MICHIGAN

SECOND REVISED CRIMINAL CODE

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Special Committee of the Michigan State Bar fo
Revision of the Criminal Code

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pendent, neglected or delinquent applies to interference with permanent custody at the final place of custody as well as temporary custody in the interim pursuant court order. [People v. Bol, 23 Mich.App. 244, 178 N.W.2d 516 (1970).] Some aspects of Section 750.138 also cover taking a child from an institution. Several other statutes cover aiding "escapes" from protective institutions: aiding escape from girls' training school [C.L.1970, Section 750.185]; aiding escape from boys' vocational school [C.L.1970, Section 750.186]; aiding or causing a person admitted by court order to mental health facility to leave or fail to return [C.L.1970, Section 330.1940]. These several sections remain unconstrued by the higher courts.

Incompetents or other persons committed by lawful authority to the custody of a person or institution fall within the protection of Section 2215. There is some possibility of overlap with the provisions [Chapter 46] on escape, but not enough to cause concern.

Unlike other offenses in this chapter which involve interference with the victim's liberty, the gravamen of the crime under Section 2215 is the interference with custody granted to an institution or person by authority of law. It is irrelevant that the incompetent or person entrusted to the custody of another consents. The actor must take or entice from lawful custody and must have knowledge that he has no legal right to do so.

It is expected that most instances of interference with custody would not fall within the kidnaping or unlawful imprisonment sections of this chapter, although under the present statutes, there have been cases of parents or relatives charged with kidnaping. [See People v. Nelson, 322 Mich. 262, 33 N.W.2d 786 (1948); People v. Congdon, 77 Mich. 351, 43 N.W. 986 (1889). In both cases, the kidnaping convictions were reversed.] The criminal sanction imposed for custodial interference under Section 2215 of the Draft is at the lowest felony level. Such sanction ought to be sufficient, even for cases where the interruption in custody involves a taking a child out of the jurisdiction, keeping in mind that in most cases the actor is often a parent or relative who presents no danger to the person taken. See generally, Mothershed, *The Problem of Parental Kidnaping*, 10 Wyo. Law Journal 225 (1956). See also, People v. Pitocco, Michigan Court of Appeals, Docket No. 17935, unpublished opinion per curiam, April 25, 1974. [Father pled guilty to abduction of his child under Penal Code Section 350, a possible life imprisonment offense. The conviction was affirmed with reluctance expressed in note 1, page 1 which refers to lesser, more appropriate punishment for custodial interference in 1967 Michigan Proposed Revised Criminal Code.]

CHAPTER 23

SEXUAL OFFENSES

Section

2301. Definition of terms

Sec. 2301. As used in sections 2301 to 2340:

(a) "Actor" means a person accused of criminal sexual conduct.

(b) "Force or coercion" includes but is not limited to any of the following circumstances:

(i) When the actor overcomes the victim through the actual application of physical force or physical violence.

(ii) When the actor coerces the victim to submit by threatening to use force or violence on the victim and the victim believes that the actor has the present ability to execute these threats.

(iii) When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the actor has the ability to execute this threat. As used in this subdivision, "to retaliate" includes threats of physical punishment, kidnaping, or extortion.

(iv) When the actor, through concealment or by the element of surprise, is able to overcome the victim.

(c) "Intimate parts" includes the primary genital area, groin, inner thigh, buttock, or breast of a human being.

(d) "Mentally defective" means that a person suffers from a mental disease or defect which renders that person temporarily or permanently incapable of appraising the nature of his or her conduct.

(e) "Mentally incapacitated" means that a person is rendered temporarily incapable of appraising or controlling his or her conduct due to the influence of a narcotic, anesthetic, or other substance administered to that person without his or her consent, or due to any other act committed upon that person without his or her consent.

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

(g) "Personal injury" means bodily injury, disfigurement, severe mental anguish, chronic pain, pregnancy, disease, or loss or impairment of a sexual or reproductive organ.

(h) "Sexual contact" includes the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching is for the purpose of sexual arousal or gratification.

(i) "Sexual penetration" means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required.

(j) "Victim" means the person alleging to have been subjected to criminal sexual conduct.

Committee Commentary

This section is a slightly modified version of the definitional section of the Michigan Criminal Sexual Conduct Act adopted in 1974 [C.L.1970, Section 750.520a]. Three modifications have been made. First, the definition of force and coercion found in C.L.1970, Section 750.-520b(1)(f)(i), (ii), (iii) and (v) was transferred to the definitional section of the Draft [see Section 2301(b)(i)–(iv)]. Unethical medical treatment or examination was removed from the enumeration of force or coercion, but is retained in the substantive sections of the Draft, as an aggravating factor [Sections 2305, 2315] or as an alternative element of an offense [Section 2310, Section 2320]. Second, under the Draft, personal injury includes severe mental anguish as opposed to mental anguish under present Section 520a(f). The word severe is added only to denote that mental anguish constituting personal injury should be more than the humiliation usually experienced by the victim.

Third, the Draft defines sexual contact [Section 2301(h)] as contact which *is* for the purpose of sexual arousal or gratification, rather than that which can reasonably be construed as being for that purpose. [See C.L.1970, Section 750.520a(g).] Sexual contact is defined broadly. Since the crimes [Sections 2315 and 2320] involving contact might potentially include acts committed with harmless purpose which could easily be misconstrued, proof of actual sexual motivation on the part of the actor should be required.

The significance of the definitions is discussed in the Committee Commentary to Sections 2305, 2310, 2315, and 2320.

2305. First degree criminal sexual conduct

Sec. 2305. (1) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exist:

(a) That other person is under 13 years of age.

(b) The other person is at least 13 but less than 16 years of age and the actor is a member of the same household as the victim, the actor is related to the victim by blood or affinity to the fourth degree according to civil law or the actor is in a position of authority over the victim and used this authority to coerce the victim to submit.

(c) Sexual penetration occurs under circumstances involving the commission of murder in either degree, manslaughter, criminally negligent homicide, assault in the first, second, or third degree, kidnaping in either degree, burglary in any degree, arson in any degree, or robbery in any degree.

(d) The actor is aided or abetted by 1 or more persons and either of the following circumstances exists:

(i) The actor knows or has reason to know that the victim is mentally defective, mentally incapacitated or physically helpless.

(ii) The actor uses force or coercion to accomplish the sexual penetration.

(e) The actor, while armed with a weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon, coerces the victim to submit.

(f) The actor causes personal injury to the victim and force or coercion is used to accomplish sexual penetration.

(g) The actor causes personal injury to the victim, and the actor knows or has reason to know that the victim is mentally defective, mentally incapacitated, or physically helpless.

(h) The actor engages in the medical treatment or examination of the victim in a manner or for purposes which are medically recognized as unethical or unacceptable, and either of the following circumstances exist:

(i) The actor is aided or abetted by one or more persons.

(ii) The actor causes personal injury to the victim.

(2) Criminal sexual conduct in the first degree is a Class A felony.

Committee Commentary

This section is a slightly modified version of present Section 520b of the Michigan Criminal Sexual Conduct Act [C.L.1970, Section 750.-520b]. It is discussed in the commentary to Sections 2305 to 2310.

2310. Second degree criminal sexual conduct

Sec. 2310. (1) A person is guilty of criminal sexual conduct in the second degree if the person engages in sexual penetration with another person and if any of the following circumstances exists:

(a) That other person is at least 13 years of age and under 16 years of age.

(b) Force or coercion is used to accomplish the sexual penetration.

(c) The actor knows or has reason to know that the victim is mentally defective, mentally incapacitated, or physically helpless.

(d) The actor engages in the medical treatment or examination of the victim in a manner for purposes which are medically recognized as unethical or unacceptable.

(2) Criminal sexual conduct in the second degree is a Class B felony.

Committee Commentary

This section restates without substantive change Section 520d of the present Michigan Criminal Sexual Conduct Act [C.L.1970, Section 750.-520d]. It is discussed in the Commentary to Sections 2305 to 2310.

Committee Commentary to Sections 2305 and 2310

Section 2305 of the Draft makes one substantive change in present section 520b. Under Section 520b(1)(c) it is a first degree, possible life imprisonment offense if sexual penetration occurs under circumstances involving the commission of any other felony. The Draft [Section 2305(1)(c)], to avoid the harsh penalty where minor felonies are involved, limits the coverage to circumstances involving the commission of murder in either degree, manslaughter, criminally negligent homicide, assault in the first, second, or third degree, kidnaping in either degree, and burglary, arson or robbery in any degree. The Draft makes two form changes in Sections 2305 and 2310. First, the definition of force or coercion is moved to definitional Section 2301(b). Second, the offenses involving unethical medical treatment remain but unethical treatment is not incorporated into the definition of force and coercion. [Compare Penal Code Section 520(b)(1)(d)(ii) with Section 2305(h)(ii); Penal Code Section 520b(1)(f)(iv) with Section 2301(h)(ii); Penal Code Section 520d(1)(b) with Section 2301(1)(c).]

Note also that the order of the second and third degree offense in the act are reversed in this draft. This is consistent with other chapters of the Draft which order the offenses into degrees according to a judgment of their relative seriousness.

The basic act in Sections 2305 and 2310 is sexual penetration, defined in Section 2301(i) as sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or any object into the genital or anal openings of another person's body, but emission of semen is not required. The definition of penetration as "however slight" is consistent with the language of the prior rape statute, Penal Code Section 520, see also, C.L.1970, Section 750.159 (sodomy). In People v. Denmark, 74 Mich.App. 403, 410, 254 N.W.2d 61 (1977), the court rejected the defendant's claim that the definition of sexual penetration is unconstitutionally vague. In People v. Swearington, 84 Mich.App. 372, 269 N.W.2d 467 (1978) the court determined that defendant lacked standing to challenge the language "or any other intrusion" on grounds of vagueness or overbreadth since he was charged under the more specific language of the definition. In People v. Hernandez, 80 Mich.App. 465, 264 N.W.2d 343 (1978) the court noted that "penetration" does not require that the act be performed with a sexual motive or purpose, but instructing the jury that the act must be sexual in nature, where the penetration involved a finger, is not reversible error.

