There is an obvious disharmony of reason between the case law rule and the statutory rule as interpreted. If a man is not guilty of rape by virtue of intercourse with a mental deficient unless he knows that she is mentally deficient, why should his act magically become criminal where the

---

15. Moran v. People, 25 Mich. 356, 365 (1872); accord, People v. Myers, 306 Mich. 100, 10 N.W.2d 305 (1943); People v. Flynn, 96 Mich. 176, 55 N.W. 834 (1893).

16. People v. Marrs, 125 Mich. 376, 84 N.W. 284 (1900).

17. Commonwealth v. Burke, 105 Mass. 376, 377 (1870).

18. Id. at 380-81.

19. But cf. Hirdes v. Ottawa Circuit Judge, 180 Mich. 321, 146 N.W. 646 (1914) (civil case).

20. Even though there is no consent in fact and no resistance, the offense of rape may be committed. This is true where the victim is non compos mentis, asleep, or where drugs or intoxicating drinks are used.

44 Am. Jur. Rape § 6 (1942) (footnotes omitted).

21. See 44 Am. Jur. Rape §§ 10-11 (1942); R. Perkins, supra note 1, at 123.

22. People v. Crosswell, 13 Mich. 427 (1865).

23. Mich. Comp. Laws § 750.541 (1948), Mich. Stat. Ann. § 28.573 (1954).

24. There is no difference in the criminality of the act between the commission of this offense upon an insane, feebleminded or epileptic person who has been ordered confined in an institution but not yet physically confined, and the commission of the same offense upon such a person who is already actually confined.

[1928-1930] Mich. Att'y Gen. Biennial Rep. pt. I, at 136, 139.

woman has been adjudged insane but not confined? This inconsistency should be resolved.[25]

Fraudulent procurement of consent leading to prosecution for rape appears in two general classes of cases: pretended medical treatment and pretended husbands. There formerly existed a distinction in Michigan, in the medical treatment context, between consent to the act in fact, under the guise that intercourse would somehow be beneficial to the patient's health, and consent to some treatment that turned out to be intercourse unbeknown to the patient. The latter kind of consent was tantamount to no consent at all, and therefore the act was rape. However, the former kind of consent, consent to intercourse in fact, was held to negate a charge of rape.[26] The rule of that case has since been overturned by statute, making it a felony to induce intercourse under pretext of medical treatment.[27]

The somewhat bizzare cases of fraudulently obtained consent involve the mistaken husband. Somehow the identity of the actor is mistaken for that of the victim's husband, as in a darkened room. The sham marriage is a variation of the mistaken husband situation. In these cases the defendant typically induces the victim's consent by staging a mock ceremony. The common law resolution of the mistaken husband cases has been exculpation of the defendant on the ground that the essential element of force is lacking.[28] Such instances of fraudulently obtained consent should not be placed beyond the ambit of the criminal law. Both the identity of the actor and her relationship to the actor are of determinative importance to the woman, and consent resting on such mistake of fact is equivalent to no consent at all. While the point has never been specifically decided in Michigan, there is good reason to believe that such conduct will not fall within the statute.[29]

Since the statute does not require that the victim be chaste, a prostitute may be the victim of rape. Evidence of bad reputation for chastity is admissible, however, but only for the narrow purpose of reflecting on whether the "victim" actually consented to the act.[30] Such a rule of evidence is heralded by one authority for its wisdom because "the jury usually supplies the common sense which the law itself seems to have overlooked at this point."[31]

25. The mental deficiency issue under the Proposed Code is discussed at pp. 942-43 infra.

26. Moran v. People, 25 Mich. 356 (1872) (dire descriptions of the consequences of failure to submit to intercourse so as to put the patient in great fear, however, would negate consent resulting in rape).

27. Mich. Comp. Laws § 750.90 (1948), Mich. Stat. Ann. § 28.285 (1962).

28. Bloodworth v. State, 65 Tenn. 492 (1872). See generally Annot., 91 A.L.R.2d 591 (1963). The common law result has been altered by statute in some jurisdictions. Id. at 601-12.

29. In Moran v. People, 25 Mich. 356 (1872), the court indicated that the mistaken husband case would not be different from the facts before the court (pretended medical treatment) holding that force is necessary to a conviction for rape. Dictum suggesting a contrary result in People v. Crosswell, 13 Mich. 427 (1865), was repudiated in Moran as erroneous.

30. People v. Ryno, 148 Mich. 137, 111 N.W. 740 (1907).

31. R. Perkins, supra note 1, at 117.

Statutory rape is an offense designed to protect an interest quite different from that guarded by the offense of forcible rape.[32] Forcible rape is designated as a criminal act for the obvious purpose of protecting the person and feelings of females from unwilling violation. Criminality is attached to statutory rape for the purpose of protecting females of tender years[33] from acts of indiscretion, the physical and sociological ramifications of which, due to their presumed immaturity of judgment, they do not fully appreciate. Like forcible rape,[34] statutory rape requires some penetration, and a man cannot be charged with rape of his wife, even though she is below the statutory age, except where he aids or abets another in the commission of the act.[35] A woman may, of course, be the victim of forcible rape even though she is below the age of sixteen, statutory rape being merely a strict liability modification of common law rape.

Statutory rape significantly departs from forcible rape with respect to the element of "force and against her will." The cases recite in various forms this distinction by noting that for statutory rape force is either not a necessary element,[36] irrelevant[37] or conclusively presumed.[38] These recitations are distinctions without a difference, the practical effect of which is that the act need not be accomplished by force nor must it be against the victim's will. A fortiori it is no excuse that the victim was willing or consented even where she was the perpetrating party or where she lied about her age.[39]

Since the offense of statutory rape is in the form of strict liability, evidence reflecting on the "victim's" chastity, or more properly the lack thereof, is not admissible for the purpose of establishing consent.[40] It has even been held that evidence showing that the victim was a prostitute is inadmissible.[41] Michigan courts have carved out two narrow exceptions to this rule: lack of chastity may be shown for the purpose of indicating that someone other than the defendant committed the crime,[42] and evidence showing the prosecutrix to be a nymphomaniac or sexual psychopath is admissible, but only for the purpose of reflecting on her credibility.[43]

Protection of interests parallel to those protected by the statutory rape

---

32. Forcible rape and statutory rape are found within the same statute. Mich. Pub. Acts 1952, No. 73, § 750.520, Mich. Stat. Ann. § 28.788 (1954).

33. Less than the full age of sixteen years in Michigan. See text of statute set out at note 2 supra. Age is a question to be determined by the trier of fact. People v. Commack, 317 Mich. 410, 26 N.W.2d 924 (1947).

34. See pp. 934-37 supra.

35. See p. 935 supra.

36. People v. Courier, 79 Mich. 366, 368, 44 N.W. 571, 572 (1890).

37. People v. Bennett, 205 Mich. 95, 100-01, 171 N.W. 363, 365 (1919).

38. People v. McDonald, 9 Mich. 149, 152 (1861).

39. People v. Gengels, 218 Mich. 632, 188 N.W. 398 (1922).

40. People v. Goulette, 82 Mich. 36, 45 N.W. 1124 (1890); People v. Glover, 71 Mich. 303, 38 N.W. 874 (1888).

41. State v. Rush, 27 S.D. 185, 130 N.W. 91 (1911), citing People v. Abbott, 97 Mich. 484, 56 N.W. 862 (1893).

42. People v. Russell, 241 Mich. 125, 215 N.W. 441 (1927).

43. People v. Bastian, 330 Mich. 457, 47 N.W.2d 692 (1951).

provision is provided by two other Michigan statutes: carnal knowledge of a female ward,[44] and debauching a male under the age of fifteen years.[45] Carnal knowledge of a female ward, under the age of eighteen, by her guardian is designated as a felony under the statute. In spite of the fact that this statute was enacted more than fifty years ago, it has never been construed in any reported case. It should be noted that, except for increasing the age limit by two years, this statute is a duplication of the protection afforded by the statutory rape provision.

The statute prohibiting female persons, over the age of fifteen, from inducing or enticing a boy under fifteen to engage in sexual intercourse designates the offense as a felony. It is interesting to note that the statute has been construed by only one reported case in the more than seventy years since its enactment.[46] This statute is substantially different from the statutory rape statute in that it requires actual knowledge that the victim is under the statutory age.[47]

In Michigan, the seduction of an unmarried woman, despite her age, is a felony by statute.[48] Seduction is defined as sexual intercourse the assent to which was obtained by an inducing promise, usually of marriage.[49] The essence of the criminal act is the inducement of the female to deviate from her virtuous avenue by means of promise.[50] Accordingly, some inducing promise must be shown by the prosecution. However, a promise of monetary compensation is not enough to sustain a conviction.[51] Similarly, a promise to marry the woman "if" she becomes pregnant will not support a prosecution for seduction.[52] The woman also must have been chaste at the time of the seduction to constitute a punishable offense,[53] but the prosecutrix is presumed to be chaste until the contrary is shown.[54] Should the defendant in fact marry the victim there can be no prosecution.[55]

---

44. Mich. Comp. Laws § 750.342 (1948), Mich. Stat. Ann. § 28.574 (1954).
45. Mich. Comp. Laws § 750.339 (1948), Mich. Stat. Ann. § 28.571 (1954).
46. People v. Bailey, 341 Mich. 592, 67 N.W.2d 785 (1954).
47. The words "knowingly and willfully," as used in the statute, disclose a legislative intent that . . . knowledge that the boy is under 15 years of age shall be essential to the commission of the crime.

Id. at 594, 67 N.W.2d at 786.
48. Mich. Comp. Laws § 750.532 (1948), Mich. Stat. Ann. § 28.800 (1954).
49. People v. DeFore, 64 Mich. 693, 31 N.W. 585 (1887); People v. Millspaugh, 11 Mich. 277 (1863).
50. People v. Clark, 33 Mich. 112, 116 (1876).
51. Id. at 116-17. But cf. People v. Gibbs, 70 Mich. 425, 38 N.W. 257 (1888) wherein promise of a gift by a 50 year old man to a 15 year old girl was held sufficient.
52. People v. Smith, 132 Mich. 58, 62-63, 92 N.W. 776, 777 (1902).
53. People v. Turton, 192 Mich. 331, 334, 158 N.W. 870, 871 (1916).
54. People v. Brewer, 27 Mich. 133, 137 (1873). But this is not to say that the victim must be a virgin, for a return to a chaste life prior to the seduction will reinstate the presumption of chastity and support a conviction. See People v. Squires, 49 Mich. 487, 13 N.W. 828 (1882); People v. Clark, 33 Mich. 112 (1876).
55. People v. Gould, 70 Mich. 240, 38 N.W. 232 (1888). But if the defendant thereafter deserts his spouse after marrying her to avoid prosecution he shall be guilty of a felony under Mich. Comp. Laws § 750.164 (1948), Mich. Stat. Ann. § 28.361 (1962).

