Immediately following the above reference to sex deviates, the writer seeks to refashion the law's perspective on these perpetrators and empathetically recommends recognition of these sex offenders as "minorities:"

> More than anything else, [reform must come from] more understanding and tolerance of all of the diverse minorities that make up our society.[11]

**Kinsey Reports Authority for Missouri "Sex Offenses"**

Pre-1950, the only lawful sexual congress between the sexes was heterosexual coitus in marriage. As a protection for marriage, all other sexual contacts were illegal, but significant penal revisions in existing Missouri common law (based on the principles of the Old and New Testaments) were changed based on other authorities. Judge Richardson, in his 26-page section on Sex Offenses in the *Missouri Law Review*, gives a glimpse of his new authority: Of 75 footnotes, Judge Richardson cites directly to The Kinsey Reports 14 times, roughly 20% of his overall authorities. Dr. Judith Reisman reviewed the collection of additional authorities cited in Judge Richardson's sex offense section and estimated that roughly 90 per cent of the sex science citations are to Kinsey or Kinsey disciples.

In addition, a preliminary review of the 29 citations to law reviews in Richardson's article found that over 50% of these law reviews also relied on Kinsey. In fact, as with Richardson, these law reviews repeated the same phrases, numbers and claims from the Kinsey Reports now discredited data. The direct quotes appear below. All Kinsey data cited to are false.

1. [T]he good people...speaking through their legislatures, are as yet unwilling to grant sexual liberties to their neighbors which, at least according to Dr. Kinsey, they allow themselves.[12]

2. But neither our criminal laws nor our publicly-voiced moral codes as to impermissible conduct are obeyed by a substantial segment of society. Kinsey reported in 1948 as to males and in 1953 as to females that about one-half of all married males and about one-quarter of all married females commit at least one adulterous act, and one out of every six females who did not do so at least wanted to or considered.[13]

3. There is a high incidence of premarital sex (fornication) in the United States, even though it is prohibited, at least when indulged in "openly and notoriously," in all but about 10 states including Missouri [cite omitted here]. "The president of a mid-western university recently remarked that three things are essential for a happy and alert university: parking for the faculty, athletics for the alumni, and most important, sex for the students"[cite omitted here]. It is estimated that there are about 2,600,000 men and 1,400,000 women who are exclusively homosexual in the United States [cite omitted here]. This means that almost everyone in the United States could at one time or another during his life have been convicted of a felony for a sexual offense or, at least, that everyone has violated his avowed moral code. "Not one in a million such episodes is likely to be

[11] *Id.*, 373.
[12] *Id.*, 371, citing G. Mueller, Legal Regulations of Sexual Conduct 16 (1961)
[13] *Id.*, 375, at fn 8, citing A. Kinsey, W. Pomeroy & C. Martin, Sexual Behavior in the Human Male 585 (1948)

discovered, none in a hundred million prosecuted.[cite omitted here—see Kinsey's Male Volume, pp. 391-392.].[14]

4. Much of any code of sexual offenses is an "inevitable fusion of secular law and religious belief." [citing Gebhard, Kinsey's associate].[15]

5. [M]ales far outnumber females in the commission of crime. Sexual offenses committed by females are so rare that the studies of the Kinsey Institute excluded them.[16]

6. Puberty in the female is that age at which she is capable of bearing children. The majority of children under 12 are prepubescent; they have "not developed pubic, hair, breast enlargement and other adult sexual characteristics that are sexually attractive to ordinary men."[17]

7. [F]ew adult male homosexuals seem particularly interested in boys under 12; rather, they seek only adolescent or young adult males.[18]

8. Many studies have been made on the increasing numbers of teenagers who have had consensual heterosexual or homosexual experiences.[19]

9. Kinsey's earlier studies may now be outdated. Even then he found that of girls born in the 1920's, 30 percent had petted to orgasm in their teens.[20]

10. Other studies, including those of Kinsey, indicate that many young people have one or more homosexual experiences in their teens; those experiences are generally purely experimental and do not persist in adulthood.[21]

11. The story is told of a man who met a good-looking girl given to heavy cosmetics, high heels, tight dresses, provocative mannerisms, and a propensity for drink and sexual banter. The anticipated sequence of events occurred. When he next saw her on the "witness stand in court, they had braided her hair in pigtails and given her a rag doll to hold."[22]

12. The Kinsey Institute found it necessary and appropriate to classify sex offenders by types. One of the variables was the age of the victim. Another was whether force had been used. Obviously, the younger the child the more difficult it is to say whether force was used.[23] [this amazing claim has been used to substantially undermine protections to small children and punishment for their abusers]

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[14] *Id.*, 375, fn 8, citing directly to Kinsey's "Male" and "Female" volume, and citing to secondary sources which themselves cite Kinsey (Time, Oct. 31, 1969 at 56; Rodell, Our Unlovable Sex Laws, Trans-Action, May 1965, at 36).
[15] *Id.*, fn 11, citing P. Gebhard, J. Gagnon, W. Pomeroy & C. Christenson, Sex Offenders 3 (1965)
[16] *Id.* at379, fn 23, citing Gebhard.
[17] *Id.* at 382, fn 31, citing Gebhard.
[18] *Id.*, fn 32, citing Gebhard.
[19] *Id.*, fn 33, citing Kinsey.
[20] *Id.*
[21] *Id.*
[22] *Id.*, fn 34, citing Gebhard.
[23] *Id.* at 383, fn35, citing Gebhard.

13. The Kinsey Institute did not attempt to study sex offenders under 16 years of age...the human female is equally ready for adulthood at age 16.[24]

14. Little agreement exists among legal and psychiatric experts as to what may properly be regarded as sex offenses or as to what punishment sex offenders should face.[25]

In the 1973 article, Judge Richardson made many legal and social references to psychiatrist Benjamin Karpman's work providing additional evidence that those who are not "sex scientists" rely almost exclusively upon Kinsey's data for their statistical claims of what is normal sexual conduct. Karpman cited Kinsey at least 33 times compared to Freud's 9 citations. Karpman, a Freudian psychiatrist, also citied Freud's discredited "Oedipus complex" as evidence of the need to relax Missouri highly protective sex laws. Karpman also refers to ALI-MPC authors/advisors Ploscowe, Tappan, Guttmacher, (and others) all fully supportive of the Kinsey Reports claims of what constitutes normal human sexuality.[26]

## Rape

Based on the guidance of the MPC, crime is graded by "age" and "use of force." The Missouri Committee redefined the "principal sex offenses (rape, sodomy, sexual abuse, and indecent exposure) as eleven separate crimes in the new criminal code for the "purpose of grading the punishment"[27] according to the use of forcible compulsion, the capacity or incapacity of the victim to consent, the age of the victim, and the age of the actor.[28] As in the concern expressed earlier by Judge Richardson for using "emotionally charged" words like "minorities" and "rapists," the Missouri Committee weaves a complex pattern of change accomplished by recasting established understanding of criminal conduct, aided with the use of new scientific terminology to justify the significant changes in sex offenses.