The definition of sexual penetration includes sexual activity between persons of the same sex in contrast to the heterosexual intercourse proscribed under the repealed rape statute [Section 750.520] and the class of persons who can commit an offense is no longer limited to males [see Section 2305(1) and definition of actor, Section 2301(a), and victim, Section 2301(j).]

Section 2305 reserves the most serious penalty for engaging in sexual penetration under one or more circumstances listed in the eight subsections.

Subsections (1) and (1)(a) proscribes sexual penetration with a person under 13 years of age. Under prior law [Section 750.520] only a male could be guilty and the critical age for statutory rape was under 16 years.

Subsection (1) and (1)(b) creates three possibilities for first degree criminal sexual conduct. First, if the victim is at least 13 years and under 16 years and the actor is a member of the same household; second, if the victim is 13 to 16 years and the actor is related by blood or affinity to the fourth degree according to civil law, and third if the victim is 13 to 16, the actor is in a position of authority and used the authority to coerce the victim. Affinity has been defined as ". . . the relation existing in consequence of marriage between each of the married persons and the blood relatives of the other, and the degrees of affinity are computed in the same way as those of consanguinity or kindred . . ." People v. Denmark, 74 Mich.App. 403, 408, 254 N.W.2d 61 (1977) citing Bliss v Caille Brothers Co., 149 Mich. 601, 608, 113 N.W. 317 (1907). There have been no reported cases on degrees of relationship under the Michigan Criminal Sexual Conduct Act. There are two methods of computing degree, the civil law method [C.L.1970, Section 702.84] and the common law method. *Cooley's Blackstone* Book II, Chapter XIV, p. 200 (1899). Subsection (1)(b) requires the degree of relationship by blood or affinity to be computed according to civil law.

Subsection (1) and (1)(c) proscribes penetration which occurs un-

der circumstances involving the commission of any of the enumerated felonies. Subsection (1) and (1)(e) proscribes sexual penetration if the actor is armed with a weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon, and coerces the victim to submit. The language is a departure from the present statute in the addition of the language "coerces the victim to submit". The added language is intended to cure the overbreadth of the present section which would, at least in theory, make it a first degree offense to engage in penetration while being armed irrespective of whether there was or was not any coercion. In People v. Dawsey, 76 Mich.App. 741, 257 N.W.2d 236 (1977) defendant raised the issue, claiming unconstitutional vagueness because Penal Code Section 520(b)(i)(e) does not require force as an essential element. The court decided against the defendant since facts showing force were before the judge as trier of fact and the judge's decision implied that he required force or threat of force to sustain the conviction.

The remaining subsections require two aggravating factors in addition to sexual penetration. Subsection (1) and (1)(d) gives two alternate ways of committing the first degree offense. First, the actor is aided or abetted by at least one other person and knows or has reason to know the victim is mentally defective, mentally incapacitated or physically helpless and second, force or coercion is used to accomplish sexual penetration and the actor is aided or abetted by at least one other person. Under subsection (1)(d)(i), it is not necessary that the actor have actual knowledge of the condition of the victim; the minimum required is that he have reason to know. The terms mentally defective, mentally incapacitated and physically helpless are defined. Under Section 2301(1) to be mentally defective, the person must be suffering from a mental disease or defect rendering him at least temporarily incapable of appraising the nature of his conduct. Mentally incapacitated under Section 2301(e) means a temporary incapacity to appraise or control conduct due to a narcotic, anesthetic or other drug administered without the victim's consent or any other act committed on the victim without consent. Under this definition a person who consents or administers a drug to himself is not considered mentally incapacitated, and the actor will not be guilty of criminal sexual conduct under this subsection, although his behavior may fall within the scope of another section. [In a 1914 civil action, the Supreme Court indicated that intercourse with a woman unable to resist because of intoxication is rape. Hirdes v. Ottawa Circuit Judge, 180 Mich. 321, 146 N.W. 646 (1914), 52 L.R.A.(N.S.) 373]. Physically helpless is defined in Section 2301(f) to mean a person is physically unable to communicate an unwillingness to act, whether because he is unconscious, asleep or for any other reason. Note that the condition must be an inability to communicate unwillingness to act, rather than physical helplessness in the everyday meaning.

Under the second alternative of Section 2305(d) the crime is complete if the actor uses force or coercion to accomplish the sexual penetration and he is aided by at least one other person. Force or coercion

is defined in Section 2301(b) to include four circumstances: (a) overcoming the victim through application of force or violence, (b) coercing the victim to submit by threatening to use force or violence on the victim if the victim believes the actor has the present ability to execute the threat, [see, People v. Kahn, 80 Mich.App. 605, 264 N.W.2d 360 (1978) testimony that defendant pointed a rifle and threatened others and hit her were relevant to show victim's belief on defendant's ability to execute the threats], (c) coercing the victim to submit by threatening to retaliate in future against the victim or any other person if the victim believes the actor has the ability to execute the threat, (retaliate is defined to include but is not limited to threats of physical punishment, kidnaping or extortion), and (d) the actor through concealment or surprise, overcomes the victim. Note that in contrast to prior law [Section 750.520] which required penetration against the will of the victim, the Criminal Sexual Conduct Act [Sections 2305 and 2320 of the Draft], do not require nonconsent as an element of the offense. What is required by many of the subsections is the use of force or coercion to accomplish the act of sexual penetration. As to those subsections which require use of force or coercion, presumably consent is a defense as it negates an essential element of the crime. See generally, Robinson, Civil and Criminal Evidence, 21 Wayne L.Rev. 437, 484 (1975).

Under subsection 2305(1)(f), the crime is committed if the actor engages in sexual penetration by force or coercion and causes personal injury to the victim. Personal injury is defined in Section 2301(1)(g) to mean bodily injury, disfigurement, loss or impairment of sexual or reproductive organ, chronic pain, pregnancy, disease or severe mental anguish. In People v. Thompson, 76 Mich.App. 705, 257 N.W.2d 268 (1977) the victim's bruises, scarring and swelling from a beating was "physical injury" and the court held that the term was not void for vagueness as applied to the facts.

Subsection 2305(1)(g) proscribes sexual penetration with a victim the actor knows or has reason to know is mentally incapacitated or defective, or physically helpless if the actor causes personal injury to the victim.

Subsection 2305(1)(h) covers the situation where the actor is engaged in the medical treatment or examination of the victim in a manner or for a purpose medically recognized as unethical or unacceptable. If the actor is engaged in such treatment or examination and engages in sexual penetration and either (a) is aided or abetted by at least one person or (b) causes physical injury to the victim, it is first degree criminal sexual conduct.

The Michigan Supreme Court has construed the first degree criminal sexual conduct statute to allow only one conviction for a single act of sexual penetration (the enumerated of circumstances are alternate ways of proving but one charged offense). People v. Willie Johnson, 405 Mich. 320, 279 N.W.2d 534 (1979). However, where defendant engages in sexual penetration and also aids another in penetration and in both cases the necessary enumerated circumstances exist, conviction of two counts of first degree criminal sex-

ual conduct are proper, the latter conviction based on accomplice liability. People v. Dalton, 83 Mich. App. 725, 269 N.W.2d 280 (1978).

Section 2310, second degree criminal sexual conduct, sets the lower limit of criminal liability for the basic act of sexual penetration. If penetration is accomplished and (a) the victim is at least 13 years but under 16 years [compare section 2305(1)(a) victim under 13], the offense is made out. Under this subsection 2310(1)(a) the critical age for "statutory rape" is under 16 as it was under repealed Section 750.520 but note the class of persons who can commit the offense is not limited to males. The penalty under Section 2310 is considerably less for 13 to 16 year olds than the possible life imprisonment of repealed Penal Code Section 520.

Under subsection 2310(1)(c) it is a second degree offense if sexual penetration occurs and the actor knows or has reason to know the victim is mentally defective or incapacitated or physically helpless. [Compare Section 2305(d)(i) and (g) which make out a first degree offense if there is one additional aggravating factor.]

Section 2310(1)(d) creates liability for an actor who engages in penetration if he engages in the medical treatment or examination of the victim for a manner or purpose medically recognized as unethical or unacceptable. [Compare Section 2305(1)(h) which makes out the first degree offense if there is one additional aggravating factor.] This section approximates the coverage of present C.L.1970, Section 750.90 (intercourse under the pretext of medical treatment) which was not repealed by the Criminal Sexual Conduct Act. The coverage of Section 2310(1)(d) and Section 750.90 and predecessor statutes compensate for prior law which held that sexual intercourse under the pretext of medical treatment is not common law rape. Moran v. People, 25 Mich. 356 (1872).

Section 2310(1)(b) is the basic dividing line of criminal responsibility. Under it, sexual penetration which is accomplished by force or coercion [as defined in Section 2301(b)] is criminal; all other penetration is not criminal unless it falls within one of the remaining three subsections.