B. Revised Criminal Code Proposals

The Proposed Code covers unlawful intercourse in four separate sections: rape in the first degree,[56] rape in the second degree,[57] rape in the third degree[58] and sexual misconduct.[59]

The Proposed Code retains the prohibition against forcible rape, without significant deviation from existing law, in language that is conducive to uniform interpretation.[60] The archaic designation of "carnal knowledge" is abandoned in favor of the term "sexual intercourse" which is defined as having "its ordinary meaning and occurs upon any penetration, however slight; emission is not required."[61]

The issue of the husband's liability for ravishing his wife is resolved by defining a "female" as "any female person who is not married to the actor."[62] In addition, the definition of "female" adopts the Model Penal Code approach to situations that are closely akin to the normal marital relationship although slightly removed in fact or in law.[63] For purposes of rape prosecutions, persons living together *as man and wife* are considered married and spouses living apart *under judicial decree* are considered not married.[64] Where the parties have been living together as man and wife there appears to be no good reason to impose criminal sanctions based on the artificial distinction between a de facto marriage and a solemnized marriage,[65] especially in view of the Proposed Code's removal of the criminal sanction from adultery.[66] The reasons for eliminating the possibility of a rape accusation where spouses are living apart without the benefit of judicial decree include the substantial possibility of resumption of sexual relations and

---

55. Mich. Rev. Crim. Code § 2310 (Final Draft 1967).
57. Id. § 2311.
58. Id. § 2312.
59. Id. § 2305.
60. (1) A male is guilty of rape in the first degree if:
(a) He engages in sexual intercourse with a female by forcible compulsion; or
(b) He engages in sexual intercourse with a female who is incapable of consent by reason of being physically helpless; or
(c) He engages in sexual intercourse with a female who is less than 11 years old.
Id. § 2310.
61. Id. § 2301(a).
62. Id. § 2301(d).
63. Model Penal Code § 213.6(2) (Official Draft 1962). See also N.Y. Pen. Law § 130.00, Comment at 271 (however a judicial separation decree is irrelevant so long as a valid marital status exists).
64. Mich. Rev. Crim. Code § 2301(d) (Final Draft 1967).
65. See People v. Pizzura, 211 Mich. 71, 178 N.W. 235 (1920); State v. Ward, 204 S.C. 210, 28 S.E.2d 785 (1944); Model Penal Code § 207.4, Comment (4) at 245 (Tent. Draft No. 4, 1955).
66. The adultery and cohabitation statutes are for practical purposes dead letters. . . . The threat of uninvoked penalties is an empty one, and full enforcement would not be tolerated. . . . [I]t is preferable to eliminate the fiction of criminal law controls on the marriage morals of Michigan.
Mich. Rev. Crim. Code § 7010, Comment at 493 (Final Draft 1967).

reconciliation, coupled with the danger of fabricated spiteful charges.[67] Existing law is retained under the Proposed Code by rendering a husband liable, as a principal to the offense, where he solicits, aids or abets another in the commission of rape upon his wife.[68]

The Proposed Code's substitution of "forcible compulsion" for the present requirement of "by force and against her will" is questionable. The draftsmen are to be applauded for their effort to define "forcible compulsion."[69] Under the existing statute there is no statutory definition for "by force and against her will." The case law has forged the descriptive term "utmost resistance," but this requirement is sufficiently ambiguous to permit a construction that the victim must have been physically incapable of additional struggle against the assailant.[70] The uncertainty inherent in the narration of such a standard to the jury is obvious. It is doubtful that the Proposed Code's description of "forcible compulsion" as "physical force that overcomes earnest resistance" is any improvement over "utmost resistance." In fact the very purpose of the definition, a clearer proscription, is probably jeopardized since the trial judge will not have the benefit of case law interpretations within which to structure his charge to the jury.

A second ambiguity with respect to the definition of "forcible compulsion" is whether the test is to be objective, a reasonably prudent woman under the circumstances, or subjective, the actual apprehension of the victim under the circumstances. Since the proffered definition is identical to that contained in the New York Penal Law it seems reasonable to assume that the draftsmen intend the same interpretation as that set out in the New York Penal Law comments—a subjective test.[71] A choice between these criteria requires a balancing of the policy favoring an assurance that the resistance is not feigned, half-hearted or ambivalent, against the policy favoring protection of women from serious bodily injury through the facilitation of prosecutions. The choice is admittedly a value judgment, but it is submitted that it is better to protect the interests of timid females at the possible expense of the aggressive male.[72]

The following definition would be both more meaningful to a jury and clearly adopt the subjective test:

---

67. Model Penal Code § 207.4, Comment (4) at 245 (Tent. Draft No. 4, 1955). See also Frazier v. State, 48 Tex. Crim. 142, 86 S.W. 754 (1905).

68. Mich. Rev. Crim. Code § 413 (Final Draft 1967).

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

Id. § 2301(h).

70. Model Penal Code § 207.4, Comment (6) at 246–47 (Tent. Draft No. 4, 1955). See generally Note, The Resistance Standard in Rape Legislation, 18 Stan. L. Rev. 680 (1966).

71. The definition "does not require the victim to have 'reasonable cause to believe' that the actor will carry out his threat." N.Y. Pen. Law § 130.00, Comment at 273.

72. Model Penal Code § 207.4, Comment (6) at 247 (Tent. Draft No. 4, 1955). But see Note, supra note 70, at 685.

> Forcible compulsion means physical force that overcomes resistance at least as great as the maximum resistance the victim could offer under the circumstances to prevent penetration while avoiding serious risk of death or serious physical injury to the victim or another person, including the serious risk that the victim or another person will be immediately kidnapped.[73]

The risk of death, injury or kidnapping of another person is taken into account, as it is under the Proposed Code's definition, for the purpose of clarifying whether a woman who submits to intercourse as a result of risk imposed upon another is the subject of a rape.[74] There is apparently no good reason to distinguish between the aggressor who compels submission by threats directed against the victim personally and the aggressor who compels submission by the imposition of risk of serious harm on another.

The "state of the victim's mind" issue is approached by the Proposed Code in a most comprehensive fashion and with a most interesting distinction. Sexual intercourse with a woman incapable of consent by reason of being physically helpless[75] is classified as rape in the first degree, while intercourse with a woman incapable of consent by reason of mental defect[76] or mental incapacity[77] is classified as rape in the third degree. The apparent distinction, upon which the disparity in punishment assigned these offenses is based, is the difference between volitional, although unreasoned, activity and non-volitional activity. Where the intercourse is non-volitional, *i.e.*, physical helplessness, there is no conscious acquiescence and no consent by definition; the aggravated character of the act merits rape in the first degree. Where the intercourse is volitional although unreasoned due to a permanent or temporary mental infirmity, *i.e.*, mental defect or mental incapacity, there is a conscious acquiescence amounting to consent in fact but for policy reasons not consent in law; the less aggravated character of the act deserves a lesser penalty. The assessment of penalties commensurate with the grievousness of the act makes good sense. Where the victim is

---

73. Cf. Note, supra note 70, at 684-85, 638. The kidnaping provision is derived from the Model Penal Code. Its inclusion is desirable because the threat of abduction is no less fear inducing than the threat of physical injury.

> [F]ormerly we relied on the formulation with regard to first degree felonies to embrace kidnapping threats. Since, when we came to draft our kidnapping provisions, we did not make all kidnapping felonies of the first degree, it became necessary to provide expressly for kidnapping.

Model Penal Code § 213.1, Comment at 143 (Official Draft 1962).

74. E.g., mother submits to save her child. Model Penal Code § 207.4, Comment (6) at 247 (Tent. Draft No. 4, 1955). Girl submits to save the life of her escort. State v. Olsen, 138 Ore. 666, 7 P.2d 792 (1932).

75. "'Physically helpless' means that a person is unconscious or for any other reason is physically unable to communicate unwillingness to an act." Mich. Rev. Crim. Code § 2301(g) (Final Draft 1967).

76. Mental defect is defined as "a mental disease or defect which renders him incapable of appraising the nature of his conduct." Id. § 2301(e).

77. Mental incapacity is defined as "temporarily incapable of appraising or controlling his conduct owing to the influence of a narcotic or intoxicating substance administered to him without his consent, or to any other act committed upon him without his consent." Id. § 2301(f).

"helpless" the actor is acting with the same disregard for personal safety as a forcible rapist. However, the magnitude of the disparity in penalties is a value judgment. Suffice it to note that first degree rape is punishable by an indeterminate term with a maximum of twenty years,[78] and third degree rape carries a penalty of a definite term with a maximum of one year.[79] There is, however, a notable ambiguity in the Proposed Code's treatment of this area. Since the definition of mental incapacity excludes those individuals who administer intoxicating substances to themselves, except where the act is accomplished by force or the victim is unconscious, no conviction may be had for intercourse with an individual so incapacitated. Whether an indictment for sexual misconduct would be appropriate is open to speculation as that section prohibits intercourse "without her consent."[80] Lack of consent is defined as "incapacity to consent,"[81] a circular definition for this purpose. As pointed out previously, the "self-intoxicated" case has never been specifically decided in Michigan.[82] Presented with an opportunity, the legislature should declare the position of the law with specificity. Where the intoxicated victim offers appropriate resistance and the assailant sucessfully overcomes that resistance, an indictment for first degree rape is proper. Similarly, where the victim's cognition has been reduced to a state of dormancy, an indictment for first degree rape should lie as the victim is physically helpless (unconscious). The circumstances applicable to consideration here are those in which the woman does not offer active resistance although she remains conscious. Where the mature woman has voluntarily reduced her inhibiting mechanisms to a state of ambivalence, especially where she engages in joint indulgence in drugs or liquor, it is ludicrous for her to claim later she has been raped. "Conditions affecting only the woman's capacity to 'control' herself sexually [should] not involve criminal liability."[83]

The Proposed Code's position with respect to the cases of fraudulently obtained consent is not clear from the comments. It is assumed that the draftsmen advocate a general repeal of existing criminal statutes including the statute covering pretended medical treatment. Where the victim consents to some medical treatment that in fact turns out to be intercourse, unbeknown to the patient, the act would fall under the sexual misconduct section since the act of intercourse was "without her consent."[84] However, where the victim does consent to intercourse in fact, although she is mistaken as to some collateral fact, it is not possible to unequivocally declare the state of the law under this formulation. In this category of cases are

78. Id. § 1401.
79. Id. § 1415.
80. Id. § 2305(1)(a).
81. Id. § 2330(2)(b). Note that the definition of mental incapacity includes only intoxication procurred without the victim's consent. Id. § 2301(f).
82. See p. 936 & note 19 supra.
83. Model Penal Code § 213.1, Comment at 144 (Official Draft 1962). See also Model Penal Code § 207.4, Comment (7) at 248 (Tent. Draft No. 4, 1955).
84. Mich. Rev. Crim. Code § 2305(1)(a) (Final Draft 1967); see p. 937 supra.

those where the woman engages in intercourse under the guise that it will be beneficial to her health, or with a man whose identity she mistakes for that of her husband, or with a man she mistakenly believes to be her husband as a result of a sham marriage. Under existing case law these fact situations would not support a conviction for rape due to the lack of force.[85] Presumably, the absence of the element of force from the sexual misconduct section would liberate these cases from the restrictive position of existing law. Since these collateral facts are essential to the victim's grant of consent, the actor who obtains consent by virtue of fraudulent misrepresentation of such collateral matters should not be free from criminal liability. The uncertainty here present should be resolved by supplementing section 2305(1) with the following provision.

(1) A person commits the crime of sexual misconduct if:

. . . .

(d) Being a male or a female, the actor knows that the other person is unaware that a sexual act is being committed upon that person or that the other person submits because that person falsely supposes that the actor is that person's spouse.[86]

This provision requires knowledge on the part of the actor, excluding cases of mutual mistake.

The Proposed Code offers a number of significant and long overdue alterations in the area of statutory rape. Initial among the proposed changes is a subclassification of offenses on the basis of age disparity between the male and female, assigning penal sanctions accordingly. An individual less than fifteen years of age is not subject to criminal responsibility, but rather his conduct falls under the Juvenile Code and the jurisdiction of the probate court.[87] The scheme is tabulated below for convenient reference in conjunction with the ensuing discussion.[88]

Victim's Age	Actor's Age	Maximum Penalty
less than 11	15 and over	20 years (felony)
11 to 14	18 and over	5 years (felony)
11 to 14	15 to 18	90 days (misdemeanor)
14 to 16	21 and over	1 year (misdemeanor)
14 to 16	15 to 21	90 days (misdemeanor)

The Proposed Code retains coverage equivalent to the common law by specifying that intercourse with a child less than eleven years old is rape

85. See p. 937 & notes 28 & 29, supra.

86. See Model Penal Code § 213.1(2)(c) (Official Draft 1962). It should be noted that the penalty under the sexual misconduct section (maximum ninety days) is considerably less severe than the penalty under existing law for intercourse under pretense of medical treatment. Mich. Comp. Laws § 750.90 (1948), Mich. Stat. Ann. § 28.285 (1962) (maximum ten years).