The focus of this and the next section is rape and child abuse. The 1949 rape statute at common law, held that convicted rapists in Missouri could receive death or imprisonment for not less than two years at the discretion of the jury. The following 1949 rape law provides an example of the simplicity of the common law:

> Every person who shall be convicted of rape, either by carnally and unlawfully knowing any female child under the age of 16 years, or by forcibly ravishing any woman of 16 years or upward, shall suffer death, or be punished by imprisonment in the penitentiary for not less than two years, in the discretion of the jury.[29]

The fact that the Kinsey Reports found not one real rape in the 4,441 interviews with women for the *Female* Report began to have legislative significance through the ALI-MPC and state penal code revisions like Missouri's. According to the Kinsey Reports, rape was only a

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[24] *Id.* at 384, fn39, citing Gebhard.
[25] *Id.* at 391, fn 68, citing Gebhard.
[26] Karpman, B. 1954. *The Sexual Offender and His Offenses*. New York: TheJulian Press, Inc.
[27] *Id.*, 377, 392.
[28] *Id.*
[29] Missouri Revised Statutes, 559.260, 1949.

problem if ***excessive*** force was used. Following the MPC's reliance on the Kinsey Reports and the Missouri Committee's reliance on the MPC, the Missouri "revisers" refashioned rape into "forcible compulsion." In Addenda IIis the preliminary draft presenting the classification for the new terms for rape based on the victim's age.

The logic in devaluing rape by rewording and penalty reduction, begins with the Kinsey Reports' flawed "scientific" findings on what is "normal" sexuality:

- The Reports claimed to find that Americans were sexually active prior to marriage and that 50 percent of American women in 1940-50s were not virgins when they married. (Illegitimacy rates, venereal disease rates, etc., from this period do not support this claim.)
- Laws prohibiting fornication were considered archaic because the Kinsey Reports' findings deemed it common and normal and eventually it became legitimate and legal.
- If women were giving away their virginity prior to marriage as the Kinsey Reports claimed, then they no longer required the protections of stringent rape laws and penalties.
- Amid the high levels of fornication reported by the Kinsey Reports, whether the woman had consented, or was raped becomes harder to determine unless she resisted and the evidence of beating is sufficient to see bodily damage or she is dead.
- Rape is downgraded to first-degree sexual assault when the victim cannot <u>demonstrate</u> "forcible compulsion" by specific injuries.[30] "The Code reserves that term [rape] for the most heinous sexual offender."[31]

"Missouri law extends, by a separate statutory rape statute, the period of protection an additional two years for young women of previously chaste character. Being of "previously chaste character" means simply that the young woman was a virgin prior to the act charged...If the state establishes that the young woman was of "previously chaste character," the same protection given a female under the age sixteen is applicable--i.e., both the consent of the prosecutrix and the use of force are immaterial."

> Admissibility of Character Evidence in Rape Prosecutions in Missouri.
> Missouri Law Review, vol. 41, 1976, p. 512.

Lesser degrees of the once sure, swift and absolute rape law and penalties were relegated to second-degree assault, statutory rape, or child molestation. Employing the new "assault" terms, explain the Missouri "revisers" were out of concern for the reputation of the rapist.

> The label "rapist" is a damaging one and should not be used in the statutory <u>non-consent</u> cases, e.g. where a fully consenting, and often fully developed and promiscuous social companion is involved.[32]

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[30] Section 559.040 Sexual Assault in the First Degree. Missouri Revised Statutes, 1978.
[31] Section 566.040 Sexual Assault. Comment to 1973 Proposed Code. Vernon's Annotated Missouri Statutes, 2000, 332..

The modern "revisers" define their "non-consent" cases e.g., their "fully consenting" and "fully developed" example of a "promiscuous social companion" as a 12 or 13-year old child. Parroting the Kinsey data they explain that the Committee:

> selected under age 12 as the critical age for the heaviest penalties for rape, sodomy, and sexual abuse in the first degree for a number of reasons...Usually the child who has reached puberty is more sexually and emotionally mature, more wise in the ways of the world, and more physically capable of resisting sexual advances. The chances of persisting psychological or physical harm from the assault are considerably reduced. A substantial number of these young people have had sexual experience of one kind or another. (Cited to Kinsey's Male and Female Volumes) [33]

Relying on the fraudulent Kinsey data, Richardson urged Missouri law to place the burden on the victim to prove use of force, assigning degrees of wrong based on age. As in the Model Penal Code, the age of consent could be seen by some to be age 10. By using the process of compromise, the Missouri Committee was able to move the age of consent to under age 14; and grading any sex offense as serious required the victim be under 12 years old. Rape of a girl 14 or older by an offender under 21 was redefined, as in the Kinsey canon, as a kind of peer sex play, less traumatic for the child victim than rape by an adult. Under the reformed Missouri law, there is no criminal restriction on young adults between the ages of 14 and 20.

The law recognizes an adolescent's immaturity in making decisions about where they will live, whether they will go to school, and their health needs; but no protections at law are afforded for these adolescents who are vulnerable to physical and emotional disease and dysfunction that result from early sexual exposure. Those protections were removed based on Kinseyan fraud that distorted normal sexual need and practice. The Kinsey Reports deny that children need this essential protection:

Dr. Judith Reisman revealed in 1981 that the child data in the Kinsey Reports is drawn from pedophile experiences with young boys, some as young as 2 months of age.[34] Upon these data, the Kinsey Reports claimed to find that "normal" children are venereal beings from birth with sexual capacities and desires. These highly irregular, illegal and unscientific data were relied upon by the Missouri authors, who cite directly to Kinsey's second volume as their authority, to blame their 12-year-old victim for not properly "resisting" her or his predator.