NOTE ON SEXUALLY DELINQUENT PERSON:

In 1952, the legislature created a category of sexually delinquent persons against whom indeterminate sentences "the minimum of which is one day and the maximum of which is life" can be imposed. [C.L.1970, Section 767.61a] The statutory definition is: "any person whose sexual behavior is characterized by repetitive or compulsive acts which indicate a disregard of consequences of the recognized rights of others, or by the use of force upon another person in attempting sexual relations of either a heterosexual or homosexual nature or by the commission of sexual aggressions against children under the age of 16." [C.L.1970, Section 750.10(a)]. The information must allege that the person is sexually delinquent. [C.L. 1970, Section 767.61a]. The statute has been construed to mean that the additional charge of sexual delinquency may not be added after trial has commenced nor can it be charged in a supplemental information after conviction on the principal offense. People v. Winford, 404 Mich. 400, 273 N.W.2d 54 (1978). After conviction of the principal offense, a second jury must be impanelled to decide the issue of sexual delinquency; it is grounds for mistrial if the jury hearing the original charge learns of the sexual delinquency charge. People v. Heltzer, 404 Mich. 410, 273 N.W.2d 44 (1978). If the statute defining the crime the person is charged with does not authorize a sentence in the event of supplementary charge of sexual delinquency, then the indeterminate sentence up to life cannot be imposed. People v. Seaman, 75 Mich.App. 546, 255 N.W.2d 680 (1977). The court noted that the criminal sexual conduct act does not authorize a life sentence for sexually delinquent persons. Several other present sex crime Michigan statutes allow life imprisonment for sexually delinquent persons.

The committee declined to continue in the Draft provisions similar to Section 750.10(a) and 767.61a. Permitting proof of "sexual delinquency" before the second jury means that the prosecutor can spread the defendant's complete history of activity, which almost guarantees his conviction. [See, dissent of Chief Justice Kavanaugh in *Winford, supra* at 409: "I am convinced this statute is unconstitutional as a denial of due process. The definition of 'sexually delinquent person' found in (Penal Code Section 10a) is vague and provides inadequent warning of what acts will serve as a basis for the characterization." See Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972), but see, People v. Griffles, 13 Mich.App. 299, 164 N.W.2d 426 (1968) holding that the punishment was not cruel and unusual as for a mental condition or status.] The sentencing provisions of the Draft provide for a rational enhancement of sentence based upon prior crimes and other information in the pre-sentence report. Such an approach is superior to and should more fairly accomplish the objective of appropriate sentence for a sexually delinquent person. Therefore, the term "sexually delinquent" person does not appear in the Draft, and the existing provisions are recommended for repeal on the basis of adequate coverage elsewhere in the Draft.

A related statute makes it a felony for a sexually psychopathic person to leave the state without permission. [C.L.1970, Section 330.-1944].

2315. Third degree criminal sexual conduct

Sec. 2315. (1) A person is guilty of criminal sexual conduct in the third degree if the person engages in sexual contact with another person and if any of the following circumstances exists:

(a) That other person is under 13 years of age.

(b) That other person is at least 13 but less than 16 years of age and the actor is a member of the same household as the victim, or related to the victim by blood or affinity to the fourth degree, or

ing to the civil law, or is in a position of authority over the victim and the actor used this authority to coerce the victim to submit.

(c) Sexual contact occurs under circumstances involving the commission of murder in either degree, manslaughter, criminally negligent homicide, assault in the first, second or third degrees, kidnaping in either degree, burglary in any degree, arson in any degree, or robbery in any degree.

(d) The actor is aided or abetted by 1 or more persons and either of the following circumstances exists:

(i) The actor knows or has reason to know that the victim is mentally defective, mentally incapacitated or physically helpless.

(ii) The actor uses force or coercion to accomplish the sexual contact.

(e) The actor, while armed with a weapon, or any article used or fashioned in a manner to lead a person to reasonably believe it to be a weapon, coerces the victim to submit.

(f) The actor causes personal injury to the victim and force or coercion is used to accomplish the sexual contact.

(g) The actor causes personal injury to the victim and the actor knows or has reason to know that the victim is mentally defective, mentally incapacitated, or physically helpless.

(h) The actor engages in the medical treatment or examination of the victim in a manner or for purposes which are medically recognized as unethical or unacceptable and either of the following circumstances exist:

(i) The actor is aided or abetted by one or more persons.

(ii) The actor causes personal injury to the victim.

(2) Criminal sexual conduct in the third degree is a Class B felony.

Committee Commentary

This section is a slightly modified version of present Section 520c of the Michigan Criminal Sexual Conduct Act [C.L.1970, Section 750.-520c]. It is discussed in the Commentary to Sections 2315 to 2320.

2320. Fourth degree criminal sexual conduct

Sec. 2320. (1) A person is guilty of criminal sexual conduct in the fourth degree if he or she engages in sexual contact with another person and if either of the following circumstances exists:

(a) Force or coercion is used to accomplish sexual contact.

(b) The actor knows or has reason to know that the victim is mentally defective, mentally incapacitated, or physically helpless.

(c) The actor engages in the medical treatment or examination of the victim in a manner or for purposes which are medically recognized as unethical or unacceptable.

(2) Criminal sexual conduct in the fourth degree is a Class E felony.

Committee Commentary

This section restates without substantive change Section 520e of the present Michigan Criminal Sexual Conduct Act [C.L.1970, Section 750.-520e]. It is discussed in the Commentary to Sections 2315 and 2320.

Committee Commentary to Sections 2315 to 2320

Section 2315 of the Draft makes one substantive change from present Section 520c. Section 2315(1)(c) is more restrictive than present Section 520c(1)(c); it substitutes enumerated felonies for the any other felony language of the present statute. [See commentary to Sections 2305 and 2310. A parallel change is made in Draft Section 2305(1)(c).]. In sections 2315 and 2320, the offense involving unethical medical treatment remains, but unethical treatment is no longer part of the definition of the terms force or coercion. [Compare C.L.1970, Section 750.520c(1)(d)ii with Section 2315(1)(h)i; compare C.L.1970, Section 750.520c(1)(f) with Section 2315(1)(h)ii; compare C.L.1970, Section 750.520e(1)(a) with Section 2320(1)(c).]

Under Section 2315, a person is guilty of criminal sexual conduct in the third degree if he engages in sexual contact with another person under one or more of the circumstances enumerated in the eight subsections. The circumstances of the eight subsections are identical to those listed in the first degree offense. [See committee commentary to Sections 2305 to 2310].

The difference between the first and second degree offense and the third and fourth degree offenses is in the basic act. The more serious offenses proscribe the act of sexual penetration while the third and fourth offenses proscribe the act of sexual contact. Sexual contact is a defined term. Under sections 2301(h) it includes intentional touching of the victim or actors intimate parts or the clothing covering the immediate area of the intimate parts, if the touching is for the purpose of sexual arousal or gratification. Under the definition, the prosecution must show that the actor's actual purpose was sexual gratification or arousal. In the latter regard, the Draft changes the present Michigan Criminal Sexual Conduct Act which only required the act is capable of being reasonably construed as for a sexual purpose. [Under the new criminal sexual conduct act, the Michigan Court of Appeals has interpreted "reasonably construed" as being for a sexual purpose to mean that an actual intent or purpose of sexual gratification does not need to be proved." People v. Fisher, 77 Mich.App. 6, 257 N.W.2d 250 (1977).]

Intimate parts are defined in Section 2301(c) to include the primary genital area, groin, inner thigh, buttock, or breast of a human being. Although the definition of intimate parts ("includes") does not seem to be limited to the specific anatomy, the Court of Appeals has held that "between the legs" is not within the definition. People v. Davenport, 75 Mich.App. 46, 254 N.W.2d 647 (1977). Section 2320 sets the lower limit of criminality for behavior involving sexual contact. The offense is complete if the actor engages in sexual contact with another person and one of three additional factors are present, (1) force or coercion is used [Section 2320(a)]; (2) the actor knows or has reason to know the victim is mentally defective or incapacitated or physically helpless [Section 2320(b)] or (3) the actor engages in the medical treatment or examination of the victim for purpose or in a manner medically recognized as unethical or unacceptable. The three additional factors in Section 2320(a)-(c) are identical to the factors which set the lower limit of liability for the penetration offense [See Section 2310(1)(b)-(d)]. Note, however, that unlike Section 2310(a), the fourth degree offense involving sexual contact does not proscribe conduct based on the victim being 13 to 16 years old.

The sexual contact offenses, (*i. e.* Section 2315, and by implication Section 2320) have been construed as an express provision on the crime of attempted penetration, first (or second) degree criminal sexual conduct; it is not proper to charge attempted penetration under the general attempt statute where the court instructs on the lesser charge involving sexual contact. People v. Denmark, 74 Mich.App. 403, 254 N.W.2d 61 (1977).

2325. Corroboration of victim's testimony

Sec. 2325. The testimony of a victim need not be corroborated in prosecutions under sections 2305 to 2320.

Committee Commentary

This section restates Section 520h of the present Michigan Criminal Sexual Conduct Act [C.L.1970, Section 750.520h]. Section 2325 provides that testimony of the victim need not be corroborated in prosecutions for the first through fourth degree criminal sexual conduct. The section codifies existing Michigan case law. People v. Inman, 315 Mich. 456, 24 N.W.2d 176 (1946) (rape); People v. Jenness, 5 Mich. 305 (1858) (incest) both citing rule despite some corroboration of victim's testimony; People v. Newby, 66 Mich.App. 400, 239 N.W.2d 387, appeal denied 397 Mich. 867, 246 N.W.2d 1 (1976) leave to appeal denied, 397 Mich. 867, 246 N.W.2d 1 (1976) (rape, under prior statute); People v. Brocato, 17 Mich.App. 277, 169 N.W.2d 483 (1969) (indecent liberties).

2330. Resistance

Sec. 2330. A victim need not resist the actor in prosecution under sections 2305 to 2320.