87. Mich. Rev. Crim. Code § 701 (Final Draft 1967).

88. See generally Mich. Rev. Crim. Code §§ 2305, 2310-12 (Final Draft 1967).

in the first degree.[89] A sexual experience of this nature, with a child who almost certainly has not reached puberty, is a risk in the order of the highest magnitude[90] that reflects a "most dangerous aberration of character and threat to public security,"[91] deserving of severe penal sanction. The remaining provisions constitute a more complex system for covering conventional statutory rape. The obvious import of this graduated scheme is that the greater age disparity merits a more severe sanction.

Recent penal law revisions in other jurisdictions have adopted graduated schemes of statutory rape offenses.[92] The Michigan proposal places primary emphasis on three arbitrary age classes of the female, considering the male's age in an incidental fashion. The Model Penal Code approach,[93] liability predicated on age differential as a function of the male's age with respect to the female's age, seems simpler, more rational and more equitable. Where the female is between the ages of eleven and sixteen and the male is more than four years older than the female the offense would be a felony, but where the age disparity is four years or less the offense would be a misdemeanor.

The rape offenses scheme provides coverage equivalent to existing statutes on carnal knowledge of a female ward and debauching a male under fifteen. The two significant changes in this area are the age alterations and sharply reduced penalties for both offenses. Debauching a male under fifteen is currently a felony punishable by imprisonment for a maximum of five years.[94] Such conduct would fall under the proscription for sexual misconduct which makes it a misdemeanor for a female to engage in intercourse with a male under the age of sixteen[95] (ninety day maximum). Carnal knowledge of a female ward under eighteen by her guardian is a felony punishable by imprisonment for a maximum of ten years.[96] Under the Proposed Code this conduct falls squarely within the statutory rape scheme set out in the table above, the nature of the offense being dependent upon age disparity. However, there is a noteworthy exception in that consensual intercourse with females over sixteen does not subject the actor to criminal liability. There appears to be no good reason to extend the age limit of statutory rape to eighteen simply because the female is a ward of the actor. The age of consent should be dependent upon sexual and psychological maturity rather than the form of legal relationship.

The draftsmen recommend repeal of the seduction statute indicating

89. Id. § 2310(1)(c).
90. See Chaneles, Child Victims of Sexual Offenses, 31 Fed. Prob. 52 (June 1967).
91. Model Penal Code § 207.4, Comment (1) at 242 (Tent. Draft No. 4, 1955).
92. See Minn. Stat. Ann. § 617.02 (1964); 6 N.M. Stat. Ann. §§ 40A-9-3, 40A-9-4 (1953); N.Y. Pen. Law §§ 130.20-.35.
93. Model Penal Code § 213.3 (Official Draft 1962).
94. Mich. Comp. Laws § 750.339 (1948), Mich. Stat. Ann. § 28.571 (1954). See p. 939 supra.
95. Mich. Rev. Crim. Code § 2305(1)(b) (Final Draft 1967). Section 2330(3)(a) deems a person incapable of consent if under the age of sixteen.
96. Mich. Comp. Laws § 750.342 (1948), Mich. Stat. Ann. § 28.574 (1954). See p. 939 supra.

that "[r]oughly equivalent protection is provided" in the chapter on sexual offenses.[97] This statement is unfounded since inducing intercourse by promise is not punishable under the Proposed Code's provisions. However, repeal should be urged on the basis of the policy that provoked the legislature to expunge all civil actions for breach of promise to marry and seduction of persons eighteen and over,[98] *i.e.*, the danger of fraudulent claims without a corresponding good reason for retaining the statute.

One of the most important of the bids to alter existing law is the section providing for the defense of mistake of fact with respect to the capacity to consent.[99] The general American rule that mistake of fact is no defense to statutory rape, in spite of the prosecutrix' misrepresentations[100] or defendant's efforts to ascertain the true facts,[101] has for years been severely criticized in legal texts and journals.[102] American adherence to this "no defense" position is in sharp contrast with European law and even our own general principles of criminal law.[103] However, the rule has in recent years suffered encroachment by statute in Illinois, New York and New Mexico,[104] and by judicial edict in California in *People v. Hernandez*.[105]

It is widely recognized that there are instances of statutory rape where it is the male who is the "victim" of a sexually sophisticated female[106] whose physical appearance is woefully misleading; that recidivism among statutory rapists is nonexistent; and that the statutory rapist is generally not an abnormal youth who represents a threat to public security as does the classic rapist.[107] Relations with females who appear to be chronologically mature violates only social and religious conventions that are widely disregarded, and does not violate our traditional principles of criminal culpability, particularly the principle of mens rea.[108]

However, the Proposed Code advocates a subjective test in line with the *Hernandez* case. The reason for allowing the defense of mistake of fact

---

97. Mich. Rev. Crim. Code § 2305, Comment at 182 (Final Draft 1967).

98. Mich. Comp. Laws § 551.301 (1948), Mich. Stat. Ann. § 25.191 (1957).

99. Mich. Rev. Crim. Code § 2331 (Final Draft 1967).

100. People v. Lewellyn, 314 Ill. 106, 145 N.E. 289 (1924); Farrell v. State, 152 Tex. Crim. 488, 215 S.W.2d 625 (1948).

101. Manning v. State, 43 Tex. Crim. 302, 65 S.W. 920 (1901).

102. See, e.g., Myers, Reasonable Mistake of Age: A Needed Defense to Statutory Rape, 64 Mich. L. Rev. 105 (1965); Comment, Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard, 62 Yale L.J. 55 (1952).

103. The primordial concept of *mens rea*, the guilty mind, expresses the principle that it is not conduct alone but conduct accompanied by certain specific mental states which concerns, or should concern the law.

People v. Hernandez, 61 Cal. 2d 529, 532, 393 P.2d 673, 675, 39 Cal. Rptr. 361, 363 (1964). See also Myers, supra note 102, at 106-07.

104. Ill. Ann. Stat. ch. 38, § 11-4(b)(1) (Smith-Hurd 1964) (reasonable belief); 6 N.M. Stat. Ann. § 40A-9-3 (1953); N.Y. Pen. Law § 130.10.

105. 61 Cal. 2d 529, 393 P.2d 673, 39 Cal. Rptr. 361 (1964) (subjective belief).

106. See McGeorge, Sexual Assaults on Children, 4 Med. Sci. & L. 245 (1964).

107. See Myers, supra note 102, at 122-25 and authorities cited therein.

108. See note 103 supra. Cf. Model Penal Code § 207.1, Comment at 206-07 (Tent. Draft No. 4, 1955).

is the avoidance of injustice where the "victim" holds herself out objectively as a mature female. Where a male engages in sexual relations with a female who appears to be over the age of consent, the law confers a harsh realization on the innocent mind of the defendant by later convicting him of rape. On the other hand, the policy of the statute is to protect immature females from their own immaturity. This policy is enhanced by facilitating prosecutions. The existence of either a subjective or an objective defense of mistake of fact dilutes the policy of the statute to some extent, but an objective standard at least requires that the defendant's belief be reasonable. Since the defendant's belief is to be based on the objective appearance of the female, it is not too much to ask that the defendant's interpretation of that appearance be objective. The best reconciliation of these competing interests is an objective standard. To demand of the defendant that his belief be reasonable at least approaches traditional principles of culpability without abrogating the basic policy of the statute. It should be noted that the defendant's burden of establishing the defense will become increasingly more difficult as the age of the victim decreases. For this reason it is urged that section 2331 be altered to encompass only reasonable mistake of fact.[109]

The mistake section applies also to incapacity by reason of mental defect, mental incapacity and physical helplessness. These modes of incapacity are not significantly different from incapacity by reason of age in that they are based on parallel policies. Therefore, the preceding discussion applies equally as well to these forms of incapacity.

C. *Analysis*

The Proposed Code's coverage of forcible rape generally retains current coverage while attempting a resolution of existing ambiguities through comprehensive definitions. The proposal is successful in promulgating a rational scheme enhanced by precise definitions, with three exceptions: the definition of "forcible compulsion" should be more comprehensive and establish clearly whether it is a subjective or objective test; the definition of incapacity to consent with respect to self-induced intoxication should be specific; and the existence of doubt regarding the cases of fraudulently obtained consent should be resolved by adding a specific provision.

The statutory rape proposal is a well reasoned and long overdue modification of existing law. The introduction of the graduated offense scheme, while it could be simpler and more equitable, is certainly an improvement. The defense of mistake of fact brings the offense of statutory rape within the general principles of criminal law, but a reasonable mistake test would be more appropriate than the proposed subjective test.

There are, however, other considerations relevant to heterosexual offenses not noticed in the Proposed Code: defense of prostitution in statutory rape actions, corroboration of charges and a restrictive statute of limitations. The statute of limitations and corroboration are reserved for later discussion.

109. But see Israel, The Process of Penal Law Reform—A Look at the Proposed Michigan Revised Criminal Code, 14 Wayne L. Rev. p. 772 supra, at 826.

Since the offense of statutory rape is predicated upon the necessity of protecting the virtue of immature females, inquiry into the virtue or chastity of the victim would be anomalous. However, it is incongruous to hold that the statute exists for the protection of prostitutes.[110] A good example of the potential injustice is provided by a New York case[111] wherein the defendant was convicted of statutory rape of a female who operated out of a hotel room as a prostitute. The woman had in fact previously been convicted of prostitution, testifying at her trial that she was twenty-three years old. Illinois provides a defense of prostitution against a charge of statutory rape.[112] Where the young girl has so far departed from sexual norms that she enters into relationships on a commercial basis, the purpose of the statute has failed with respect to that individual. Having failed in its purpose, the statute should not be operative in favor of prostitutes who subsequently decide that they have been raped. Accordingly, the lead of Illinois should be followed in establishing prostitution as a defense to statutory rape of females between eleven and sixteen. Prostitution in this context should be defined as sexual intercourse in exchange for compensation rather than mere promiscuity.[113] The reason for defining prostitution in this manner is to minimize the possibility of "oath helpers," individuals that swear to prior acts of intercourse simply to assist a comrade.

III

UNLAWFUL DEVIATE SEXUAL CONDUCT

A. Existing Michigan Law

Principal among the prohibitions against deviate sexual conduct is the offense of sodomy. The crime derives its name from the ancient city of Sodom, reputedly destroyed for notorious unnatural sex practices in violation of the biblical edict "thou shall not lie with mankind, as with womankind."[114] Michigan's statutory proscription of sodomy, due to its vague statutory definition, has been held to adopt the common law crime of sodomy.[115] As a result, the sodomy statute covers penetrations of animals and humans *per anum* but not *per os*,[116] and the rule of an early Michigan case that emission must be shown, has been overturned by a subsequent

110. See Ploscowe, Sex Offenses: The American Legal Context, 25 Law & Contemp. Prob. 217, 222 (1960); Model Penal Code § 207.4, Comment (13) at 254 (Tent. Draft No. 4, 1955).

111. People v. Marks, 146 App. Div. 11, 130 N.Y.S. 524 (1911).

112. Ill. Ann. Stat. ch. 38, § 11-4(b)(2) (Smith-Hurd 1964).

113. But see Model Penal Code § 213.6(4) (Official Draft 1962).

114. Leviticus 18:22. See generally 48 Am. Jur. Sodomy §§ 1-7 (1943).

115. "[T]he abominable and detestable crime against nature either with mankind or with any animal . . . ." Mich. Pub. Acts 1952, No. 73, § 750.158, Mich. Stat. Ann. § 28.355 (1962). Offenses declared in general statutory language adopt the common law for particularization of the elements of the crime. People v. Schmitt, 275 Mich. 575, 267 N.W. 741 (1936).