The reinvented term used to spare the reputation of the predator is that of "actor." Indeed, a preliminary review of the terms used in the Symposium report finds "actor" (meaning only one who plays a part) to be regularly substituted for predator, offender, criminal or any other objectively pejorative term identifying the crimes one has committed.

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[32] Section 566.040 Sexual assault. Comment to 1973 Proposed Code. Vernon's Annotated Missouri Statutes, 2000.

[33] Richardson, *supra.*, p. 381-382.

[34] Kinsey, Pomeroy, Martin, 1948. *Sexual Behavior in the Human Male.* Table 34, p. 180.

## Child Sexual Abuse: Missouri's Lost Legacy, The Protection of Minors

Prior to the criminal code reform adopted in 1979, Missouri laws provided the potential for harsh penalties for those preying on women or children. For example, a minor was still regarded as any person under the age of 21 years (State v. Chapple, 462 S.W.2d. 707 (Mo. 1971). The Appendix A to the Symposium, "A Historical Review of Missouri Laws," included the following citation by symposium author Judge Orville Richardson regarding Missouri "minors," Pre-Kinsey and pre-ALI-MPC law indicates Missouri's vigilant protection for minors, the weaker and more vulnerable of the state.

> **K. Molesting Minor With Immoral Intent:** § 563.160. RSMo 1969, enacted in 1949, provides for imprisonment in the penitentiary for a term of not more than 5 years, or a jail sentence of not over one year, or fine of $500, or both for
>
> > [a]ny person who in the presence of any minor shall indulge in any degrading, lewd, immoral or vicious habits or practices; or who shall take indecent or improper liberties with such minor; or who shall publicly expose his or her person to such minor in an obscene or indecent manner; or who shall by language, sign or touching such minor suggest or refer to any immoral, lewd, lascivious or indecent act or who shall detain or divert such minor with intent to perpetrate any of the aforesaid acts. . . .
> >
> > Intent is not an essential element of the crime and consent is not a defense. A "minor" is any person under the age of 21 years. Because the statute proscribes all types of sexual offenses including rape, sodomy, touching, indecent exposure, and even mere mention of sexual intercourse, **the true "age of consent" in Missouri is 21 years.** ***(Emphasis added).***[35]

As would be expected from a cadre of state leaders crafting sex laws not based on a normal model, but a sexually deviant model, the Symposium writers continued to show decreasing regard at law for the plight of child victims, (miscast as sexual beings according to the Kinsey Reports), and sympathy for their abusers having been seduced by the child's "normal" desires.

> Sexual intercourse with incapacitated persons and those 12 or 13 years of age should not carry as severe a penalty [as forcible acts and those against children under 12], especially where mistake as to age is no defense and the victim may have not only consented but deliberately solicited the sexual act.[36]

As is evident from the consenting age of 21 in 1949, Missouri law sought to safeguard children against any irresponsible sexual exposure. Thirty years passed before Missouri

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[35] Richardson, O. 1973. Sexual offenses under the proposed Missouri Criminal Code. *Missouri Law Review, 38*(3) Columbia: University of Missouri Law School, p. 397.
[36] *Id.*

jurists and then lawmakers finally accepted the Kinsey Reports, through the ALI-MPC, as the latest in objective sex science. Missouri law today carries the assumption that children are sexual from birth and entitled to unfettered sexual expression early in life, and predators are not to be held to such "obsolete, vague, deficient," standards for doing what the Kinsey Reports says is normal.

Pre-1950 Missouri law held that those who talked about or displayed sexual materials to children as taking "indecent" and "improper liberties...degrading [by] immoral or vicious habits...practices...such a minor." Were this standard still upheld in Missouri, pornography and modern sex education would be wholly illegal under the pre 1973 laws. *Playboy* magazine first published in December 1953, would also be illegal to disseminate in any college near a "minor" under age 21. It is clear that such laws would threaten the existence of the burgeoning sex industry today.

**Changes in Age of Consent.**

Prior to 1970, before Missouri's revised criminal code, *a child's consent to sex could not be obtained "under the age of 16."* This allowed judges the leeway based on the evidence presented to determine that in some cases a 16-year-old might have given consent in a "Romeo and Juliet" kind of scenario. In other less poetic circumstances, Lotharios were deterred by the threat of the potential penalty of death--or imprisonment for not less than two years--for sex with someone under age 16.[37]

The Kinsey-based ALI-MPC guided Missouri to reduce the age of consent to 14, ranking rape (new definition being forcible compulsion) as a Class B felony (Maximum imprisonment exceeds 10 years and is less than 20). So rape of a 14-year-old became a class A felony (20 years to life) only when "serious physical injury" was inflicted or a deadly weapon was displayed in a "threatening manner."[38] Adult sex with a 14-year-old was re-named "sexual assault in the first degree" instead of "rape." In keeping with Kinsey's alleged "findings of the harmlessness of adult sex with children" this was ranked as a lesser class C felony (maximum imprisonment 10 years).

Note that although a child under 14 could not legally consent to sex, her age is the criteria for "grading" her responsibility and lessening the seriousness of the violation based on the justice professional's view that by age 12 one is worldly wise. For example, a Class A misdemeanor, sexual abuse in the second degree (MO Rev. Stat. 566.110, 1986) applies to a predator who "subjects another person to whom he is not married to sexual contact, when the other person (child) is incapacitated or twelve or thirteen years old."

Redefining a sex crime or reducing a penalty based on the victim's age was justified by the Kinsey Report's construct of 'juvenile sexual entitlement.' *The burden of proof of harm was now placed on the victim to prove she or he did not "consent."* This concept of "consent," unknown in the common law for criminal behaviors, (addressed more extensively in the first section) is setting alarming precedents. A victim's burden of proof could extend to his/her

[37] Section 559.260 Rape, punishment. Missouri Revised Statutes, 1949.
[38] Section 566.030 Rape. Missouri Revised Statutes, 1978.

death resulting from "rough sex." In the "rough sex" defense, the "actor" (rapist-murder) under the new code says the "complainant" (victim) consented to the "rough sex" and died in the act. The victim, now dead, cannot defend and the rapist-murderer potentially can avoid receiving a conviction or penalty for murder.