Committee Commentary

This section restates Section 520i of the present Michigan Criminal Sexual Conduct Act [C.L.1970, Section 750.520i].

The section provides that the victim, defined in Section 2301(j), need not resist the actor, defined in Section 2301(a), in prosecutions under the first to fourth degree criminal sexual conduct, Sections 2305 to 2320. It represents a departure from prior case law. Under the former rape statute [C.L.1970, Section 750.520] nonconsent must be proved, so a showing that the woman resisted to the utmost was necessary to convict unless the failure to physically resist was excused because her will was overcome by fear. [People v. Oliphant, 399 Mich. 472, 490, 491, 250 N.W.2d 443 (1976) and cases cited therein].

Section 2330 should be read in connection with sections 2305 to 2320 which do not by their terms include lack of consent of the victim as an element of the crimes, but rather require use of force or coercion (or other appropriate alternative) to accomplish the sexual penetration or contact.

2335. Admissibility of evidence

Sec. 2335. (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 2305 to 2320 unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:

(a) Evidence of the victim's past sexual conduct with the actor.

(b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

(2) If the defendant proposes to offer evidence described in subsection (1)(a) or (b), the defendant within 20 days after the arraignment on the information shall file a written motion and offer of proof. The court may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1). If the new information is discovered during the course of trial which may make the evidence described in subsection (1)(a) admissible, the judge may order an in camera hearing to determine whether the proposed evidence is admissible under subsection

Committee Commentary

This section restates, with one slight modification Section 520j of the present Michigan Criminal Sexual Conduct Act [C.L.1970, Section 750.520j]. Section 2335(2) would allow the defendant 20 days after arraignment on the information to file written motion and offer of proof of evidence enumerated in Section 2335(1)(a) and (b) whereas the present statutory Section 520j(2) allows only 10 days. Ten days seems an unreasonably short time; twenty days is more adequate, but not so long as to necessitate adjournment of a scheduled trial date.

By prohibiting the admission of all but specified types of evidence of the victim's sexual conduct, this section of the Michigan Criminal Sexual Conduct Act, retained in full in the Draft, modifies pre-1975 case law which left the admissibility to the sound discretion of the trial judge. People v. Whitfield, 58 Mich.App. 585, 228 N.W.2d 475 (1975). Section 2335(1) precludes the admission of any evidence of specific instances of the victim's sexual conduct, and opinion and reputation evidence of the victim's sexual conduct in prosecutions under Sections 2305 to 2320 unless such evidence falls within one of the two exceptions: evidence of the victim's past sexual conduct with the actor and evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy or disease. The section is compatible with the general rule of prior case law against admissibility of prior sexual acts of the victim with third parties. People v. McLean, 71 Mich. 309, 38 N.W. 917 (1888); People v. Whitfield, 58 Mich.App. 585, 228 N.W.2d 475 (1975); and the exception of Section 2335(1)(a) is consistent with People v. DerMartzek, 390 Mich. 410, 213 N.W.2d 97 (1973); People v. Abbott, 97 Mich. 484, 56 N.W. 862 (1893), allowing introduction of evidence of prior sexual acts with the defendant. However, Section 2335(1)(a) and (b) is incompatible with prior case law to the extent that evidence which has been held to be admissible in previous cases would not fall within one of the two exceptions and thus be inadmissible under the language of this section. [See People v. Ryno, 148 Mich. 137, 111 N.W. 740 (1907), (bad reputation for chastity admissible as tending to prove consent); People v. McLean, 71 Mich. 309, 38 N.W. 917 (1888) (evidence that character for chastity is bad or that victim a common prostitute admissible, dicta); People v. Bastian, 330 Mich. 457, 47 N.W.2d 692 (1951) (specific sexual conduct of complainant admissible to show she was a sexual-psychopath where there was testimony that sexual psychopathy was a condition which rendered her credibility poor.)].

Even if the proferred evidence of the victim's sexual conduct falls within one of the exceptions, it can be admitted only if and to the extent the trial judge finds that it is material to a fact at issue and its inflammatory or prejudicial nature does not outweigh its probative value. Under Section 2335(2) if the defendant plans to offer evidence which falls within the exceptions of (a) or (b) of subsection (1), he must within 20 days of the arraignment on the information file a written motion and offer of proof. The court, if it chooses, may hold an in-camera hearing to determine admissibility of the proposed evidence. If new information is discovered during the trial that makes the proposed evidence admissible, the court may again hold an in-camera hearing to determine admissibility under subsection (1).

This admissibility of evidence section of the criminal sexual conduct act has been held to be a legitimate exercise of the legislative authority, until superceded by court rule. [People v. Denmark, 74 Mich.App. 402, 254 N.W.2d 61 (1977), see Michigan Proposed Rules of Evidence Rule 608, committee note at page 39; Rule 608(a) could authorize opinion evidence such as admitted in *Bastian, supra*, and to this extent may be inconsistent with MCLA Section 750.520j(1). Note that the scope of Rule 608 is limited to evidence of character and conduct for purposes of attacking or supporting credibility.]

Several panels of the Michigan Court of Appeals have upheld the constitutionality of the Section 520(j) (Section 2335 of the Draft) against the challenge that the legislative prohibition denied defendant (who wished to cross-examine the complainant about prior sex acts) the sixth amendment right of confrontation, People v. Dawsey, 76 Mich.App. 741, 257 N.W.2d 236 (1977); People v. Thompson, 76 Mich.App. 705, 257 N.W.2d 268 (1977). *Accord*, People v. Patterson, 79 Mich.App. 393, 262 N.W.2d 835 (1977); People v. Khan, 80 Mich.App. 605, 264 N.W.2d 360 (1978). However, the majority opinion in *Dawsey*, (at p. 753) intimated a problem of the statute's constitutionality if the facts of the case were different. "Defendant did not attempt to produce witnesses to testify about the complainant's reputation for chastity. Had he done so, and been denied, a serious question about the statute's constitutionality would have to be faced. (Citation omitted)".] In People v. Mikula, 84 Mich.App. 108, 269 N.W. 2d 195 (1978), the court construed the exception for evidence of semen etc, in Section 520j(1)(b) to allow evidence of prior acts to explain the condition of the female genital where medical testimony on the condition supplied circumstantial evidence of penetration. In People v. Walker, 81 Mich.App. 202, 265 N. W.2d 82 (1978) where defendant was charged with breaking and entering with intent to commit criminal sexual conduct and third degree criminal sexual conduct, the court said that reputation evidence of the victim's chastity should have been allowed as relevant to defendant's intent in breaking and entering; such evidence could be introduced with a limiting instruction.

In adopting Section 750.520j as part of this Draft, the committee expressed serious reservations about the possible constitutional defects of the section as it may be applied in specific cases. See Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 29 L. Ed.2d 347 (1974); Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). Rather than suggesting curative modification to the statute, thus imposing their collective opinion, the committee felt the question of constitutionality is a matter better left to judicial review.

2340. Married persons

Sec. 2340. A person does not commit criminal sexual conduct under this act if the victim is his or her legal spouse, unless the couple are living apart and one of them has filed for separate maintenance or divorce.

Committee Commentary

This section restates Section 520 1 of the present Michigan criminal sexual conduct statute [C.L.1970, Section 750.520 1].

The section states the general rule that an actor does not commit first through fourth degree criminal sexual conduct if the victim is his or her legal spouse. To the rule, there is one exception, if the couple are living apart and one of them has filed for separate maintenance or divorce. It does not matter whether the purported actor or victim is the spouse who has filed.

The general rule of the section is consistent with prior case law holding that a man cannot be guilty of rape on his wife. People v. Pizzura, 211 Mich. 71, 178 N.W. 235 (1920) (based upon common law marriage held to be valid), *but see* People v. Chapman, 62 Mich. 280, 28 N.W. 896 (1886) [the defendant who contracted for another to rape his wife was convicted of rape under statute making aiders and abettors liable as principals.] This section is not intended to preclude an actor from conviction under Sections 2305 to 2320 if his criminal liability is based upon the behavior of another. Section 425 of Chapter 4 provides that in a prosecution for an offense in which criminal liability is based upon the behavior of another, it is no defense that the defendant belongs to a class of persons who by definition of the offense are legally incapable of committing the offense in an individual capacity.

Note on Sections of the Michigan Criminal Sexual Conduct Act Omitted from the Draft

SUPPRESSION OF NAMES

Present Section 520k [C.L.1970, Section 750.520k] provides that on the request of either party, the magistrate before whom the accused is brought on a charge of having committed an offense under the act shall order suppression of the name of the victim and details until arraignment on the information, dismissal of the charge or the case is otherwise concluded, whichever occurs first. The Michigan Supreme Court has previously held that the power of the court to suppress does not extend to publication of newspapers or media if the information is obtained from any source outside of the court records. *In re Times Publishing Co.*, 276 Mich. 349, 267 N.W. 858 (1936).

It was the judgment of the committee that the section be omitted for several reasons. First, publicity of charges of other serious crimes may be as harmful to reputation as sex offense charges and the latter should not be singled out for special treatment. Second, the power of suppression should not be automatic on request of the parties but should only be exercised, if at all, when the facts and circumstances justify it. Third, the statute has already been declared unconstitutional on its face and orders issued pursuant to it are a violation of the First Amendment. WXYZ, Inc. v. Hand, 463 F.Supp. 1070 (E.D.Mich.1979).