116. People v. Dexter, 6 Mich. App. 247, 148 N.W.2d 915 (1967).

statute.[117] Other statutory enactments, carrying identical penalties, prohibit acts of "gross indecency" between persons, regardless of sex, in public or private.[118] Regrettably, the judiciary has not been disposed to relate the meaning of the legislative cipher "gross indecency" with any specificity. The supreme court has held that an indictment in the form of the statute is sufficient to appraise the defendant of the charge against him since "[t]he common sense of the community, as well as the sense of decency, propriety, and morality which most people entertain is sufficient to apply the statute to each particular case . . . ."[119] The gross indecency statutes are not unconstitutional for vagueness,[120] and as such probably cover every conceivable form of sexual activity that any substantial group of individuals considers indecent.

The most that can be said of the current status of Michigan law with respect to deviate sexual conduct is that it probably prohibits any and all sexual activity, in public or private, heterosexual or homosexual, other than conventional petting or coitus. Consent is, of course, no defense.

B. Revised Criminal Code Proposals

The Proposed Code's coverage of deviate sexual conduct would work sweeping change in the law. Criminality would attach only to nonconsensual conduct, assessing penalties in accordance with the degree of aggravation or age disparity in a manner identical with the aforementioned rape provisions.

The unwieldy and unnecessarily vague phrases "abominable and detestible crime against nature"[121] and "gross indecency"[122] are abandoned in favor of the phrase "deviate sexual intercourse," which is defined as "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."[123] This retreat from the use of language, borrowed from another era,[124] that is repugnant to modern theory of constitutionality,[125] is to be commended.

---

117. "[I]t shall not be necessary to prove emission, any sexual penetration, however slight shall be deemed sufficient . . . ." Mich. Pub. Acts 1952, No. 73 § 750.159, Mich. Stat. Ann. § 28.356 (1962), overturning People v. Hodgkin, 94 Mich. 27, 53 N.W. 794 (1892).

118. Mich. Pub. Acts 1952, No. 73, § 750.338, Mich. Stat. Ann. § 28.570 (1954) (acts between male persons). Mich. Pub. Acts 1952, No. 73, § 750.338a, Mich. Stat. Ann. § 28.570(1) (1954) (acts between female persons). Mich. Pub. Acts 1952, No. 73, § 750.338b, Mich. Stat. Ann. § 28.570(2) (1954) (acts between males and females).

119. People v. Carey, 217 Mich. 601, 602-03, 187 N.W. 261, 262 (1922). The court quoted with approval from an earlier case that "[c]ourts will never allow its [sic] records to be polluted by bawdy and obscene matters." Id. at 603, 187 N.W. at 262.

120. People v. Dexter, 6 Mich. App. 247, 148 N.W.2d 915 (1967).

121. Mich. Pub. Acts 1952, No. 73, § 750.158, Mich. Stat. Ann. § 28.355 (1962).

122. Mich. Pub. Acts 1952, No. 73, § 750.338, Mich. Stat. Ann. § 28.570 (1954); Mich. Pub. Acts 1952, No. 73, § 750.338a, Mich. Stat. Ann. § 28.570(1) (1954); Mich. Pub. Acts 1952, No. 73, § 750.338b, Mich. Stat. Ann. § 28.570(2) (1954).

123. Mich. Rev. Crim. Code § 2301(b) (Final Draft 1967).

124. "[T]he infamous *crime against nature*, committed either with man or beast . . . ." 4 Blackstone, Commentaries *215.

125. If the statute were a new one, it would be obviously unconstitutional for

The most severe penalty (twenty year maximum) under the graduated scheme is assigned to deviate sexual intercourse by forcible compulsion, or with a person physically helpless, or with an infant under eleven years of age.[126] The definitions of physically helpless and forcible compulsion are the same in this context as for rape.[127] As in the case of rape, sexual impositions by force, or upon physically incapacitated persons, or upon children of extreme immaturity are extraordinarily dangerous to the individual victim and a serious threat to public security, deserving of severe sanction. The remaining sections covering deviate sexual intercourse correspond to the system of statutory rape provisions.[128]

Victim's Age	Actor's Age	Maximum Penalty
less than 11	15 and over	20 years (felony)
11 to 14	18 and over	5 years (felony)
11 to 14	15 to 18	90 days (misdemeanor)
14 to 16	21 and over	1 year (misdemeanor)
14 to 16	15 to 21	90 days (misdemeanor)

This graduated scheme, based on age disparity, follows that adopted by New York in its recent penal law revision.[129] The systematic concept was formalized in the early drafts of the Model Penal Code based on the theory that it is advisable to deter seduction of the young by older perverts, with relatively harsh penalties, while avoiding attaching serious criminality to occasional experimentation between adolescent contemporaries.[130] Empirical evidence, such as there is, tends to justify this distinction. The famous Kinsey study indicates that nearly sixty per cent of the male population in America has had some sort of homosexual experience, usually in their youth.[131] While the magnitude of Kinsey's figures has been questioned,[132] there can be little doubt that his estimates bear a significant relationship to actuality. Surely no one would contend that such passing sexual experimentation by

---

vagueness. The former concern for the feelings of those reading the statute has yielded to the necessity that an indicted person know of what he is charged. Euphemisms have no place in criminal statutes.

Perkins v. State, 234 F. Supp. 333, 336 (W.D.N.C. 1964).

126. Mich. Rev. Crim. Code § 2315 (Final Draft 1967).

127. The definition of forcible compulsion is open to the same criticism here as it was in connection with rape, it being of no consequence that the victim of deviate sexual intercourse may be male as well as female. See pp. 941-42 supra.

128. See Mich. Rev. Crim. Code §§ 2305(1)(c), 2315-17 (Final Draft 1967). It is of no consequence to the comparison that the victim of deviate sexual intercourse may be male as well as female. See pp. 944-45 supra.

129. N.Y. Pen. Law §§ 130.20, 130.40-.50.

130. Model Penal Code § 207.5, Comments (3)-(4) at 280 (Tent. Draft No. 4, 1955).

131. A. Kinsey, W. Pomeroy & C. Martin, Sexual Behavior in the Human Male 371 (1948).

132. See N. St. John-Stevas, Law and Morals 29-30 (1964); Wheeler, Sex Offenses: A Sociological Critique, 25 Law & Contemp. Prob. 258, 264 (1960).

something approaching sixty per cent of the population is deserving of penalties equivalent to the most heinous of crimes.

Deviate sexual intercourse with persons incapable of consent by reason of mental incapacity is classified, as in the rape context, as a Class A misdemeanor[133] (one year maximum). The discussion in the rape section parallels the considerations relevant here.[134] It should also be noted that the defense of mistake of fact is available in deviate sexual intercourse prosecutions as well as rape prosecutions and consequently open to the same criticisms.[135]

The most important alteration of law under the proposal is the elimination of criminality from deviate sexual activity between consenting adults in private. The premise underlying this position is that it is not a proper function of the criminal law to regulate private morality,[136] a premise to be examined in detail in the following section. Accordingly, the Proposed Code would punish homosexual activities accomplished by compulsion, perpetrated on the young, or displayed in public[137] even though consensual, while relegating the control of private morality to religious and sociological institutions. This view reflects a philosophy that has been extremely popular in legal texts and journals but apparently not among the legislatures. Illinois is presently the only jurisdiction that exempts homosexual conduct, between consenting adults in private, from criminal liability.[138] The recent penal code revision in New York retained the prohibition against consensual sodomy,[139] but the penality for violation (ninety day maximum)[140] is in sharp contrast to the existing Michigan penalty (fifteen year maximum).[141]

133. Mich. Rev. Crim. Code § 2317(1)(a) (Final Draft 1967).

134. See pp. 942-43 supra.

135. See pp. 946-47 supra.

136. Mich. Rev. Crim. Code § 2317, Comment at 186 (Final Draft 1967).

137. Public homosexual displays are covered by the Proposed Code's provisions for loitering. Id. § 5540(1)(c), notwithstanding the statement that such conduct is "included in the concept of disorderly conduct." Id. § 5505, Comment at 187.

138. Ill. Ann. Stat. ch. 38, §§ 11-1 to 11-20 (Smith-Hurd 1964). The Model Penal Code reporters originally adopted this position but the proposal was defeated by the council.

> Some members believe that the Reporters' position is the rational one but that it would be totally unacceptable to American legislatures and would prejudice acceptance of the Code generally. Other members oppose the position . . . on the ground that sodomy is a cause or symptom of moral decay in a society and should be repressed by law.

Model Penal Code § 207.5, Comment (1) at 276 (Tent. Draft No. 4, 1955). See Schwartz, Morals Offenses and the Model Penal Code, 63 Colum. L. Rev. 669 (1963).

139. N.Y. Pen. Law § 130.38. See Ploscowe, Sex Offenses in the New Penal Law, 32 Brooklyn L. Rev. 274, 286 (1966) (critical: "It is obvious once again that change is not necessarily progress."). The New York proposed code would have removed criminality from private consensual conduct. See Note, The Proposed Penal Law of New York, 64 Colum. L. Rev. 1469, 1545 (1964).

140. N.Y. Pen. Law § 70.15(2).

141. Mich. Pub. Acts 1952, No. 73, § 750.158, Mich. Stat. Ann. § 28.355 (1962) (life maximum for a sexually delinquent person).

C. *Analysis*

The proposed scheme for unlawful deviate sexual intercourse is comprehensive, well-integrated and complete with definitions. The graduated penalty provisions based on a varying degree of aggravation are sound. The definitions are a marked improvement over existing law, although open to specific objection as previously discussed.[142] It is important to note that this portion of the Proposed Code is characterized by a distinct alteration in penalties, some reduced and some increased. However, space limitation does not permit a discussion of penal theory in this presentation.[143] The most striking change is the elimination of punishment for deviate sexual activity between consenting adults in private, an issue requiring detailed analysis.

The regulation of deviate sexual conduct between consenting adults in private requires discussion at three levels, though not clearly distinct and somewhat overlapping: the ethical level—the relationship between morality and legal sanction; the legal level—the relationship between existing jurisprudential doctrines and legal sanction; and the practical level—the relationship between enforcement and legal sanction.

To set the problem in its ethical context the following premise is taken as self-evident. Every legal sanction must be justifiable, for the deprivation of life, liberty or property is itself a crime without the impetus of law based on reason. It is the justification about which the controversy centers. The publication of the British study[144] in 1957, commonly referred to as the Wolfenden Report, precipitated the latest bout over the legal regulation of morality.[145] The report advised that homosexual practices between consenting adults in private be excluded from criminal liability on the following ground:

> Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there remains a realm of private morality and immorality which is, in brief and crude terms, not the law's business.[146]

The ensuing controversy has been championed by two eminent legal scholars. Lord Devlin takes exception to the Wolfenden Report's conception of what is properly "the law's business," equating immoral conduct to treason.[147] His thesis is that a set of common moral values is essential to the existence of a society and therefore private conduct that threatens a moral principle,

---

142. See p. 947 supra.

143. See generally Comment, Sentencing Reform and the Michigan Revised Criminal Code, 14 Wayne L. Rev. p. 891 supra.

144. Report of the Committee on Homosexual Offenses and Prostitution, CMD. No. 247 (1957) [hereinafter cited as Wolfenden Report].

145. See, e.g., P. Devlin, The Enforcement of Morals (1965) [hereinafter cited as Devlin]; H. Hart, Law, Liberty and Morality (1966) [hereinafter cited as Hart]; N. St. John-Stevas, Law and Morals (1964); Dworkin, Lord Devlin and the Enforcement of Morals, 75 Yale L.J. 986 (1966); Ison, The Enforcement of Morals, 3 U. Brit. Colum. L. Rev. 353 (1967).