This happened in Missouri. According to the *St. Louis Post Dispatch,* Dennis Bulloch was tried for first-degree murder in June 1987 insisting that his wife had died accidentally during a game of sexual bondage. Her nude body was found in the smoldering ruins of her home, gagged and bound to a chair with more than 76 feet of tape. Bulloch said he had been drunk at the time and must have passed out when his wife died. He said he had later set fire to the house and to his dead wife, to disguise the nature of her death. The state asked for the death penalty. It would seem that the claim of "rough sex" and a claim of drunkenness got Bulloch convicted of involuntary manslaughter. He received a seven-year prison sentence for his part in the "game" but Julia Miller Bulloch lost her life and received no justice.[39]

## Kinsey Influences Laws pre-empted by Supreme Court

Of the 52 laws targeted for change by Ernst and Loth in 1948, each and every one that was current on Missouri books was indeed changed by the criminal code revision. Laws such as "impairing morals, "nudist camps," and "obscenity" had already been altered by Supreme Court decisions.

Although our pilot study has been limited in scope, the criminal code revisions have had a ripple effect on criminal and civil procedures. As an author of a 1980 *University of Missouri Kansas City Law Review* article points out regarding the entire criminal justice system:

> Although the code is largely substantive in nature, it touches so intimately on procedural aspects that it warrants this initial recognition. In addition, its adoption spawned subsidiary changes such as the new Missouri Approved Instructions in criminal cases and Missouri Approved Charges, Criminal. Preliminary mention also should be made that the Supreme Court of Missouri ordered a large-scale revision of its rules pertaining to criminal matters.[40]

## Missouri Criminal Penalties

For the year 1979 when the MPC took effect (confirming dates):

- Class A felony- life imprisonment or twenty years or more
- Class B felony - maximum imprisonment exceeds ten years but is less than twenty
- Class C felony - if the maximum imprisonment is ten years
- Class D felony -if the maximum imprisonment is less than ten years;
- Class A misdemeanor - if imprisonment exceeds six months in jail; fine not to exceed one thousand dollars

[39] Mary E. Chollet, "3 Bulloch Charges Are Upheld By Judge," *St. Louis Post Dispatch,* April 12, 1988.
[40] Popper, R. 1980. Recent developments in Missouri: Criminal Law (The Sixth Amendment). *UMKC Law Review, 48*(4). Kansas City: UMKC Law School, 602.

- Class B misdemeanor - - if imprisonment exceeds thirty days but is not more than six months; fine not to exceed five hundred dollars
- Class C misdemeanor - if imprisonment is thirty days or less; fine not to exceed three hundred dollars.

## Conclusion: Missouri's Women & Children Today

Contrary to the Symposium's summary remarks that "the Proposed Code would make no essential change in most respects in the present Missouri law of sexual offenses,"[41] the new Code indeed made "substantive changes" in most laws on Missouri Sexual Offenses. In fact, the new code is unrecognizable as a successor to Missouri's pre-Kinsey child protection statutes. The 2000 edition of *Vernon's Annotated Missouri Statutes* includes "Comment to 1973 Proposed Code" in each subsection. Chapter 566 Sex Offenses cites the ALI Model Penal Code in virtually every comment pertaining to the sex crimes reviewed, thus directly connecting the Kinsey Reports--in which the ALI Code was grounded--to most current Missouri laws on sexual matters. These facts regarding the scientific fraud that undergird the Missouri Criminal Code related to Sexual Offenses need to be brought to the attention of state leaders and legislators invested with the authority to redress the use of Kinsey's fraudulent scientific "data" in reducing or eliminating protections and remedies at law for Missouri women and children.

[41] Richardson, *supra.*, p. 392.

# Missouri Rape Laws: A Comparative Analysis

**1949–1986–2000**

| 1949 Missouri Revised Statute | 1986 Missouri Revised Statute | 2000 Missouri Revised Statute |
|---|---|---|
| **Rape. 559.260.** "Every person who shall be convicted of rape, either by carnally and unlawfully knowing any female **under the age of sixteen years**, or by forcibly ravishing any woman of the age of sixteen years or upward, shall suffer death, or be punished by imprisonment in the penitentiary for not less than two years, in the discretion of the jury."<br>**559.300 Carnal knowledge of female between ages of 16 and 18.** "If any person over the age of 17 years shall have carnal knowledge of any unmarried female of previously chaste character, between the age of 16 and 18 years of age, he shall be deemed guilty of a felony. Penalty: Imprisonment in the penitentiary for a term of two years, or in the county jail 1 to 6 months, or a fine of not less than $100, or more than $500, or both in the discretion of the jury. | **Rape 566.030** "A person commits the crime of forcible rape if: (1)He has sexual intercourse with another person to whom he is not married, without that person's consent by the use of forcible compulsion; or (2)he has sexual intercourse with another person to whom he is not married **who is less than 14 years old.** Rape is a Class B felony.<br>**Sexual assault in the first degree. 566.040**<br>". . .sexual intercourse with another person to whom he is not married and who is incapacitated or who is **14 or 15 years old.** Sexual assault in the first degree is a class C felony.<br>**Sexual Assault in the second degree 566.050.** sexual intercourse with a 16 ear old. (Class D Felony)<br>**Sexual misconduct 555.090.** "Being less than 17, having intercourse with a 14 or 15 year old; (Class A misdemeanor).<br>**Sexual abuse in the first degree 566.100.** . . subjects another person who is less than 12 years old to sexual contact, or contact by forcible compulsion (Class D felony unless actor inflicts serious physical harm or displays a deadly weapon—then a Class C felony).<br><br>**Sexual abuse in the second degree 566.110.** Subjects another person who is 12 or 13 years old to sexual contact (Class A misdemeanor).<br><br>**Sexual abuse in the 3rd degree 566.120** Subjects another person to sexual contact without that person's consent. (Class B misdemeanor) | **Rape 566.030.** Sexual intercourse with another person by the use of forcible compulsion. (Class B felony).<br>**Sexual Assault 566.040.** ". . if he has sexual intercourse with another person knowing that he does so without that person's consent. (Class C felony).<br>**Statutory Rape in the first degree. 566.032.** Person over 21 having intercourse with a person less than 14 years old. The felony authorizes life imprisonment or 5 years imprisonment unless the victim is less than 12 years old, in which case 10 years is authorized.<br>**Statutory Rape in the Second Degree 566.034.** Person over 21 having intercourse with another person who is less than 17. (Class C felony)<br>**Child molestation in the first degree 566.067** Subjects a person under 12 years of age to sexual contact (Class C felony)<br>**Child molestation in the second degree 566.068.** subjects another person who is 12 or 13 years of age to sexual contact. (Class A misdemeanor).<br>**566.083 Sexual misconduct involving a child.** "Knowingly exposing the person's genitals to a child less than 14 years of age for the purpose of arousing or gratifying the sexual desire of any person, including the child; coerces a child less than 14 years of age to expose the child's genitals. ."(Class D felony)<br>**566.090 Sexual misconduct in the first degree.** ". . purposely subjects another person to sexual contact or engages in conduct which would constitute sexual contact except that the touching occurs through the clothing without that person's consent. (Class A misdemeanor) |