ASSAULT WITH INTENT TO COMMIT CRIMINAL SEXUAL CONDUCT

Present Section 520g [C.L.1970, Section 750.520g] makes assault with intent to commit criminal sexual conduct involving sexual penetration a felony punishable by up to 10 years and assault with intent to commit criminal sexual conduct under Section 750.520c a felony punishable by not more than 5 years imprisonment. [In People v. Alexander, 82 Mich.App. 621, 267 N.W.2d 466 (1978), the court held that double jeopardy did not bar convictions for assault with intent to commit criminal sexual conduct involving penetration and criminal sexual conduct in the second degree involving one incident with one victim since the offenses had different elements.]

The Draft omits the assault with intent section. Unsuccessful or inadequate activity plus intent are the critical elements under the concept of attempt. In theory, it would be in order to charge attempted criminal sexual conduct. However, in People v. Denmark, 74 Mich.App. 402, 254 N.W.2d 61 (1977), the court held it was improper to apply the general attempt statute (for "attempted penetration") where the statute provides an express provision for attempt (second degree criminal sexual conduct, Penal Code Section 520c is in effect an attempted first degree offense). If the activity cannot be charged as criminal sexual conduct involving contact, it is possible to charge under the general assault provisions of Chapter 21, Sections 2101 to 2105 if actual injury or offensive contact is caused, or if there is no injury then under Sections 2110 to 2113, Criminal Threatening.

SECOND OR SUBSEQUENT OFFENSES

Present Section 520f [C.L.1970, Section 750.520f] requires a mandatory minimum sentence of five years on conviction of a second or subsequent offense of first, second, or third degree criminal sexual conduct. The Draft omits this section and instead deals with the problem of repeat offenders in a consistent fashion under the sentencing provisions. [See committee commentary in Chapter 14.]

MICHIGAN

SECOND REVISED CRIMINAL CODE

Final Draft—June 1979

Special Committee of the Michigan State Bar for the

Revision of the Criminal Code

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house of prostitution or other prostitution enterprise like a call-girl operation, or (e) does anything else designed to facilitate prostitution. Promoting prostitution thus includes elements of procuring, transportation for purposes of prostitution, keeping a house of prostitution and pandering.

A person profits from prostitution by accepting or receiving money or property which is viewed as proceeds from prostitution. This, of course, is defined to exclude the prostitute, in order not to overlap with Section 6205. This is the equivalent of the "living on the earnings" provision in the present statute.

Any one of the alternatives of advancing or profiting from prostitution, if proven, constitutes third degree promoting under Section 6217. It is a Class E felony. However, if the advancing or profiting involves managing, supervising, controlling or owning a prostitution operation involving two or more prostitutes, then the crime is second degree promoting under Section 6216, and is a Class C felony. Even heavier penalties are imposed if force or intimidation or minors are involved. Under Section 6215, it is a Class B felony to advance prostitution by compelling a person by intimidation or force to engage in prostitution or to profit from such coercive conduct of a third party. It is also a Class B felony under the section to advance or profit from prostitution of a minor.

Section 6220 defines the crime of permitting prostitution as possessing or controlling premises knowing they are being used for prostitution and failing to take reasonable steps to halt that use. The crime can in effect be committed through negligence. Recognizing that this manner of facilitating prostitution is in a sense at third remove from actual practice of prostitution, punishment is set at a Class A misdemeanor level. If there is greater involvement of the lessor or provider of premises in the actual prostitution enterprise, a charge can be made under Section 6217 for promoting prostitution.

6225. Exemptions from coverage

Sec. 6225. (1) Sections 6205, 6210, 6215, 6216, 6217, and 6220 do not apply to a law enforcement officer while in the performance of his duties as a law enforcement officer.

Committee Commentary

Section 6225 restates present Michigan Law [C.L.1970, Section 750.451a]. Its purpose is to make clear that law enforcement officers acting in performance of their duties are exempt from the coverage of this chapter.

CHAPTER 63

OBSCENITY AND RELATED OFFENSES

Section

6301. Definition of terms

Sec. 6301. The following definitions apply to Sections 6305 to 6315:

(a) "Child" means a person who is less than 18 years of age, is not emancipated by operation of law as provided in Section 4(1) of Act No. 293 of the Public Acts of 1968, as amended, being Section 722.4 of the Michigan Compiled Laws.

(b) "Commercial purpose" means any purpose for which monetary gain or other remuneration could reasonably be expected or anticipated, or has already been received or arranged for. Commercial purpose shall not be construed to mean processing. However, processing may be used, where applicable, to demonstrate the ultimate sale, distribution, showing, rental, lease, or use for remuneration was intended. "Processing", as used in this subdivision, means photographing, filming, or sound record, or the reproducing, copying, or printing of a photograph, film, slide, electronic visual image or sound recording.

(c) "Erotic fondling" means touching a person's clothed or unclothed genitals, pubic area, buttocks, or, if the person is a female, breasts, or if the person is a child, the developing or undeveloped breast area, for the purpose of, real or simulated, overt sexual gratification or stimulation of 1 or more of the persons involved. Erotic fondling shall not be construed to include physical contact, even if affectionate, which is not for the purpose of, real or simulated, overt

sexual gratification or stimulation of 1 or more of the persons involved.

(d) "Erotic nudity" means the display of the human male or female genital or pubic area, or developed or developing female breast, in a manner which lacks primary literary, artistic, educational, political, or scientific value and which the average person applying contemporary community standards would find appeals to prurient interests. As used in the subdivision, "community" means the state of Michigan.

(e) "Financing" means the furnishing of funds or capital for a commercial purpose. Financing shall not be construed to mean the simple purchase or rental of a material or activity after it is created or produced.

(f) "Listed sexual act" means sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, passive sexual involvement, sexual excitement, or erotic nudity.

(g) "Masturbation" means the real or simulated touching, rubbing, or otherwise stimulating a person's clothed or unclothed genitals, pubic area, buttocks, or if the person is female, breasts, or if the person is a child, the developing or undeveloped breast area, either by manual manipulation or self-induced or with an artificial instrument, for the purpose of, real or simulated, overt sexual gratification or arousal of the person.

(h) "Passive sexual involvement" means an act, real or simulated, which exposes another person to or draws another person's attention to an act of sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, sexual excitement, or erotic nudity because of viewing any of these acts or because of the proximity of the act to that person, for the purpose of, real or simulated, overt sexual gratification or stimulation of 1 or more of the persons involved.

(i) "Child abusive commercial activity" means a child engaging in a listed sexual act which was or is for a commercial purpose.

(j) "Child abusive commercial material" means a developed or undeveloped photograph, film, slide, electronic visual image or sound recording of a child engaging in a listed sexual act, or any reproduction, copy or print of such a photograph, film, slide, or sound recording, which was or is for a commercial purpose.

(k) "Sadomasochistic abuse" means either of the following:

(i) Flagellation or torture, real or simulated, for the purpose of real or simulated sexual stimulation or gratification, by or upon a person.

(ii) The condition, real or simulated, of being fettered, bound, or otherwise physically restrained for sexual stimulation or gratification of a person.

(l) "Sexual excitement" means the condition, real or simulated, of human male or female genitals when in a state of real or simulated overt sexual stimulation or arousal.

(m) "Sexual intercourse" means intercourse, real or simulated, whether genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex or between a human and an animal, or with an artificial genital.

6305. Promoting child pornography

Sec. 6305. (1) A person commits the crime of promoting child pornography if he causes or knowingly allows a child to engage in a child abusive commercial activity, or he arranges for, produces, makes, or finances, or he attempts or prepares or conspires to arrange for, produce, make, or finance any child abusive commercial activity or child abusive commercial material, and if both of the following occur:

(a) That person knows, has reason to know, or should reasonably be expected to know that the person is a child, or that person has not taken reasonable precautions to determine the age of the child.

(b) That person knows, has reason to know, should reasonably be expected to know, or intends that the child abusive commercial activity or child abusive commercial material is or was for a commercial purpose.

(2) Promoting child pornography is a Class C felony.

6310. Distributing child pornography

Sec. 6310. (1) A person commits the crime of distributing child pornography if he commercially distributes or promotes, or finances the distribution or promotion of, or receives for the purpose of commercially distributing or promoting, or conspires, attempts, or prepares to so distribute, receive, finance, or promote any child abusive commercial material or child abusive commercial activity and, if both of the following occur:

(a) That person knows, has reason to know, or should reasonably be expected to know that the person is a child.

(b) That person knows, has reason to know, should reasonably be expected to know, or intends that the prohibited commercial activity

or child abusive commercial material is or was for a commercial purpose.

(2) Distributing child pornography is a Class D felony.

6315. Admissibility of evidence

Sec. 6315. (1) Expert testimony as to the age of the child used in a child abusive commercial material or a child abusive commercial activity shall be admissible as evidence in court and may be a legitimate basis for determination of age, if age has not otherwise been proven.

(2) The section shall apply in any prosecution or violation of Section 6305 of Section 6310.

Committee Commentary to Sections 6301 to 6315

Sections 6301 to 6315 continue, with only stylistic changes, present Penal Code Section 145c added by the Michigan Legislature in late 1977. The new legislation is aimed at the use of children in production of pornography and commercial distribution of such material. The growing problem of use of juveniles to produce "kiddie prono" has been a matter of serious concern recently.

Section 6305 punishes, at a Class C felony level, a person who is involved in the production aspect of child pornography, while Section 6310, a Class D felony, is aimed at those involved in the commercial distribution of such matter. Under Chapter 15, a fine of up to double the gain can be imposed. The penalty levels fairly correspond to present law; Section 750.145c(2) (production section) provides for up to 20 years in prison and fine of $20,000 while Section 750.145c(3) (distribution section) provides for up to 7 years in prison and fine of $10,000.00. To sustain a prosecution under either section, it must be shown that the defendant knows, has reason to know or should have known that he was dealing with a child and knows, had reason to know or should have known or intends the commercial purpose. Under Section 6305, the prosecutor can alternatively show that the defendant did not take reasonable precautions to determine age. The definitions of the many specific terms used in the sections are found in Section 6301.