146. Wolfenden Report at 24.

147. Devlin at 13-14.

while not a menace to others, is a threat to the existence of society. The conclusion is that the law is justified in controlling private homosexual activity to prevent a chink in the moral cement of society just as it is justified in the "supression of subversive activities."[148]

H.L.A. Hart aligns himself with John Stuart Mill on the issue of the enforcement of morality, taking the position that the only justification for the regulation of private conduct is the prevention of harm to other individual members of society.[149] Hart diverges from the strict principles of Mill in distinguishing between what he terms "legal moralism" and the enforcement of a "moral principle and nothing else" or "paternalism." The distinguishing example cited by Hart is a statute punishing cruelty to animals. The justification for such a statute is not the immorality of the act, "paternalism," but rather the prohibition of inflicting suffering, albeit only of an animal, "legal moralism."[150] A law cannot be justified without showing an imposition on some sentient being. While mere knowledge that someone may be doing something wrong might distress some member of society, punishment on this basis is tantamount to punishment simply because someone objects to what is being done. The only liberty that could exist in such an atmosphere is the liberty to do those things to which no one seriously objects —an illusory liberty at best.[151] As Hart points out, the principle of legality is seriously undercut by a law prohibiting that which some group feels is immoral, without justification, and is reminiscent of the Nazi period in Germany during which a statute was enacted punishing activity deserving of punishment according "to the fundamental conceptions of a penal law and sound popular feeling."[152]

Devlin's fear, that society would collapse as an eventual result from the weakening of society's moral bonds through relaxation of the regulation of private sexual conduct, is not supported by history.[153] On the entire Eurpoean Continent only Austria and Germany punish private homosexual conduct between consenting adults.[154] Indeed, if Dr. Kinsey's statistics are accurate, our society was on the verge of collapse in 1948.[155] Devlin's tol-

148. Id.

149. Hart at 4-5. See also Fletcher, Sex Offenses: An Ethical View, 25 Law & Contemp. Prob. 244 (1960). A hybrid position is attributable to Norman St. John-Stevas that only "those moral offenses which affect the common good are fit subjects for legislation." N. St. John-Stevas, supra note 145, at 27. However, the assessment of the public good via empirical study interjects serious difficulty. Id. at 27-31.

150. Hart at 33-34. See Comment, Private Consensual Adult Behavior: The Requirement of Harm to Others in the Enforcement of Morality, 14 U.C.L.A.L. Rev. 581, 586-94 (1967).

151. Hart at 46-48.

152. Id. at 12.

153. See Hart at 50-52; Ison, supra note 145, at 266-69.

154. N. St. John-Stevas, supra note 145, at 120. Such predominantly Catholic countries as France, Italy, Mexico and Uruguay do not attempt regulation of private sexual relationships between consenting adults. Model Penal Code § 207.5, Comment (1) at 278 (Tent. Draft No. 4, 1955).

155. See N. St. John-Stevas, supra note 145, at 118-19.

erance limit, that limit where legal regulation should be imposed, is that which arouses feelings of "intolerance, indignation, and disgust."[156] The problem is that there is no demonstrable correlation between such elusive tags and their destructive influence on society, and there are serious difficulties associated even with determining the real feelings of the community.[157]

Assuming *arguendo* that most men regard homosexuality as a "vice so abominable that its mere presence is an offence,"[158] that tenet itself demands examination.[159] If a man contend that the law should condemn homosexuality, it is advisable to inquire of his reasons. The response may be based on: prejudice—homosexual creatures are morally inferior because they are effeminate; emotion—they make me sick; rationalization—everyone knows homosexuality is sinful; fantasy—homosexuality causes earthquakes (as the Emperor Justinian believed);[160] or personal aversion—blind hate attributable to unacknowledged self suspicion. None of these justify the restriction of another man's freedom. Accordingly, "[a] conscientious legislator who is told a moral consensus exists must test the credentials of that consensus."[161] If none of the aforementioned reasons are acceptable justification, the legislator must uncover some other reason to support the law. Does such a reason exist?

Careful reflection on the justification of law should lead to a conclusion in accordance with that of Hart. The enforcement of morality *qua* "intolerance, indignation and disgust" without demonstrable individual harm, at the expense of liberty, is simply not worth the price. The regulation of private homosexual conduct between consenting adults is, on this basis, itself immoral.

An examination of morality legislation at the legal level indicates that the regulation of consensual homosexuality between adults in private is curiously out of step with constitutional doctrines. The contention presented here is not that such regulation is unconstitutional; it clearly is not as of this date, although the trend is not favorable to the continuing validity of such regulation. Rather the ensuing discussion is intended to point up the discriminatory application of legal doctrines between homosexual offenses and the remainder of the criminal law. In this respect it is hoped that the legislature will examine the disparity and articulate a justification.[162]

A line of cases leading to the Supreme Court's latest pronouncement, in *Griswold v. Connecticut*,[163] have established a constitutionally protected

156. Devlin at 17.
157. Ison, supra note 145, at 267-69.
158. Devlin at 17.
159. See generally Dworkin, supra note 145, at 994-1002.
160. Hart at 50.
161. Dworkin, supra note 145, at 1001.
162. See generally Comment, Deviate Sexual Behavior: The Desirability of Legislative Proscription, 30 Albany L. Rev. 291 (1966); Note, The Crimes Against Nature, 16 J. Pub. L. 159, 177-83 (1967); Comment, supra note 150, at 599-603.
163. 381 U.S. 479 (1965). See 64 Mich. L. Rev. 197-288 (1965) for a series of articles by renowned professors discussing the Griswold case.

right of privacy. The majority opinion draws upon several provisions of the Bill of Rights stating that the protections afforded by these amendments are incumbent upon the states through the fourteenth amendment. *Griswold* struck down a Connecticut statute that forbade the use of contraceptive devices by married couples, on the ground that the statute abridged a right of privacy that lay within the penumbra of fundamental constitutional guarantees.[164] It is but a short extension of the "zone of privacy" enshrouding marital sexual relations to include homosexual acts between consenting adults in private, particularly if the state can demonstrate no convincing justification for such regulation.[165]

Punitive measures directed at homosexuality also may encounter difficulty with the cruel and unusual punishment prohibition of the eighth amendment.[166] While psychiatric opinion is not unanimous on the causes or nature of homosexuality, there is a substantial school believing that homosexuality in certain cases has a compulsive element. That is to say, that certain homosexuals do not have the voluntary capacity to conform their conduct to the requirements of law.[167] *Robinson v. California*[168] held invalid a state statute making it a crime to be a narcotics addict, on the ground of cruel and unusual punishment. An attempt was made two years later to apply the *Robinson* rule to a sodomy case in *Perkins v. State*.[169] *Robinson* was distinguished on the basis that punishment based on the status of narcotics addiction is different from punishment based on an overt homosexual act.[170] Evidently Judge Craven felt a twinge of injustice, even

164. 381 U.S. at 485. The search and seizure provision of the fourth amendment is not entirely distinct from a right of privacy entitled to constitutional protection. In Smayda v. United States, 352 F.2d 251 (9th Cir. 1965), homosexuals were apprehended and convicted on evidence obtained by clandestine surveillance of a public toilet by means of a concealed hole drilled in the ceiling. In spite of the fact that a large number of innocent users were necessarily observed during the surveillance, the court held that there was no unreasonable search and seizure of a constitutionally protected area. See 17 Hastings L.J. 335 (1966) (critical). However, the recent Supreme Court decision in Katz v. United States, 389 U.S. 347 (1967) apparently strips Smayda of its basic underpinnings by declaring constitutional protection for persons in public phone booths where the surveillance is without benefit of judicial decree issued upon probable cause.

165. One state court that has considered the question rejected the constitutional privacy argument on the rather unconvincing ground that "[i]t is sufficient to say that sodomy has been a crime over the centuries." State v. White, — Me. —, —, 217 A.2d 112, 115 (1966). But cf. Bielicki v. Superior Court, 57 Cal. 2d 602, 371 P.2d 288, 21 Cal. Rptr. 552 (1962). "[L]icense to make such an inspection of a toilet stall is not the equivalent of authority to invade the personal right of privacy of the person occupying the stall." Id. at 609, 371 P.2d at 292, 21 Cal. Rptr. at 556.

166. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

167. See George, Legal, Medical and Psychiatric Considerations in the Control of Prostitution, 60 Mich. L. Rev. 717, 753-57 (1962); Glueck, An Evaluation of the Homosexual Offender, 41 Minn. L. Rev. 187, 194-205 (1957), and the authorities collected therein.

168. 370 U.S. 660 (1962).

169. 234 F. Supp. 333 (W.D.N.C. 1964).

170. Id. at 337.

though he felt constrained to uphold the conviction on constitutional grounds, for he drew into question the wisdom of penal theory with respect to homosexuals when he commented at the end of his opinion that "[p]utting Perkins into the North Carolina Prison system is a little like throwing Brer Rabbit into the Briar-patch."[171]

The *Perkins* decision has definitely not foreclosed the issue. Two recent circuit court decisions, *Driver v. Hinnant*[172] and *Easter v. District of Columbia*,[173] have held that since a chronic alcoholic lacks the voluntary capacity to conform his conduct to law, no conviction can be had for that particular conduct for "[t]o do so would affront the Eighth Amendment, as cruel and unusual punishment . . . ."[174] Accepting current medical opinion that homosexuality contains elements of compulsiveness, punishment of homosexual offenders may well come under this rule.[175]

An examination of the issue at the practical level is divorced from any judgments respecting the morality of homosexuality. This aspect of the issue focuses on the enforcement of existing law and its ancillary effects.[176] Basic to the discussion is a recognition that homosexuals have a moral code of their own and, even if they are capable of controlling their conduct, they are not likely to be deterred by threat from conduct that they consider moral.[177] If estimates of homosexuality are at all realistic, there is a significant proportion of the public regularly flouting the law.[178] In face of such apparently widespread violation of law, enforcement is far from uniform

171. Id. at 339.

172. 356 F.2d 761 (4th Cir. 1966).

173. 361 F.2d 50 (D.C. Cir. 1966).

174. 356 F.2d at 764. It should be noted, however, that voluntary intoxication is not within the rule. Nor are other criminal acts of the chronic alcoholic, not characteristic of his affliction, exempt from punishment. Id.

175. Subsequent to the preparation of this comment the Supreme Court handed down its decision in Powell v. Texas, 88 S. Ct. 2145 (1968), wherein the Court refused to apply the Robinson rule to an alcoholic. The Justices concurring in the majority opinion were not convinced of the compulsiveness of alcoholism, but the indication is that this factor would not be controlling since an overt public act was involved. However, Mr. Justice White's special concurrence, the deciding vote in a five-four decision, suggests that the result would be different could compulsiveness be definitively established. In any event the issue with respect to homosexuals remains open.

176. For an exceedingly fine empirical study of the enforcement of homosexual laws see Comment, The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County, 13 U.C.L.A.L. Rev. 647 (1966).

177. See Comment, Deviate Sexual Behavior: The Desirability of Legislative Proscription, 30 Albany L. Rev. 291, 300-01 (1966).

178. See A. Kinsey, W. Pomeroy & C. Martin, Sexual Behavior in the Human Male (1948). "[Eight] per cent of the males are *exclusively homosexual* . . . for at least three years between the ages of 16 and 55. This is one male in every 13. [Four] per cent of the white males are *exclusively homosexual throughout their lives* . . . ." Id. at 651. See also G. Mueller, Legal Regulation of Sexual Conduct 16-19 (1961); Note, supra note 162, at 171-75.

or regular.[179] One striking aspect of discriminatory enforcement is reflected by the nearly total failure to prosecute lesbian activity.[180] Since most homosexual activity is conducted in private, the possibility of enforcement, assuming an impetus for enforcement,[181] is exceedingly dim due to search and seizure limitations. The practical result of sporadic and discriminatory enforcement is the breeding of a general disrespect for the law on the part of the unfortunate few who are punished for indulging in acts that are practiced on a relatively broad basis.