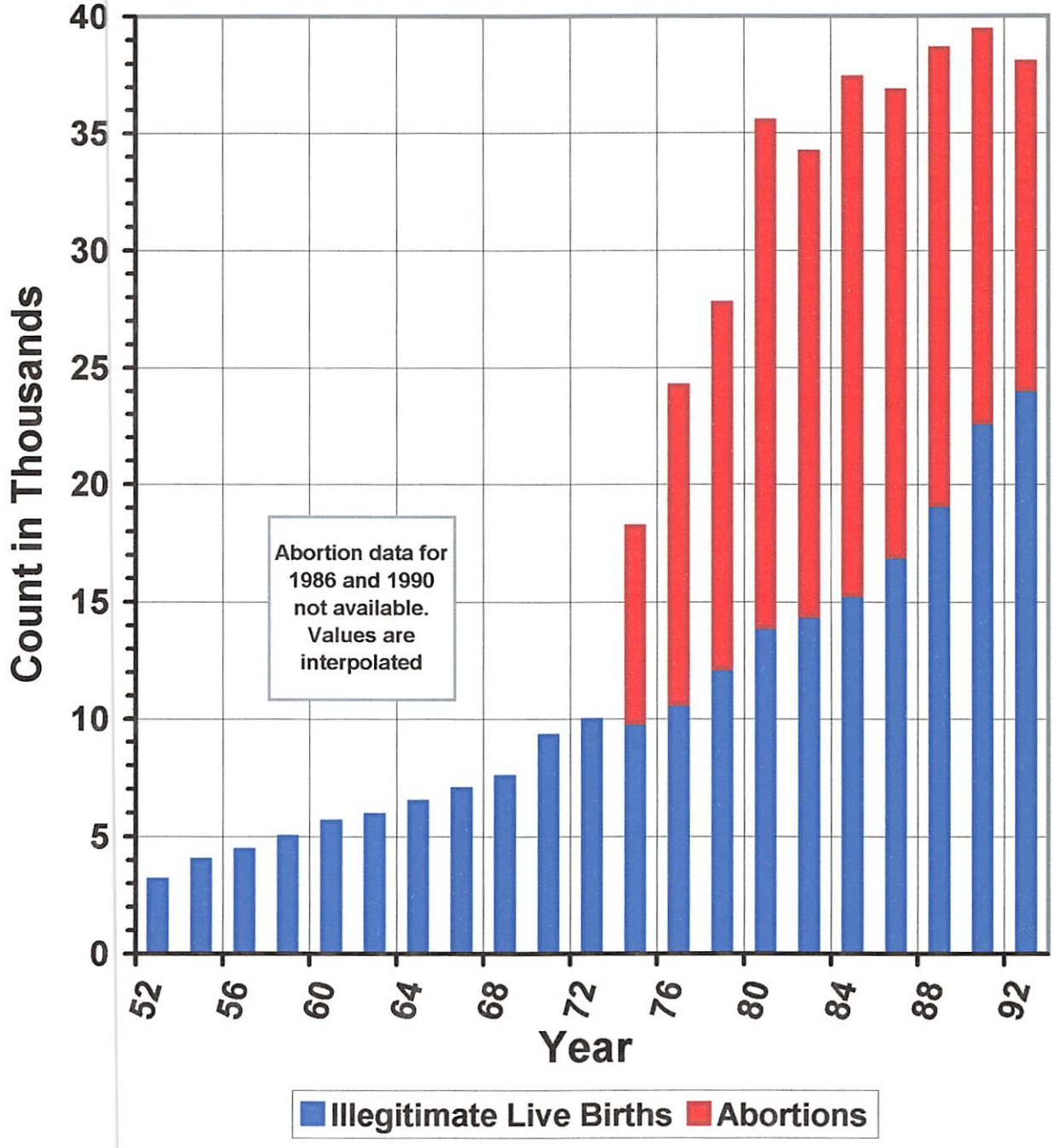
*A work in progress

# Addendum II

## Statistical Charts

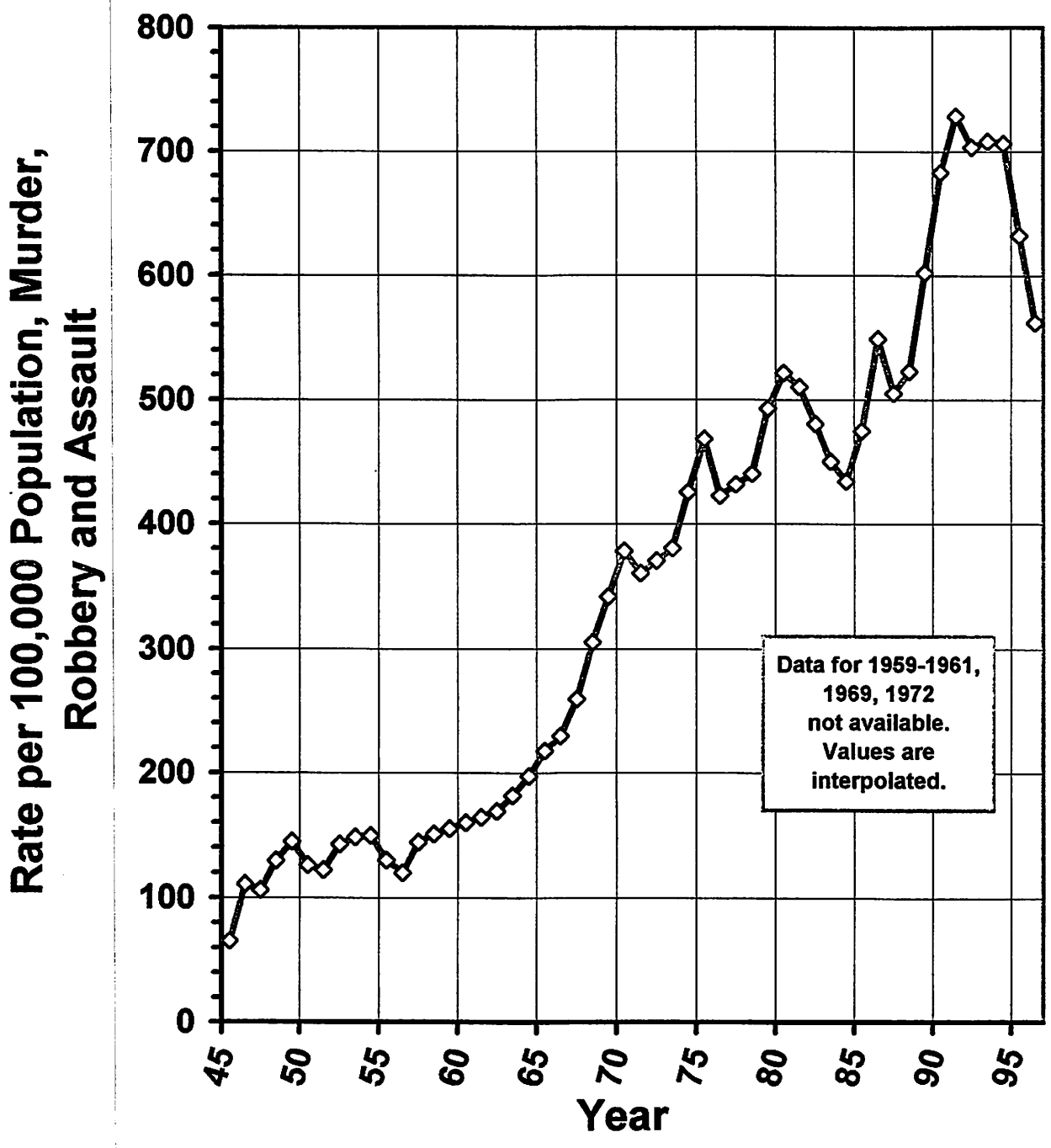
# Missouri Illegitimate Live Births. 1952-1992, Plus Abortions after 1973

**Source: Vital