Under Section 6315 expert testimony as to age is admissible if age has not otherwise been proven. Under Section 6365 local regulation of matters covered by Section 6301 to 6315 is preempted.

6320. Definition of terms

Sec. 6320. The following definitions apply to Section 6325 to 6340:

(a) "Exhibit" means to do one or more of the following:

(i) Present a performance.

(ii) Sell, give, or offer to agree to sell or give a ticket to a performance.

(iii) Admit a minor to premises where a performance is being presented or is about to be presented.

(b) "Disseminate" means to sell, lend, give, exhibit, or show or to offer or agree to do the same.

(c) "Minor" means a person under 18 years of age.

(d) "Nudity" means the lewd display of the human male or female genitals or pubic area.

(e) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(f) "Erotic fondling" means touching a person's clothed or unclothed genitals, pubic area, buttocks, or if the person is female, breasts, for the purpose of sexual gratification or stimulation.

(g) "Sadomasochistic abuse" means either of the following:

(i) Flagellation or torture, for sexual stimulation or gratification, by or upon a person who is nude or clad only in undergarments or in a revealing or bizarre costume.

(ii) The condition of being fettered, bound, or otherwise physically restrained for sexual stimulation or gratification, of a person who is nude or clad only in undergarments or in a revealing or bizarre costume.

(h) "Sexual intercourse" means intercourse, real or simulated, whether genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex or between a human and an animal.

(i) "Sexually explicit matter" means sexually explicit visual matter, sexually explicit verbal material, or sexually explicit performance.

(j) "Sexually explicit performance" means a motion picture, exhibition, show, representation, or other presentation, which, in whole or in part, depicts nudity, sexual excitement, erotic fondling, sexual intercourse or sadomasochistic abuse.

(k) "Sexually explicit verbal material" means a book, pamphlet, magazine, printed matter reproduced in any manner, or sound recording which contains an explicit and detailed verbal description or narrative account of sexual excitement, erotic fondling, sexual intercourse, or sadomasochistic abuse.

(l) "Sexually explicit visual material" means a picture, photograph, drawing, sculpture, motion picture film, or similar visual representation which depicts nudity, sexual excitement, erotic fondling,

sexual intercourse, or sadomasochistic abuse, or a book, magazine, or pamphlet which contains such a visual representation. An undeveloped photograph, mold, or similar visual material may be sexually explicit material notwithstanding that processing or other acts may be required to make its sexually explicit content apparent.

(m) "Harmful to minors" means sexually explicit matter which meets all of the following criteria:

(i) Considered as a whole, it appeals to the prurient interest of minors as determined by contemporary local community standards.

(ii) It is patently offensive to contemporary local community standards of adults as to what is suitable for minors.

(iii) Considered as a whole, it lacks serious literary, artistic, political, educational, and scientific value for minors.

(n) "Local community" means the county in which the matter was disseminated.

(o) "Prurient interest" means a lustful interest in sexual stimulation or gratification. In determining whether sexually explicit matter appeals to the prurient interest, the matter shall be judged with reference to average 17-year-old minors. If it appears from the character of the matter that it is designed to appeal to the prurient interest of a particular group of persons, including, but not limited to homosexuals or sadomasochists, then the matter shall be judged with reference to average 17-year-old minors within the particular group for which it appears to be designed.

6325. Distributing obscene matter to a minor

Sec. 6325. (1) A person is guilty of distributing obscene matter to a minor if that person does either of the following:

(a) Knowingly disseminates to a minor sexually explicit visual or verbal material that is harmful to minors.

(b) Knowingly exhibits to a minor a sexually explicit performance that is harmful to minors.

(2) A person knowingly disseminates sexually explicit matter to a minor when the person knows both the nature of the matter and the status of the minor to whom the matter is disseminated.

(3) A person knows the nature of matter if the person either is aware of the character and content of the matter or recklessly disregards circumstances suggesting the character and content of the matter.

(4) A person knows the status of a minor if the person either is aware that the person to whom the dissemination is made is under 18

years of age or recklessly disregards a substantial risk that the person to whom the dissemination is made is under 18 years of age.

(5) Distributing obscene matter to a minor is a Class E felony.

6330. Exemptions

Sec. 6330. Section 6325 does not apply to the dissemination of sexually explicit matter to a minor by any of the following:

(a) A parent or guardian who disseminates sexually explicit matter to his or her child or ward.

(b) A teacher or administrator at a public or private elementary or secondary school which complies with the provisions of Act No. 451 of the Public Acts of 1976, being sections 380.1 to 380.1853 or the Michigan Compiled Laws, who disseminates sexually explicit matter to a student as part of a school program permitted by law.

(c) A licensed physician or certified psychologist who disseminates sexually explicit matter in the treatment of a patient.

(d) A librarian employed by a library of a public or private elementary or secondary school which complies with the provisions of Act No. 451 of the Public Acts of 1976, or employed by a public library, who disseminates sexually explicit matter in the course of that person's employment.

(e) Any public or private college or university or any other person who disseminates sexually explicit matter for a legitimate medical, scientific, governmental, or judicial purpose.

6335. Displaying obscene matter to a minor

Sec. 6335. (1) A person is guilty of displaying obscene matter to a minor if that person possesses managerial responsibility for a business enterprise selling visual matter which depicts sexual intercourse or sadomasochistic abuse and which is harmful to minors, and that person knowingly permits a minor who is not accompanied by a parent or guardian to examine that matter.

(2) A person knowingly permits a minor to examine visual matter which depicts sexual intercourse or sadomasochistic abuse and which is harmful to minors, if the person knows both the nature of the matter and the status of the minor permitted to examine the matter.

(3) A person knows the nature of the matter if the person either is aware of the character and content of the matter or recklessly dis-

regards circumstances suggesting the character and content of the matter.

(4) A person knows the status of a minor if the person either is aware that the person who is permitted to examine the matter is under 18 years of age or recklessly disregards a substantial risk that the person who is permitted to examine the matter is under 18 years of age.

(5) Displaying obscene matter to a minor is a Class C misdemeanor.

6340. Facilitative misrepresentation

Sec. 6340. (1) A person is guilty of facilitative misrepresentation when that person knowingly makes a false representation that he or she is the parent or guardian of a minor, or that a minor is 18 years of age or older, with the intent to facilitate the dissemination to the minor of sexually explicit matter that is harmful to minors.

(2) A person knowingly makes a false representation as to the age of a minor or as to the status of being the parent or guardian of a minor if the person either is aware that the representation is false or recklessly disregards a substantial risk that the representation is false.

(3) Facilitative misrepresentation is a Class C misdemeanor.

Committee Commentary to Sections 6320 to 6340

Sections 6320 to 6340 continue, with stylistic changes, that portion of P.A. 33 of 1978 which defines offenses and sets punishment. [C.L. 1970, Section 722.671 to 722.678, effective June 1, 1978]. The statute is patterned largely on a proposed statute of the Michigan Law Revision Commission. See, Juvenile Obscenity Law Study Report, Michigan Law Revision Commission 10th Annual Report (1975) pp. 133–297. The offense of knowing dissemination of sexually explicit visual or verbal material or knowing exhibition of a sexually explicit performance which is harmful to minors is punishable by up to two years imprisonment and a fine of up to $10,000.00 [Section 722.675]. Exceptions are made for parents and under certain circumstances for colleges, teachers, physicians, librarians, and other persons [Section 722.676]. The act makes it a misdemeanor punishable by up to 90 days and fine of $5,000 for a manager of a business enterprise to knowingly permit a minor to examine visual matter portraying sexual intercourse or sadomasochistic abuse which is harmful to minors [Section 722.677] or for one to falsely represent himself as a parent or guardian in order to facilitate dissemination of sexually explicit matter which is harmful to minors [Section 722.678]. P.A. 33 follows the mandate of Miller v. California, 413 U.S. 15, 24, 93 S.Ct.

2607, 37 L.Ed. 419 (1973) that the prohibited "obscene" conduct be specifically defined in the legislation or as authoritatively construed. Section 722.672 defines nudity, sexual excitement, and other depictions etc. which constitute the prohibited "sexually explicit matter". Likewise, following the tripartite test of *Miller*, the statute in Section 722.674 defines as "harmful to minors" matter which appeals to the prurient interest of minors measured by contemporary local community standards, is patently offensive to local standards of adults as to what is suitable for minors, and which as a whole lacks serious literary, artistic, political, educational, or scientific value. [*Miller* rejected the "utterly without redeeming social value" test of Memoirs v. Massachusetts, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1 (1966).]

Sections 6320 to 6340 do not include the sections of P.A. 33 of 1978 which allow a person to request of the prosecuting attorney an advisory opinion on whether dissemination of the matter would violate the act, or the provision permitting a person to bring a civil action for declaratory judgment [Section 722.680]. A favorable advisory opinion or declaratory judgment is a complete defense to a criminal prosecution for knowingly disseminating or exhibiting. [Section 722.682]. The civil action or advisory opinion is not a prerequisite to criminal prosecution however. [Section 722.682(1)]. The committee recommends that these sections [C.L.1970, Sections 722.679–722.682] be retained elsewhere in the Compiled Laws outside the Penal Code.