Another undesirable practical effect of existing law is the victimization of homosexuals by blackmailers.[182] The luckless homosexual encountered by a blackmailer is deterred from resorting to the law and exposing the blackmailer by the threat of criminal punishment. Since the homosexual may not be aware of the physician-patient privilege, he may be reluctant to seek psychiatric help or other assistance for his emotional problems.[183] Removing the criminal sanctions from homosexuality will not remove the social stigma attached to homosexual conduct and therefore will not eliminate the blackmail problem. However, the removal of such a weapon from the blackmailer's arsenal should at least diminish the threat of extortion.

An evaluation of the considerations relevant to the prohibition of deviate sexual conduct between consenting adults in private does not weigh in favor of the retention of existing law. On ethical ground there appears to be no justification for such prohibition. Current law seems to be out of phase with existing legal doctrines although there is a discernible trend toward judicial rectification of that anomaly. As a practical matter, the disadvantageous effects of the law are not balanced by corresponding benefits. Objective perusal of these considerations compels a redefinition of the law.

179. Ploscowe, Sex Offenses: The American Legal Context, 25 Law & Contemp. Prob. 217, 221 (1960). See Comment, supra note 177, at 297-99; Note, supra note 162, at 171-75.

180. A survey covering a ten year period in New York City found only three cases of sodomy prosecution of females while "tens of thousands" of males were prosecuted. Bowman & Engle, A Psychiatric Evaluation of Laws of Homosexuality, 29 Temp. L.Q. 273, 281 (1956). A survey conducted by Kinsey covering 1696 to 1952 revealed not a single conviction of a female for homosexual activity. A. Kinsey, W. Pomeroy, C. Martin & P. Gebhard, Sexual Behavior in the Human Female 484-86 (1953). But see People v. Livermore, 9 Mich. App. 47, 155 N.W.2d 711 (1967) (conviction for "gross indecency" between females).

181. "Only an intellectually numb person can still maintain that the criminal law, with the traditional means at its command, can enforce the sexual standard which it endorses. It cannot, and we must face the fact." G. Mueller, supra note 178, at 17.

182. The experience of the English attorney general's office has been that 95 per cent of all blackmail cases reported to that office concerned homosexuals. E. Schur, Crimes Without Victims: Deviate Behavior and Public Policy 83 (1965). A recent New York indictment for extortion involved seventeen defendants, part of a nationwide ring, who specialized in victimizing prominent homosexuals. N.Y. Times, March 3, 1966, at 1, col. 3. See generally Comment, supra note 177, at 302-04; Note, supra note 162, at 175-177.

183. Model Penal Code § 207.5, Comment (1) at 278 (Tent. Draft No. 4, 1955).

IV

ILLICIT SEXUAL CONTACTS WITHOUT PENETRATION

A. Existing Michigan Law

This section of the discussion deals with conduct antecedent to criminal sexual penetration and sexually motivated touchings that do not require sexual penetration. Three types of offenses fall into this category: assaults, indecent liberties and enticings.

Assault with intent to commit rape, sodomy or gross indecency is a felony punishable by imprisonment up to ten years.[134] Criminal assault in general is an attempt to commit a nonconsensual immediate touching of the victim by a show of force or violence, coupled with the apparent present ability to complete the act.[135] Assault with intent to commit rape, sodomy or gross indecency is, however, a specific intent crime. The burden is on the prosecution to show that the defendant intended specifically to commit rape, sodomy or gross indecency.[186] That the assailant voluntarily desisted before completion of the act does not necessarily negate the intention at the time he commenced the attack, to commit rape, sodomy or gross indecency.[187] If the victim is below the statutory age of consent, it is necessary only that the defendant intend the act; it is of no consequence that he did not intend to overcome resistance.[188] If, however, the requisite intent is not proved in such a case, and the act is not completed, an indictment will still lie for indecent liberties.[189] It is also important to note that the specific intent mens rea may not exist where the defendant's mental faculties are numbed, as by alcohol.[190]

The specific intent must be accompanied by active steps toward accomplishment of the intended act.[191] An actual touching is not a necessary element of the offense,[192] although it usually is present. The steps necessary are those that would constitute an ordinary assault if it were not for the specific intent.[193] Should the victim consent before the intended act is consummated, but after initial resistance, the assailant is still chargeable

184. Mich. Pub. Acts 1952, No. 73, § 750.85, Mich. Stat. Ann. § 28.280 (1962). If the defendant is a "sexually delinquent person" a maximum life sentence may be imposed. Id. A sexually delinquent person is defined as "any person whose sexual behavior is characterized by repetitive or compulsive acts . . . ." Mich. Pub. Acts 1952, No. 73, § 750.10a, Mich. Stat. Ann. § 28.200(1) (1962).

185. People v. Carlson, 160 Mich. 426, 125 N.W. 361 (1910). See generally R. Perkins, Criminal Law 36-96 (1957).

186. People v. Guillett, 342 Mich. 1, 69 N.W.2d 140 (1955).

187. People v. Richardson, 224 Mich. 66, 194 N.W. 612 (1923).

188. People v. Goulette, 82 Mich. 36, 45 N.W. 1124 (1890).

189. People v. Dowell, 136 Mich. 306, 99 N.W. 23 (1904).

190. The trier of fact must consider all factors reflecting on the state of the defendant's mind in determining if he had the capacity, and did in fact, entertain the specific intent. People v. Guillett, 342 Mich. 1, 69 N.W.2d 140 (1955).

191. People v. Courier, 79 Mich. 366, 44 N.W. 571 (1890).

192. People v. Sanford, 149 Mich. 266, 112 N.W. 910 (1907).

193. People v. Courier, 79 Mich. 366, 44 N.W. 571 (1890).

with the assault because the offense is complete before the victim acquiesced.[194] In accordance with the familiar phrase "mere words do not constitute an assault," illicit solicitations unaccompanied by actual or attempted physical contact do not give rise to a charge of assault.[195]

The attempt or act of taking indecent liberties with a child under sixteen years of age is a felony carrying the same penalty as assault.[196] Indecent liberties in this context means "such liberties as the common sense of society would regard as indecent and improper."[197] Some touching is essential to the commission of the crime,[198] but it need not be of the child's "private parts."[199]

It is clear that the offense is not a lesser degree of statutory rape.[200] This offense and the offense of assault with intent to commit rape, sodomy or gross indecency are mutually exclusive,[201] and it is error to omit the statutory phrase, "without committing or intending to commit the crime of rape, sodomy or gross indecency," from the charge to the jury.[202]

Conduct directed toward inducing youths to commit immoral acts is currently prohibited by three different Michigan statutes. It is a misdemeanor to "accost, entice, or solicit" a person under sixteen years of age with the intent to induce the commission of or submission to an immoral act.[203] The offense requires active steps toward the consumation of the intended act coupled with the requisite intent, and it has been held that merely inviting a thirteen year old boy to enter an automobile is not enough to sustain a conviction.[204] The statutes covering the debauching of a boy under fifteen by a

194. People v. Marrs, 125 Mich. 376, 84 N.W. 284 (1900).

195. See, e.g., State v. White, 52 Mo. App. 285 (1893). However, it has been held that an action for assault will be sustained where the defendant's conduct leads to injury as a result of mental distress intentionally inflicted by the defendant. State v. Williams, 186 N.C. 627, 120 S.E. 224 (1923). See generally Annot., 12 A.L.R.2d 971 (1950).

196. Mich. Pub. Acts 1952, No. 73, § 750.336, Mich. Stat. Ann. § 28.568 (1954).
> Any person or persons over the age of 16 years, who shall assault a child under the age of 16 years, and shall take or attempt to take indecent and immoroper liberties with the person of such a child, without committing or intending to commit the crime of rape or the crime of sodomy or gross indecency upon such child, shall be guilty of a felony . . . .

197. People v. Hicks, 98 Mich. 86, 90, 56 N.W. 1102, 1104 (1893); accord, People v. Szymanski, 321 Mich. 248, 32 N.W.2d 451 (1948).

198. People v. Noyes, 323 Mich. 307, 43 N.W.2d 331 (1950); People v. Visel, 275 Mich. 77, 265 N.W. 781 (1936).

199. People v. Hicks, 98 Mich. 86, 90, 56 N.W. 1102, 1104 (1893). See People v. Szymanski, 321 Mich. 248, 32 N.W.2d 451 (1948) (man placing his hand on girl's leg in a theater). For cases decided in favor of the defendant, see People v. Healy, 265 Mich. 317, 251 N.W. 393 (1933) (artist raising child's bloomers to sketch her legs); People v. Sheffield, 105 Mich. 117, 63 N.W. 65 (1895) (defendant placed his arms around the waist of a young girl with whom he was acquainted).

200. People v. Eddy, 252 Mich. 340, 233 N.W. 336 (1930).

201. People v. Oberstaedt, 372 Mich. 521, 127 N.W.2d 354 (1964).

202. People v. Parmalee, 206 Mich. 4, 172 N.W. 399 (1919).

203. Mich. Comp. Laws § 750.145a (1948), Mich. Stat. Ann. § 28.341 (1962).

204. People v. Pippin, 316 Mich. 191, 25 N.W.2d 164 (1946).

female[205] and by a male,[206] discussed previously,[207] include punishment for soliciting or enticing the same.

B. Revised Criminal Code Proposals

The Proposed Code categorizes indecent touchings under the sexual abuse scheme. The prohibition is against "sexual contact" which is defined as "any touching of the sexual or other intimate parts of a person not married to the actor, done for the purpose of gratifying sexual desire of either party."[208] The comments to the identical New York provision state that it is not necessary that there be a direct contact with the victim's body to constitute a "sexual contact"; a touching through clothing will be sufficient.[209] The Proposed Code's definition in this respect could be clearer by providing specifically for direct or indirect contacts. It should be noted that the phrase "for the purpose of gratifying sexual desire" will place a burden on the prosecution that may prove difficult to satisfy. The protection of children from illicit manipulations could be diluted by placing such an onus on the prosecution.[210] A decision concerning whether to include such a provision requires a balancing of society's interest in protecting the young, against the interest of protecting innocent defendants from fraudulent or imagined charges. However, corroborating evidence is not required to sustain a conviction.[211] In this respect the prosecution's burden will be light, at the expense of defendants. With this factor operating to the disadvantage of defendants, it is desireable to include the gratification phrase as a mitigating factor. A compromise in this fashion would glean the most laudable benefits from each provision without serious sacrifice of either interest.

Sexual abuse in the first degree corresponds to first degree rape and first degree sodomy but with a five year maximum sentence. Covered by this section are sexual contacts by forcible compulsion, or with a physically helpless person, or with a child under eleven years of age.[212] The previous discussion with respect to forcible compulsion is applicable here.[213] The lower penalty in this context, while still a felony, is justified by the correspondingly less severe threat of physical and psychological injury to the victim.

Sexual abuse in the second degree encompasses "sexual contacts" with individuals who are incapable of consent by reason of mental defect, mental

205. Mich. Comp. Laws § 750.339 (1948), Mich. Stat. Ann. § 28.571 (1954).
206. Mich. Comp. Laws § 750.340 (1948), Mich. Stat. Ann. § 28.572 (1954).
207. See p. 939 supra.
208. Mich. Rev. Crim. Code § 2301(c) (Final Draft 1967).
209. N.Y. Pen. Law § 130.55, Comment at 307.
210. See Ploscowe, Sex Offenses in the New Penal Law, 32 Brooklyn L. Rev. 274, 281-82 (1966).
211. Unlike the New York code from which the Proposed Code's proposals are largely drawn, the Michigan proposal contains no corroboration requirement. The relative merits of such a proposal are discussed at pp. 966-68 infra. See N.Y. Pen. Law § 130.15.
212. Mich. Rev. Crim. Code § 2320 (Final Draft 1967).
213. See pp. 941-42 supra.

incapacity or being less than fourteen years old.[214] The gist of the offense is the victim's lack of appreciation for the nature of the conduct. While the aggressor's conduct is deserving of criminal punishment, it lacks the danger element sufficient to elevate the offense to felony status. Accordingly, the offense is a Class A misdemeanor (one year maximum).