Statistics of the United States, Vol. 1**
**Abortion Data: Survey of the Alan Guttmacher Institute**



# Violent Crime in Missouri, 1945 - 1996

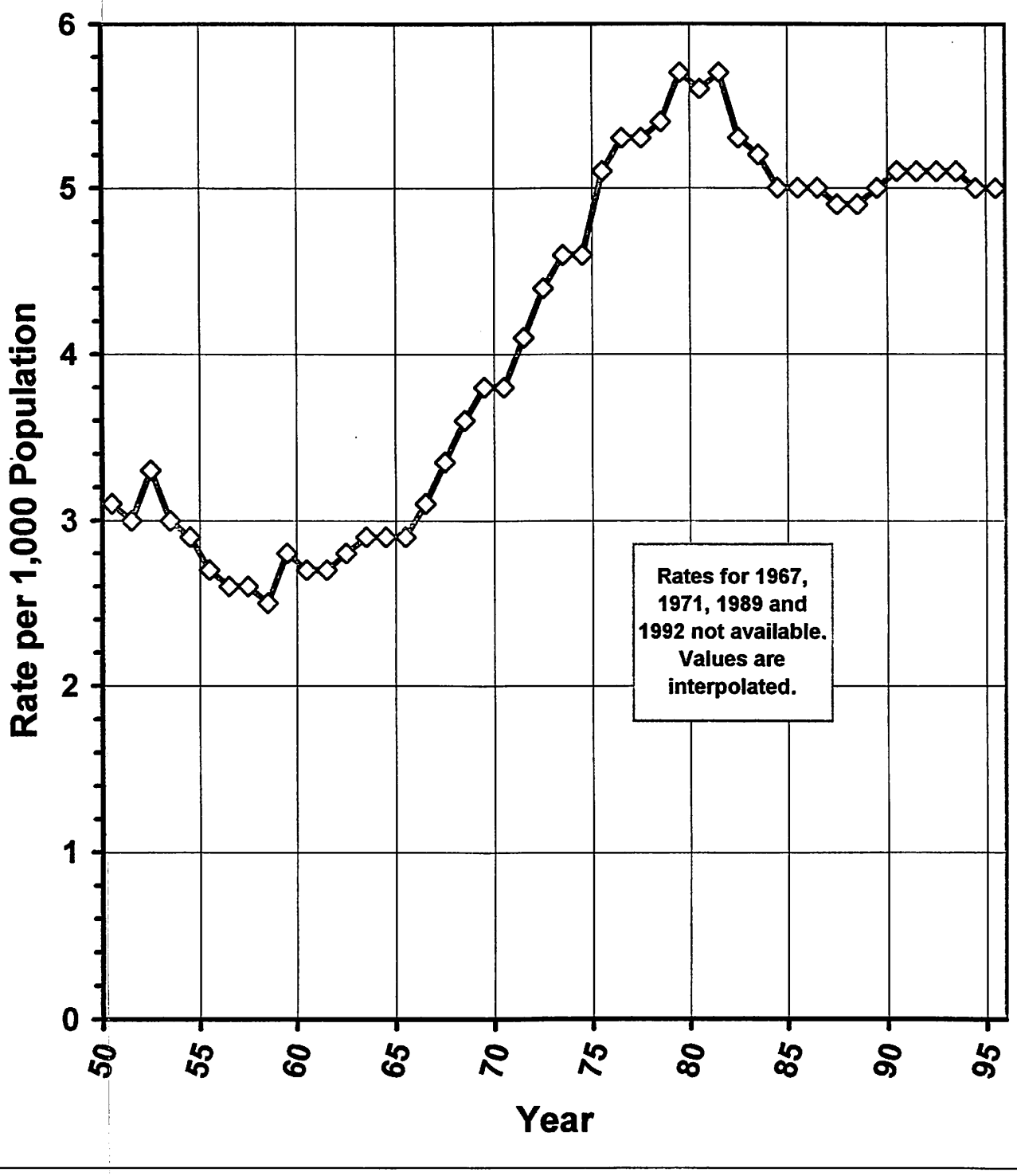
Source: Statistical Abstracts of the United States