NOTE ON OTHER MICHIGAN STATUTES PERTAINING TO DISTRIBUTION OF OBSCENE MATTER TO MINORS:

Michigan also has two other statutes pertaining to dissemination of pornography to minors which were not expressly repealed by P.A. 33 of 1978. Section 142 of the Penal Code [Section 750.142] prohibits the distribution to a person under 18 years any printed material containing obscene language or descriptions "tending to corrupt the morals of youth", or devoted to criminal news, or to hire or for a parent or guardian to permit the employment or use of child to distribute such materials, a misdemeanor. The section appears not to meet the standards of *Miller*, but in any event P.A. 33 of 1978 covers the same subject matter of dissemination of obscene matter to minors.

Section 143 of the Penal Code prohibits the public exhibition of materials "tending to corrupt the morals of youth" or printed material devoted to criminal deeds etc., a misdemeanor. This provision would seem to be invalid under the doctrine of Butler v. Michigan, 352 U.S. 380, 77 S.Ct. 524, 1 L.Ed.2d 412 (1957), holding that former Penal Code Section 343 violated the due process clause of the 14th Amendment because it was not reasonably restricted to the evil aimed at; Michigan cannot reduce the adult population to reading only material fit for children in order to keep such material from children. *Id.* at 383–384.

The Committee recommends the repeal of present Sections 142 and 143.

6345. Definition of terms

Sec. 6345. The following definitions apply to Sections 6350 to 6360:

(a) "Matter" means any book, magazine, newspaper, or printed or written material on any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription, or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

(b) "Performance" means any place, motion picture, dance or other exhibition or presentation, whether pictured, animated or live, performed before an audience of one or more persons.

(c) Any matter or performance is obscene if:

(i) The average person, applying contemporary community standards, finds that the dominant theme of the matter or performance taken as a whole, appeals to the prurient interest in sex, and

(ii) the matter or performance depicts of describes in a patently offensive way, sexual conduct, and

(iii) the matter or performance, taken as a whole, lacks literary, artistic, political or scientific value.

(d) "Sexual conduct" means

(i) acts of actual sexual intercourse, or sodomy, or

(ii) exhibition of the uncovered genitals in the context of masturbation or other actual sexual activity, or

(iii) depiction of sado-masochistic abuse.

(e) "Sado-masochistic abuse" means flagellation or torture by or upon a person as an act of sexual stimulation or gratification.

(f) "Distribute" means to transfer possession of obscene matter for a consideration.

(g) "Knowingly" means knowing or having good reason to know the character of the matter or performance.

(h) "Owner" means any person who owns or has legal right to possession of any matter.

6350. Importation or distribution of obscene matter

Sec. 6350. (1) A person commits the crime of importation or distribution of obscene matter if he knowingly or intentionally does either of the following:

(a) Sends or brings into this state obscene matter for sale or distribution.

(b) Distributes or exhibits to another person obscene matter.

(2) Importation or distribution of obscene matter is a Class A misdemeanor.

6355. Exhibiting an obscene performance

Sec. 6355. (1) A person commits the crime of exhibiting an obscene performance if he knowingly or intentionally engages or participates in, manages, produces, sponsors, presents or exhibits any obscene performance.

(2) Exhibiting an obscene performance is a Class A misdemeanor.

6360. Defense

Sec. 6360. A person does not commit an offense under Section 6350 or 6355 if the matter was distributed or the performance was performed for legitimate scientific, medical, or educational purposes. The burden of injecting this issue is on the defendant, but this does not shift the burden of proof.

Committee Commentary to Sections 6345 to 6360

The language of Sections 6345 to 6360 is taken from the Indiana obscenity statute enacted in 1975. [I.C.1971, 35–30–10.1–1 to 35–30–10.1–4]. The sections continue substantially the coverage of present Michigan Penal Code provisions as authoritatively construed in People v. Newmayer, 405 Mich. 341, 275 N.W.2d 230 (1979).

The basic Michigan statutes prohibiting the distribution or possession with intent to distribute "obscene, lewd, lascivious, filthy, or indecent, sadistic, or masochistic" books, magazines, films, etc. are in Penal Code Sections 343a to 343d. [C.L.1970, Section 750.343 a-d]. Section 343a proscribes the knowing sale, transfer, distribution, showing, advertising or possession with intent to show, sell, etc. any lewd written, printed or recorded matter including motion pictures whether or not they require mechanical or other means to be transmitted. The offense is punishable by up to one year in jail and a fine of $1,000.00. Under that section, possession of six identical items is prima facie evidence of possession with intent to sell, show, transmit or transfer. Section 343b provides that lewdness shall be judged by its impact on "the average person in the community." Section 343c makes the jail and fine penalty of Section 343a applicable to one who publishes or distributes for commercial exploitation certain books etc. devoted to portraying illicit sex. Section 343d sets the same penalty for a distributor of written matter who requires his purchaser to accept obscene matter as a condition of sale or who threatens to deny a franchise or any other penalty if such matter is not accepted by the purchaser. The provisions do not cover obscene performances.

While there are no reported cases under the latter two provisions [Section 750.343c-d] the first two

sections, like the obscenity statutes of several other states, have been the subject of considerable recent litigation.

In People v. Bloss, 394 Mich. 79, 228 N.W.2d 384 (1975), the Michigan Supreme Court found Penal Code Section 343a valid and enforceable as to unconsenting adults, but said, "We are divided as to whether such statutes can properly be construed by us without further legislative expression as proscribing the dissemination of 'obscene' material to consenting adults. See Const. 1963, Art. I, Section 5." The 1975 *Bloss* opinion was on remand from the United States Supreme Court [Michigan v. Bloss, 413 U.S. 909, 37 L.Ed.2d 1021, 93 S.Ct. 3060 (1973)] with direction of further consideration in the light of Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973) and other cases decided that term. In People v. Llewellyn, 401 Mich. 314, 322, 257 N.W.2d 902 (1977) the court again urged the legislature to revise the obscenity statute to conform to the constitutional requirements set forth in *Miller*. [*Llewellyn* held, in view of comprehensive state statutes on obscenity (*i. e.* Sections 750.343a-d)] that local anti-obscenity ordinances (but not zoning ordinances) are preempted.]

In the absence of any successful legislative effort to codify the *Miller* requirements in a new obscenity statute, finally in 1979, the court in *Newmayer, supra*, "Miller-ized" the basic obscenity statute [Section 343a] by construing it to conform to the minimum standards of *Miller*. Noting that obscenity, as defined in *Miller*, is also not protected speech under the Michigan Constitutional provision [Const.1963, Art. I, Section 5], the court incorporated into the Michigan statute the *Miller* definitions of what is obscene:

> "(a) Patently offensive representations or descriptions of ultimate sex acts, normal or perverted, actual or simulated; (b) patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."

The court also specifically adopted the tripartite test of *Miller* as a standard for determining what is obscene, in replacement for the test set forth in Penal Code Section 343b.

Sections 6345 to 6360 which prohibit the knowing exhibiting or distributing of obscene matter [Section 6350] or producing, exhibiting, or participating in obscene performances [Section 6355] codify the *Miller* standards. Section 6345(c) through the definition of what is "obscene" restates the tripartite test of *Miller* and the definition of "sexual conduct" [Section 6345(d)] heeds the requirement of *Miller* "that conduct must be specifically defined by the applicable state law, as written or authoritatively construed." (at p. 24). The *mens rea* is the same as under present Penal Code Section 343a. The offense must be done "knowingly" defined in Section 6345(f) to mean either knowing or having good reason to know the character of the matter or performance. Section 6355 expands Michigan law by including obscene theatrical or other performances. [See definition of performance, Section 6345(b)]. By virtue of Section 6360, the burden of injecting the issue of exceptions from liability for matters or performances of scientific, literary, etc. value is on the defendant, but this does not shift the burden of proof. The Class A misdemeanor penalty both for importing or distributing obscene matter [Section 6350] and for exhibiting an obscene performance [Section 6355] is the same as present law.

Section 6365 preempting local regulation of obscenity is consistent with the holding of *Llewellyn, supra*.

Sections 6345 to 6360 do not continue the language of Penal Code Sections 343c and 343d. A violation of present Section 343d would necessarily include an offer to distribute obscene matter and would therefore be a violation of Draft Section 6350. Section 343c was not duplicated since Section 6350 provides substantial coverage of the problem.

NOTE ON OTHER MICHIGAN STATUTES

MATERIALS PORTRAYING ACTS OF VIOLENCE

No attempt has been made to duplicate present Section 38 [C.L.1970, Section 750.38] as it applies to depictions of acts of violence. The same is true of several other present provisions prohibiting the dissemination of material primarily devoted to the portrayal of crime or violence. C.L.1970, Section 750.41 prohibits distribution of books etc. made up of criminal news, stories of bloodshed, lust, crime and the like, or use of minors to distribute them, a misdemeanor. C.L.1970, Section 750.344 is identical in language, but omits the portion dealing with using minors. C.L.1970, Section 750.345 repeats in almost identical language the last part of Section 41 prohibiting use of minors to sell, etc. such materials. A New York statute prohibiting news of crimes, lust, etc. in essentially the same language was declared unconstitutional in Winters v. New York, 333 U.S. 507, 68 S.Ct. 665, 92 L.Ed. 840 (1947). There are no reported cases under the three statutes; and the Committee recommends their repeal. The provision on obtaining search warrants for indecent books [C.L.1970, Section 750.346], if retained in any form, should be moved to the Code of Criminal Procedure.