Sexual abuse in the third degree covers all other nonconsensual "sexual contacts." For purposes of this section, lack of consent carries an expanded definition; "the victim does not expressly or impliedly acquiesce in the actor's conduct."[215] This expanded definition of "without consent" was thought necessary for coverage of sexual advances not characterized by force or violence although still objectionable. Taking indecent liberties with persons in crowds supposedly falls into this category.[216]

Third degree sexual abuse also covers "sexual contacts" with persons incapable of consent by reason of being less than sixteen years of age. However, if the victim is over fourteen but less than sixteen and the actor is less than six years older than the victim, no criminality is attached to the act.[217] The reason for exculpation, "so that heavy petting between contemporaries is not brought within the coverage of criminal law . . . ,"[218] seems sound. However, the age disparity specified is debatable. An examination of the extremes reveals that heavy petting resulting in sexual touchings between an actor just under twenty and an individual just over fourteen will be exculpated. From the defendant's point of view, it may be contended that fourteen year old girls commonly disguise their age with cosmetics, high heel shoes, and other manifestations, making it very difficult to ascertain age from appearances. However, the defense of mistake of fact is available to the defendant.[219] Another significant point is that "sexual contact" may be either heterosexual or homosexual. It is submitted that the policy of protecting the young from sexual experience would be better served, without serious injustice to youthful offenders, by reducing the age differential from six years to four years.

C. Analysis

The gradation and definitional aspects of the Proposed Code's provisions are here again the striking features and deserve commendation. Under the provisions for assault, a physical injury is essential to the offense.[220] The sexual abuse sections therefore provide coverage for sexual impositions that would not be covered elsewhere. Assault with intent to commit rape, sodomy or gross indecency under existing law receives equivalent coverage under the

214. Mich. Rev. Crim. Code § 2321 (Final Draft 1967). For a detailed discussion of mental incapacity and mental defect see pp. 942-43 supra.

215. Mich. Rev. Crim. Code § 2330(2)(c) (Final Draft 1967).

216. See N.Y. Pen. Law § 130.05, Comment at 275. The example cited is an illicit touching in a crowded subway.

217. Mich. Rev. Crim. Code § 2322(2) (Final Draft 1967).

218. Id., Comment at 139; N.Y. Pen. Law § 130.55, Comment at 308.

219. Mich. Rev. Crim. Code § 2331 (Final Draft 1967).

220. Id. §§ 2101-03.

sexual abuse scheme. The current prohibition against indecent liberties is covered by sexual abuse, but the existing statute also covers attempts. Provision for attempts is made elsewhere in the Proposed Code and not susceptible to discussion under sex offenses.[221]

Since the proposed sexual abuse provisions require an actual touching, the existing Michigan statutes prohibiting the enticement to commit or submit to an immoral act do not come within the sexual abuse coverage. Such enticements or solicitations will fall under the chapter on attempts.[222]

V

INDECENT EXPOSURE

A. Existing Michigan Law

Indecent exposure is a misdemeanor by statute in Michigan.[223] The offense requires an intentional exposure, so an inadvertent or accidental exposure is not criminal.[224] However, where the defendant is reckless in his behavior by exposing himself where he is likely to be observed by others, his intent will be presumed.[225] It is essential that the offense be committed in public view, and it has been held that this element is statisfied where the act took place on the private property of the defendant but open to the public view.[226] It is of course necessary that some other person observe the act.[227] The consent of the observers has led to an interesting question particularly with regard to nudist camps.

In an early Michigan case, *People v. Ring*,[228] members of a nudist camp were convicted of indecent exposure. The authorities viewed the camp from an overhanging bluff on adjoining property prior to entering the camp and making the arrests. The camp was apparently not well secluded as a neighboring property owner described their activity as "cavorting around."[229] The case has been interpreted by the Michigan Attorney General as authority for labeling cult nudism illegal.[230]

---

221. Id. §§ 1001-20.

222. Id.

223. Mich. Pub. Acts 1952, No. 73, § 750.335a, Mich. Stat. Ann. § 28.567(1) (1954). If the offender is classified as a "sexually delinquent person" a maximum penalty of life imprisonment may be imposed. See note 134 supra.

224. People v. Kratz, 230 Mich. 334, 203 N.W. 114 (1925).

225. Peyton v. District of Columbia, 100 A.2d 36 (D.C. Ct. App. 1953); cf. People v. DeVine, 271 Mich. 635, 261 N.W. 101 (1935).

226. People v. DeVine, 271 Mich. 635, 261 N.W. 101 (1935); cf. People v. Ring, 267 Mich. 657, 255 N.W. 373 (1934).

227. People v. Kratz, 230 Mich. 334, 203 N.W. 114 (1925). It is sometimes said that at least one other person in addition to the observer must have been able to see the act if he had looked. Green v. State, 106 Ga. App. 435, 127 S.E.2d 383 (1962).

228. 267 Mich. 657, 255 N.W. 373 (1934), noted in 33 Mich. L. Rev. 936 (1935).

229. 267 Mich. at 659, 255 N.W. at 373.

230. In response to the introduction of legislation that would have prohibited nudism, the attorney general opined that present law, as interpreted by the Ring case, was adequate prohibition of the practice of nudism. [1955-1956] Mich. Att'y Gen. Biennial Rep. pt. 1, at 134.

A more recent decision casts serious doubt on the continuing viability of the *Ring* case. In *People v. Hildabridle*[231] the supreme court reversed a conviction for indecent exposure arising out of the practice of nudism. However, the reversal rested on two grounds: illegal search and seizure and nonviolation of the statute. The doubt surrounding the decision is a result of a divided court. Three justices voted for reversal on the dual grounds of illegal search and seizure and that private cult nudism did not violate the statute.[232] One justice voted for reversal on the ground of illegal search and seizure alone without expressing opinion on the nudism question.[233] The three remaining justices voted for affirmance of the conviction.[234] It could be argued that the *Ring* case is not inconsistant with *Hildabridle* on the basis that the defendants in *Ring* were exposed to public view while the defendants in *Hildabridle* were not.[235] However, it remains possible that cult nudism could be brought within the statute should the issue be presented to the court absent the complicating search and seizure problem.[236]

B. Revised Criminal Code Proposal

The Proposed Code prohibits exposure of the actor's genitals, with the specific intent to gratify a sexual desire, under circumstances that he knows would cause affront or alarm.[237] The express requirement of exposure of genitals is a sensible improvement over current statutory language prohibiting exposure of "his or her person." Under the existing language it is conceivable that an attempt might be made by some zealous group to use the statute for regulation of wearing apparel. This possibility is foreclosed under the proposal. The regulation of "swim fashions," "short shorts" and other items of wearing apparel is better left to local control.[238]

The specific intent element contained in the proposed section, "with intent to arouse or gratify sexual desire of himself or of any person other than his spouse," raises some serious problems. The prosecution must prove the subjective intention of the defendant in a specific intent crime, and the familiar rule that a man is presumed to intend the "natural and probable consequences

---

231. 353 Mich. 562, 92 N.W.2d 6 (1958), noted in 5 Wayne L. Rev. 256 (1959).

232. I say and hold that the search and arrests in this case were unreasonable and unlawful. . . .[E]ven if the officers were there lawfully . . . what the search disclosed did not in these circumstances constitute a violation of this statute.

353 Mich. at 576, 92 N.W.2d at 12 (Voelker, J., with Smith & Black, JJ., concurring).

233. Id. at 594, 92 N.W.2d at 20 (Edwards, J., now federal circuit judge for the Sixth Circuit).

234. Dethmers, Carr and Kelly, JJ. Judge Kavanagh, former Michigan Attorney General who wrote the opinion on the Ring case, note 230 supra, did not participate in the decision.

235. See People v. Hildabridle, 353 Mich. 562, 582-83, 92 N.W.2d 6, 14-15 (1958).

236. But see Roberts v. Clement, 252 F. Supp. 835 (E.D. Tenn. 1966), discussed p. 965 infra.

237. Mich. Rev. Crim. Code § 2325 (Final Draft 1967).

238. Cf. Ill. Ann. Stat. ch. 38, § 11-9, Comment at 539-40 (Smith-Hurd 1961).

of his act" will not satisfy a specific intent requirement.[239] Two hypothetical examples will serve to illustrate the problem.

Case I: A man exposes himself to his spouse under circumstances where he is likely to be observed by others (*e.g.*, in a car at a drive-in theater) intending only to arouse his spouse, hoping that no one else will observe the act.

Case II: A man exposes himself on a public street for the purpose of urinating, intending only to relieve himself, while harboring the somewhat spurious hope that no one will happen along and observe him.

Note that in neither case does the actor maintain the specific intent to "arouse or gratify sexual desire of himself or of any person other than his spouse." In Case I the actor's specific intent is to arouse his spouse, an intent expressly excluded from the statute. In Case II the actor's intent is merely to relieve himself, intending no sexual consequences whatsoever. In both cases the actor's conduct may be characterized as negligent, or possibly reckless, and in both cases his conduct falls without the statute.

The statutory purpose of prohibiting indecent exposure is to prevent displays that would be shocking or disturbing to public sensibilities. It should make no difference that the actor was merely indifferent to the mental integrity of others and not an exhibitionist. The purpose of prohibiting indecent exposures would be better served by the following suggested statutory form.

> A person commits the crime of indecent exposure if he exposes his genitals under circumstances in which he knows or should have known that his conduct is likely to cause affront or alarm.

Under this form negligent or reckless, as well as intentional, exposures may be prosecuted. The criminality of the act would depend upon the reasonableness of the exposure. For example, where the defendant's only purpose was to relieve himself, an exposure on a busy street obviously would be a violation, but an exposure in a secluded woodlot would be a violation only if the offender had actual or constructive knowledge that he would be observed by others who would be disturbed.

As the comments to the Proposed Code point out, it is the purpose of the exposure and the likelihood of psychological alarm rather than the place that is determinative of the criminality of the act.[240] This statement is founded on two different elements of the proscription: "intent to arouse or gratify" and "knows his conduct is likely to cause affront or alarm." To sustain a conviction under this section it would have to be shown that the defendant knew that his act would shock others and that it was his intent to gratify some sexual desire. This aspect of the statute probably would eliminate the possibility of a prosecution for private cult nudism. The suggested statutory form set out above would not diminish this result. The retention of "likely to cause affront or alarm" in the suggested form would exclude private

239. See R. Perkins, Criminal Law 671-74 (1957).
240. Mich. Rev. Crim. Code § 2325, Comment at 190 (Final Draft 1967).

nudism since nudists supposedly are not disturbed by the naked view of their fraternal membership. The facts presented in the *Ring* case (nudism open to public view) would, however, be subject to prosecution under this form.

C. Analysis

The Proposed Code's provision is drawn in clear and concise terms not characteristic of the existing statute. The specific intent provision does not appear to serve any salutary purpose, however, and should be stricken in view of the severe restriction it places on the section.

With respect to the application of the criminal law to private cult nudism, it should be questioned whether such prohibition is justifiable assuming even that it is desirable. Although less emotional, the issue here is not different from the prohibition of private homosexual practices, *i.e.*, the justification of law is the prevention of harm to other individuals.[241] The prohibition of private cult nudism requires an articulation of the harm threatened to others.[242]

Ethical questions aside, it now appears doubtful that a state can prohibit the practice of nudism on constitutional grounds. A Tennessee statute[243] was recently struck down as a violation of the due process clause of the fourteenth amendment in *Roberts v. Clement*.[244] The majority opinion rested its decision on the denial of due process because the statute was unduly vague and indefinite. In a concurring opinion Judge Darr indicated that the Tennessee statute should not fall for violation of "procedural" due process but rather for violation of "substantive" due process. The statute infringed on more than the defendant's ability to present a proper defense—procedural due process; it also infringed upon the constitutionally protected substantive rights of privacy[245] and freedom of association.[246] If a state seeks to prohibit such conduct in more precise terms than did Tennessee in order to avoid the void for vagueness doctrine, it may be hard pressed to show sufficient state interest to overcome Judge Darr's arguments.[247] In any event, constitu-

241. See pp. 952-54 supra.

242. It seems in fact something of a mystery why those who engage in [nudism's] strange practices are willing to suffer both the stings of outraged public opinion and voracious, ravenous insects in order to pursue its illusory rewards. . . . But . . . in our triune form of government it is the particular duty of the judiciary to protect individuals and minorities in their constitutional rights even though their beliefs and activities may be heretical or unpopular.