Note: Data for 1945-1956 are normalized from urban population data, 1957 basis

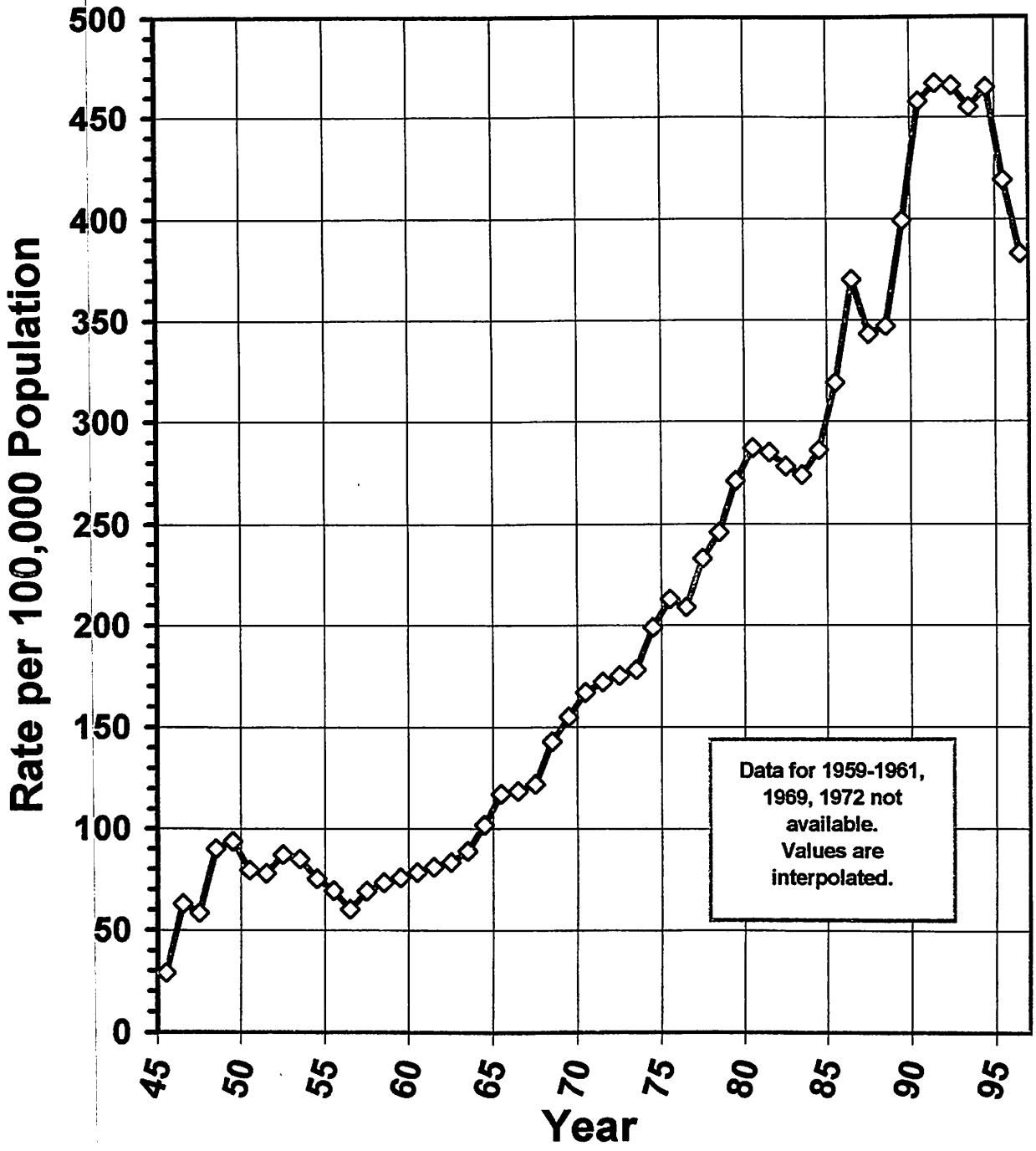
# Missouri - Divorce Rate per 1,000 Population