RESTRICTIONS ON ADVERTISEMENTS

In addition to Penal Code Section 38, Michigan has several other provisions dealing with public displays or advertising. C.L.1970, Section 750.34 makes it a misdemeanor, punishable by up to one year's imprisonment to advertise the healing or cure of venereal disease, specialization in healing sex organs, restoration of "lost manhood" and the like. One who publishes such matter is likewise guilty of a misdemeanor. C.L.1970, Section 750.35. [A prima facie evidence section and limitation on liability section applies to Sections 34 and 35 (see Sections 750.36 and 750.37)]. It is a misdemeanor to advertise, etc. medicines "in language of immoral tendency" [C.L. 1970, Section 750.39]. C.L.1970, Section 750.40 prohibits the publication of any book containing "prescriptions in indecent language for the cure of chronic female complaints or private diseases", and C. L.1970, Section 750.42 prohibits use of a name of an ex-president in an advertisement for intoxicating liquors. The Committee found no need to repeat these provisions and suggests that they be repealed.

EXHIBITION OF HUMAN BODIES IN MUSEUMS

The Committee also recommends the repeal of C.L.1970, Section 750.347 which prohibits the exhibition in museums of deformed human bodies or representations which would be indecent were the person living.

6365. Preemption by state

Sec. 6365. A political subdivision of this state shall not adopt or enforce a local law, charter, ordinance, resolution, rule, or portion thereof, which imposes a civil or criminal penalty for offenses defined in this chapter. A political subdivision shall not interpret nor apply a law of general application to circumvent this section.

Committee Commentary

Section 6365 preempts local law in matters covered by Chapter 63. Present Michigan law [C.L.1970, Section 750.145c(5)] preempts local law in the area of use of children in producing pornography and distribution of such materials. [See Sections 6301 to 6315]. Section 6365 replaces that statute. In the area of adult pornography, preemption of local law is a matter of case law. *Llewellyn, supra.* Section 6365 continues this preemption as applied to the adult pornography provisions of the Draft, Sections 6345 to 6360.

Section 6365 also applies to Sections 6320 to 6340 which restates portions of the present Michigan statute [C.L.1970, Sections 722.671–.678] on distribution of pornography to minors. That statute did not continue a section preempting local law, but the committee felt that preemption by the state is equally appropriate in this area in the interest of uniformity.

Section 6365 relates only to offenses in this chapter. It does not preempt or preclude local zoning ordinances such as those governing the location of "adult entertainment" establishments. See *Llewellyn, supra,* at 330–331.

OFFENSES AGAINST THE FAMILY

CHAPTER 70

OFFENSES AGAINST THE FAMILY

Section

7001. Bigamy

Sec. 7001. (1) A person commits the crime of bigamy if he intentionally contracts or purports to contract a marriage with another person at a time when he has a living spouse.

(2) A person does not commit a crime under this section if he reasonably believes that he is legally eligible to marry. The burden of injecting the issue is on the defendant but this does not shift the burden of proof.

(3) Bigamy is a Class D felony.

Committee Commentary

The section is adapted from New York Revised Penal Law Sections 255.15 and 255.20.

What is denominated bigamy in most jurisdictions is called polygamy under the Michigan statute [C.L. 1970, Section 750.439]; the definition is the same as the standard definition elsewhere. Two acts are prohibited. One is entering into a second marriage relationship; it is no defense that the second marriage is legally void, because every bigamous marriage is void [People v. Brown, 34 Mich. 339 (1876)]. Either of the marriages may be a common-law marriage if valid under the law of the place where it came into being [People v. Lewis, 221 Mich. 164, 190 N.W. 702 (1922)], and the state must prove both marriages, whatever their legal form. [People v. Sokol, 226 Mich. 267, 197 N.W. 569 (1924)]. The second prohibited act is cohabitation in Michigan following a bigamous marriage outside the state. To convict under that portion of the statute, it must be

MICHIGAN

SECOND REVISED CRIMINAL CODE

Final Draft—June 1979

Special Committee of the Michigan State Bar for the

Revision of the Criminal Code

Distributed as a Public Service

COMMITTEE FOREWORD

The 1979 Proposed Criminal Code represents the culmination of nearly three years of study by a Special Committee of the State Bar of Michigan for the Revision of the Criminal Code.

Previously, another state bar committee prepared a revision of the Criminal Code that was passed by the Michigan House of Representatives in 1972. The present code brings the prior proposed Code up to date. All revisions of the criminal laws made by the Legislature in the past few years and major revisions of criminal codes made by 18 other states since that time were considered. With this Code, Michigan joins at least 25 other states that have undertaken a comprehensive revision of their states' penal code.

It should be noted first of all that the 1972 Code, passed by the House, became a model for many of the revised criminal codes adopted in the 1970's in other states. Working on the 1967 Code, the present Committee considered a substantial number of other state's codes. The Committee considered recently adopted codes of Georgia, Oregon and New Hampshire, and the Model Penal Code upon which is based the Pennsylvania Criminal Code. In addition, revised criminal codes of New York, California, Maine, Illinois, Minnesota, Wisconsin, and Indiana, were considered. Federal statutes influenced, among others, the general definition in the chapter on offenses against privacy and some provisions were even patterned after the English Criminal Justice Act. Other state's laws were considered but not utilized. For example, the Texas Criminal Code provisions on escape were debated thoroughly but rejected.

This Code therefore not only brings up to date the 1972 product passed by the Michigan House of Representatives, but in bringing it up to date considers recent revisions of Codes throughout the United States and also recent acts of the Michigan Legislature dealing with criminal activity.

This Code has reduced the criminal law from approximately 3500 sections to roughly 350 sections. It has consolidated criminal provisions throughout the law and has made a topical arrangement of basic provisions as opposed to the present alphabetical listing.

Michigan has not had a complete revision of its criminal laws since 1857, and this product represents literally thousands of hours of work by a dedicated committee, made up of judges, defense lawyers, prosecuting attorneys, police officials, corrections officials, and other persons

with a deep concern for the criminal law process. A list of the Committee is attached. The Committee met regularly at least every month for the past two and one-half years and at least 34 full days were spent by committee members in debating the provisions of the Code.

Not a single chapter of the proposed Code was considered and adopted by the Committee at a single meeting. Instead, the initial draft of every chapter was mailed to committee members in advance of the meeting at which it was first considered. After initial consideration, the draft was, in all instances, returned to the Committee's reporter. Sometime later, usually a few months later, the revised draft was again submitted to the Committee members, again by mailing. Some chapters were then approved at the second meeting. Most chapters underwent additional revision and referred back to the reporter. Only after the third meeting, and sometime the fourth, were those chapters forwarded to the State Bar Commissioners for their approval. Finally, the Committee met over three days in March and April of 1979 to reconsider every item approved by it if requested by a member.

All drafts were approved by Commissioners of the State Bar of Michigan and were forwarded to the Legislature for inclusion in House Bill 4842.

One of the most pressing difficulties of the present criminal laws are their failure to cope with the problems presented by recent social and economic changes. This Code has paid special attention to these matters and has filled gaps in present coverage resulting from the development of new commercial devices like the credit card and the temporary leasing of items.

The Code has simplified the criminal law and reworded the entire criminal law in language easily understood by everyone. One example of the simplification of the law is the 1979 code revision of theft laws. The five degrees of theft replace the following fifteen larceny offenses: larceny over $100 and larceny under $100, larceny in a building, larceny over $5 from a motor vehicle and larceny under $5 from a motor vehicle, larceny by trick over $100 and larceny by trick under $100, larceny by conversion over $100 and larceny by conversion under $100, embezzlement under $100 and embezzlement over $100, obtaining money under false pretenses over $100 and obtaining money by false pretenses under $100, welfare fraud over $500 and welfare fraud under $500.

One of the most significant portions of the new code is the complete revision of sentencing provisions. First of all, all felonies are divided into five categories, Class A to Class E, and all misdemeanors are graded into four categories, A through D. For the most serious felonies, Class A and Class B felonies, a standard sentencing structure is established. Under this structure, for a Class A felony, a standard

sentence of six years with good time at five days per month and no accelerated good time is established. Upon the showing of mitigating or aggravating circumstances, the sentence for a Class A felony may be raised by the sentencing judge to 20 years or lowered to 2 years. For a Class B felony, the standard sentence is 4 years which can be aggravated to 15 years or mitigated to 18 months. Thus, for the most serious felonies, no probation will be allowed, and even under the most compelling mitigating circumstances, a person would have to serve 2 years for a Class A felony and 18 months for a Class B felony. First degree murder remains mandatory life and second degree murder and attempted murder may be aggravated to mandatory life without parole upon a proper showing of aggravating circumstances. Class C, D and E felonies remain indeterminate, with Class C carrying a maximum of 10 years, Class D 5 years and Class E 2 years. Class A misdemeanors carry one year, Class B misdemeanors 6 months, Class C misdemeanors 90 days and Class D misdemeanors 30 days.

Appellate review of sentencing is also established. This would allow either the prosecutor or the defendant to appeal to a panel of the Court of Appeals, made up of Circuit or Recorder's Court Judges, who would have the power to increase or decrease, or to affirm the determination of the trial judge.

All crimes are categorized according to their nature and their seriousness. Modern definitions and simple modern language is used.

The fine structure is drastically revised. Fines of up to $100,000 may be imposed upon corporations for the most serious offenses and $10,000 upon individuals. In addition, if a person has benefit from crime, he may be fined twice the amount of the benefit received from the crime.

Special thanks and credit should be given to the Committee Reporter, Sharon M. Brown, who prepared drafts, revised all drafts in accordance with Committee determination, and wrote the Commentary for the Code. Without her thorough, careful and thoughtful attention to detail, and her hours of dedicated service, this Code would not have been possible.

An undertaking of this magnitude has been an expensive one. The Committee's gratitude to the Commissioners of the [illegible] Michigan and the Law Enforcement Assistance Administ[illegible] be inadequately expressed. Through their financial sup[illegible] ing of this Code has been possible.

We are also deeply grateful to the West Publishin[illegible] publishing and distributing this final draft with Comm[illegible]

COMMITTEE FOREWORD

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