Roberts v. Clement, 252 F. Supp. 335, 350 (E.D. Tenn. 1966) (concurring opinion of Darr, J.). According to some psychologists nudity may have a very beneficial effect on certain persons. See Time, Feb. 23, 1968, at 68.

243. Tenn Code Ann. § 39-3009 (Supp. 1967).

It shall be unlawful for any person, firm or corporation to operate or carry on, or engage in the operation of a nudist colony in this state. It shall also be unlawful for any person to engage in nudist practices in this state.

244. 252 F. Supp. 335 (E.D. Tenn. 1966).

245. Id. at 848. See also Griswold v. Connecticut, 381 U.S. 479 (1965), discussed pp. 954-55 supra.

246. 252 F. Supp. at 350. See U.S. Const. amends. I, XIV.

247. Cf. Griswold v. Connecticut, 381 U.S. 479 (1965).

tional protection from illegal search and seizure renders the possibility of prosecution for nudism that is truly private extremely remote.[248]

VI

CONCLUSION

Before summarizing the preceding discussion it should be pointed out that there are two additional considerations not noticed in the proposal that deserve reflection in conjunction with comprehensive revision.

In order that the possibility of fraudulent charges be minimized, a requirement of prompt complaint should be added to the sex offense chapter.[249] Since juries tend to be sympathetic to alleged victims, there is a substantial danger that a defendant will be convicted on stale evidence. For example, a willing participant to intercourse may later become a vindictive complainant upon discovering that she is pregnant. A victim that truly has been subjected to an act of sexual outrage should not delay in bringing the offense to the attention of authorities. The additional dangers of blackmail and psychopathic complaint would be reduced by a prompt complaint requirement.

Current Michigan law requires that an indictment be brought within six years after the alleged commission of the offense.[250] Seduction prosecutions are an exception, the indictment for which must be brought with one year.[251] Evidence of delay in making complaint is admissible, but only for the purpose of reflecting on the credibility of the complainant.[252] It is suggested that the Model Penal Code be followed by requiring that the action be instituted within three months of occurrence except where the complainant is less than sixteen years of age or otherwise incompetent to make complaint, in which case the action must be instituted within three months after the parent or guardian learns of the offense.[253] Since complainants in this latter category lack the capacity to become willing participants, consistency of reason demands that their personal failure to bring complaint cannot operate in favor of the defendant. Likewise, the fear of parental anger or confusion as to the significance of the act may delay the complaint, factors that should not prevent prosecution.

The Proposed Code makes no provision with respect to corroboration of the complainant's allegations. Sex offenses are easily charged and difficult to disprove. The fear that innocent defendants might be convicted on the bare accusations of complainants is as old as the law itself.[254] Accordingly, some

248. See, e.g., People v. Hildabridle, 353 Mich. 562, 92 N.W.2d 6 (1958).
249. See Model Penal Code § 207.4, Comment (23) at 264-65 (Tent. Draft No. 4, 1955).
250. Mich. Comp. Laws § 767.24 (1948), Mich. Stat. Ann. § 28.964 (1954).
251. Mich. Comp. Laws § 750.532 (1948), Mich. Stat. Ann. § 28.800 (1954).
252. Turner v. People, 33 Mich. 363 (1876); People v. Gage, 62 Mich. 271, 28 N.W. 835 (1886).
253. Model Penal Code § 213.6(3) (Official Draft 1962).
254. Speaking of sodomy Blackstone remarks that "it is an offence of so dark

jurisdictions have a general requirement of corroboration to support convictions for sex offenses.[255] Professor Mueller supports his assertion that corroboration is "indispensable in order to avoid easily trumped-up charges," with the following example from West Virginia.[256] The prosecutrix explained how a doctor had raped her, while she was under anesthetic, by describing how he knelt down to perpetrate the act. The defense promptly showed that the physician had artificial legs and could not possibly kneel down.

But Dean Wigmore takes a contrary position. His contention is not that the fear of fraudulent or imaginary charges is unrealistic, for he carefully documents the existence of such a danger.[257] Rather his position is that the partial protection afforded defendants by the common sense of the jurymen and the power of the trial judge to set aside a verdict based upon insufficient evidence,[258] should be supplemented by an alteration of the rules of evidence to permit inquiry into the complainant's moral character and mental disposition.[259] The partial protections that Wigmore suggests exist are open to question. Sex offense accusations are fraught with reason-impairing emotion that may prevent the common sense of the jury from meeting our noble expectations. Indeed, the jury's sympathy may well lie with the complainant rather than the defendant. Where a judge sets aside a verdict rendered solely on the testimony of the complainant he runs the risk of invading the function of the jury, credibility generally being exclusively for the jury's determination.[260] In any event, Wigmore's suggested alterations of the rules of evidence, to permit inspection of the victim's chastity and mental disposition, are in part inconsistent with the policy of the substantive law. To the extent that the victim has been subjected to a nonconsensual imposition, moral or mental disposition is irrelevant. If prior conduct or psychiatric opinion is admitted into evidence the impact on the jury is obvious. The jury is not likely, assuming they have the capacity, to distinguish between evidence admitted for the purpose of reflecting on credibility and evidence admitted for any other purpose. The practical effect may be the acquittal

a nature, so easily charged, and the negative so difficult to be proved, that the accusation should be clearly made out; for if false it deserves a punishment inferior only to that of the crime itself." Blackstone, Commentaries *215.

255. E.g., Iowa Code Ann. § 782.4 (1950); N.Y. Pen. Law § 130.15. See also Model Penal Code § 207.4, Comment (II) at 263-64 (Tent. Draft No. 4, 1955); Ploscowe, Sex Offenses: The American Legal Context, 25 Law & Contemp. Prob. 217, 223 (1960).

256. G. Mueller, Legal Regulation of Sexual Conduct 38-39 (1961).

257. 3 J. Wigmore, Evidence § 924a (3d ed. 1940). "Judging merely from the reports of cases in the appellate courts, one must infer that many innocent men have gone to prison because of tales whose falsity could not be exposed." Id. at 459.

258. 7 J. Wigmore, Evidence § 2061 (3d ed. 1940).

259. 3 J. Wigmore, Evidence § 924b (3d ed. 1940).

260. That credibility is for the determination of the jury is as old as the jury system itself. "For one excellence of the trial by jury is, that the jury are triers of the credit of the witness, as well as of the truth of the fact." Blackstone, Commentaries *214. See People v. Koukol, 262 Mich. 529, 247 N.W. 738 (1933). See generally 58 Am. Jur. Witnesses § 862 (1948).

of a guilty defendant. Another adverse effect could be the failure to bring any charges in order to avoid placing the victim's moral virtue on trial.

The danger of convicting innocent defendants is substantial. The legislative concern with this risk is reflected by the corroboration requirement commonly found in seduction statutes and occasionally encountered in rape, sodomy and indecent exposure statutes.[261] On the other hand, sex crimes are among the most repulsive offenses to be found in any penal code. A general requirement of corroboration will place an extremely onerous burden on the prosecution in certain cases that may well prevent the conviction of some offenders. These competing considerations present a most perplexing dilemma. Three factors permit a resolution that is at least palatable. The first is the prompt complaint requirement proposed above. To a certain extent, prompt complaint reduces the risk of fraudulent allegations without unduly burdening the prosecution. Secondly, Michigan jurisprudence contains a built-in safeguard mitigating the harshness of an absolute rule—the trial judge's discretionary power to comment on the evidence, testimony and character of witnesses.[262] While the judge's comments are not binding on the jury, the impact of his tested judgment on the ultimate triers of fact is bound to be substantial. In this respect the jury will be reminded of the solemn nature of their undertaking whenever the trial judge foresees the risk of convicting an innocent defendant on the bare accusation of the complainant. Finally, the Anglo-American adversary system provides protection of the defendant's interests by assuring him of counsel who is duty bound to remind judge and jury of the impending risk. In view of these factors, a statutory corroboration requirement is not desirable.

The chapter of the Proposed Code covering sexual offenses is a nearly total adoption of the sex offense provisions of the New York Penal Law. In general the Proposed Code is a marked improvement over current Michigan law. Certain aspects of this chapter, however, require more meticulous consideration. Those aspects are discussed in detail within this presentation and are merely summarized at this point. The "forcible compulsion" definition should be more comprehensive and encompass a subjective test in line with the definition suggested. The uncertainty with respect to the capacity to consent where the victim is under the influence of a self-induced intoxicant should be resolved by specifically excluding the possibility of prosecution under such circumstances. The cases of fraudulently obtained consent should be anticipated by supplementing section 2305(1) with the subsection suggested. The highly desirable mistake of fact section should be based on an objective rather than a subjective test. The Proposed Code should also provide for a defense of prostitution against a charge of statutory rape. The specific intent formulation of the proposed indecent exposure section is ex-

261. See statutes and cases collected in 7 J. Wigmore, Evidence § 2061 n.2. (3d ed. 1940 & Supp. 1964).

262. Mich. Gen. Ct. Rule 516.1 (1963). Relevant constructional considerations are found in People v. Padgett, 306 Mich. 545, 11 N.W.2d 235 (1943), cited with approval in People v. Oates, 369 Mich. 214, 217, 119 N.W.2d 530, 532 (1963).

tremely restrictive and should be replaced by the aforementioned suggested form. Finally, the entire chapter should be subject to a prompt complaint requirement. In deference to the draftsmen of the Proposed Code it must be pointed out that the foregoing list of criticisms is not to be interpreted as a general indictment of the proposal. In spite of the fact that this commentator finds fault with specific provisions, the Proposed Code in its present form is a much needed improvement over existing Michigan law.

J. TERRY MORAN

THE MICHIGAN REVISED CRIMINAL CODE AND OFFENSES INVOLVING THEFT

I

INTRODUCTION

One of the most significant changes made by the Michigan Revised Criminal Code (Proposed Code) involves the law relating to crimes against property. The proposed coverage of offenses involving theft contains comprehensive provisions prohibiting fraudulent appropriation of property.[1] The Proposed Code attempts to eliminate the inadequacies of present Michigan law while retaining its basic principles as to misappropriation. To achieve this, the proposal consolidates in one offense, theft, several traditionally distinct property crimes,[2] and incorporates new provisions to meet the failure of current statutes to reach certain misappropriations.[3]

II

CONSOLIDATION OF LARCENY, EMBEZZLEMENT AND OBTAINING PROPERTY BY FALSE PRETENSES

A. Historical development

Historically, misappropriation of property has been covered by three different offenses: larceny, embezzlement and obtaining property by false pretenses. The earliest development, common law larceny, punished the taking and carrying away of personal property of another with the intent to deprive permanently.[4] Situations where the accused fraudulently appropriated prop-

1. Crimes against property involve three types of criminal conduct: damage to property, trespass and misappropriation. For offenses involving Criminal Damage to Property see Mich. Rev. Crim. Code §§ 2701-30 (Final Draft 1967). See id. §§ 2605-07 for Criminal Trespass to Property.

2. Larceny, embezzlement of several different kinds, and obtaining property by false pretenses are consolidated into a single offense, theft. Id. § 3205.

3. Appropriation of Lost Property, Theft of Services and Theft by Failure to Make the Required Disposition of Funds Received or Held represent new provisions. See id. §§ 3215, 3220, 3225.

4. See Kenny's Outlines of Criminal Law § 220 (19th ed. J. Turner 1966), de-