**Source: Statistical Abstracts of the United States**



# Assault in Missouri, 1945 - 1996

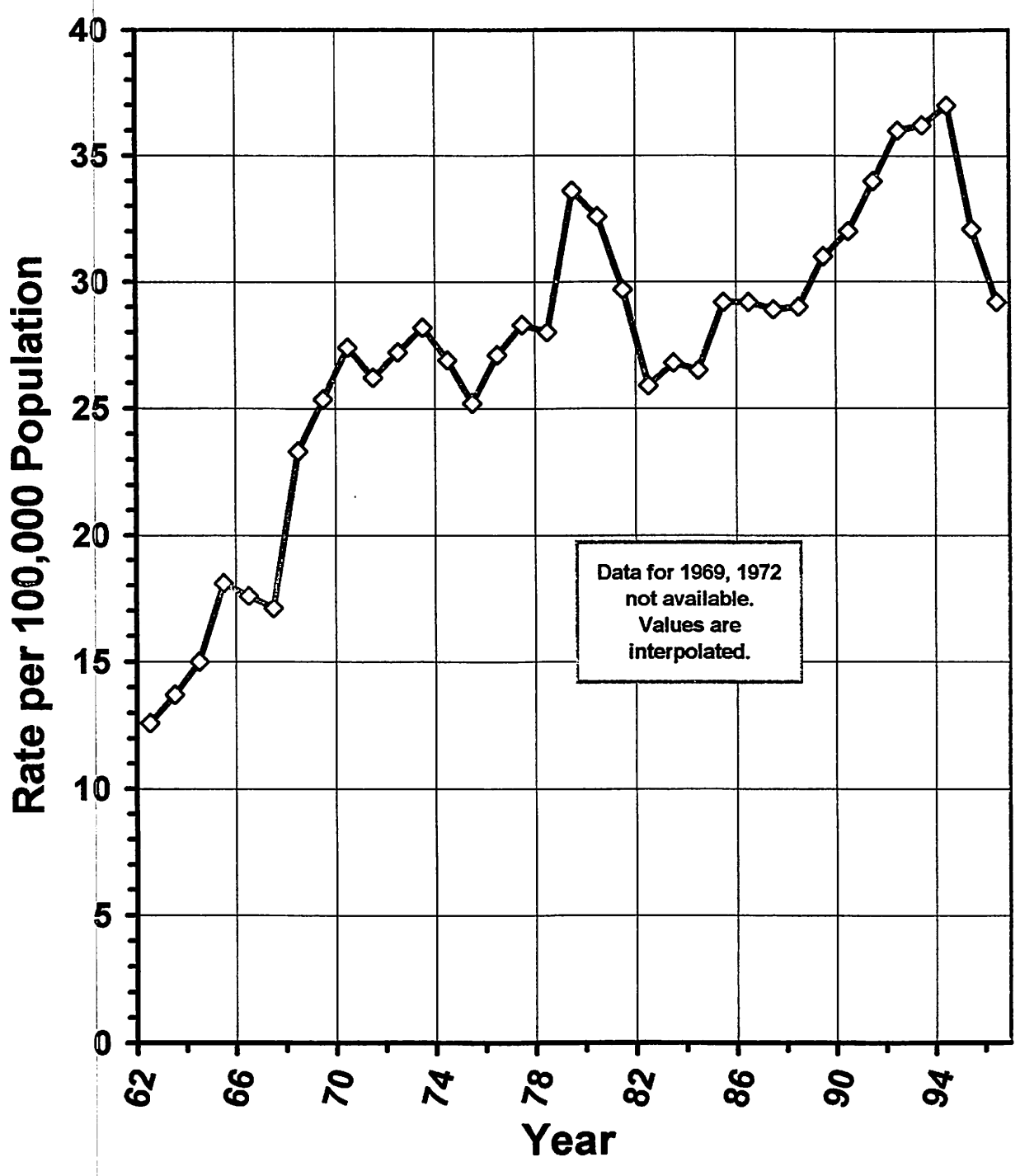
Source: Statistical Abstracts of the United States




Note: Data for 1945-1956 are normalized from urban population data, 1957 basis

# Rape in Missouri, 1962 - 1996

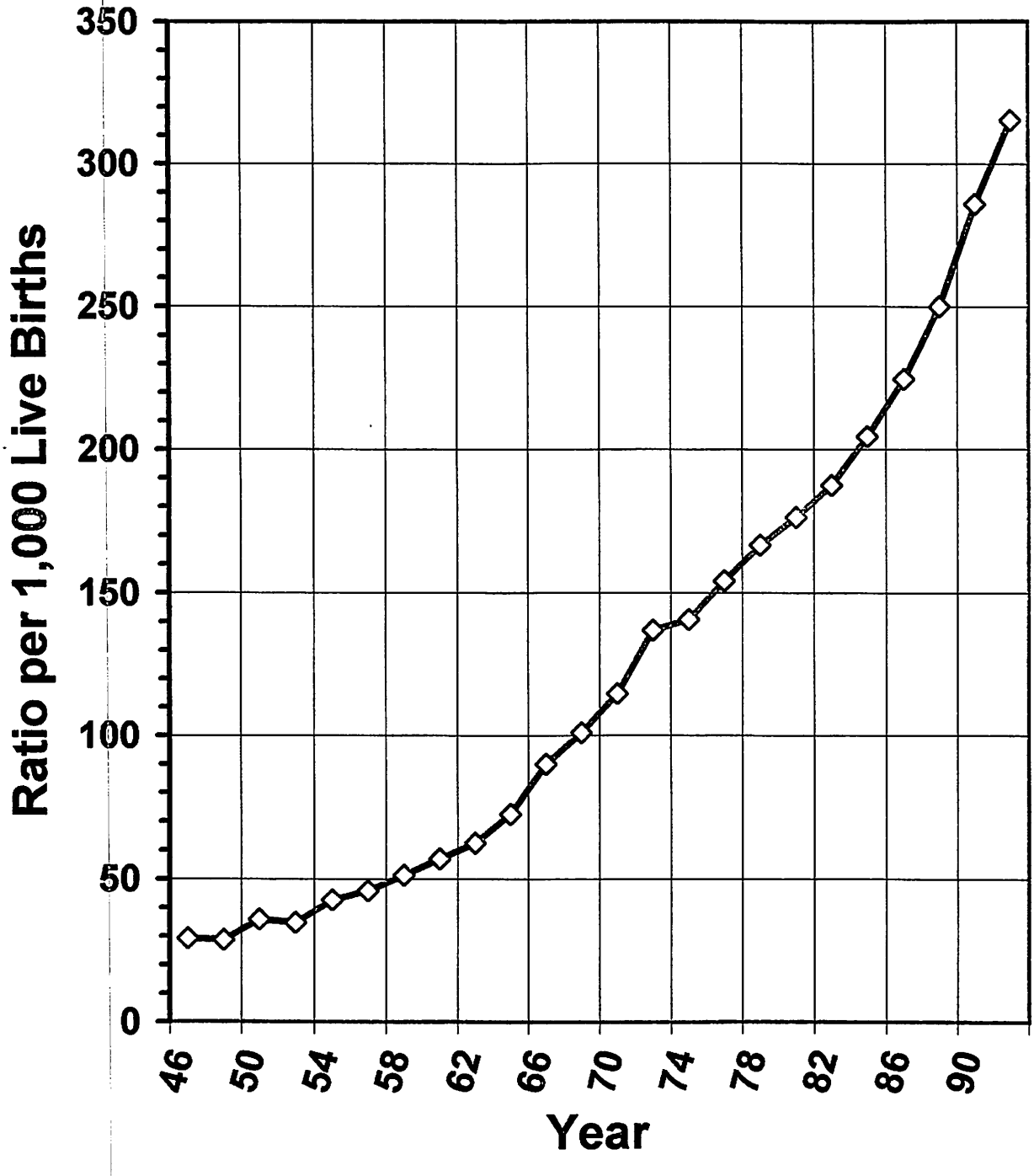
Source: Statistical Abstracts of the United States




Note: Rape was not reported by state prior to 1962

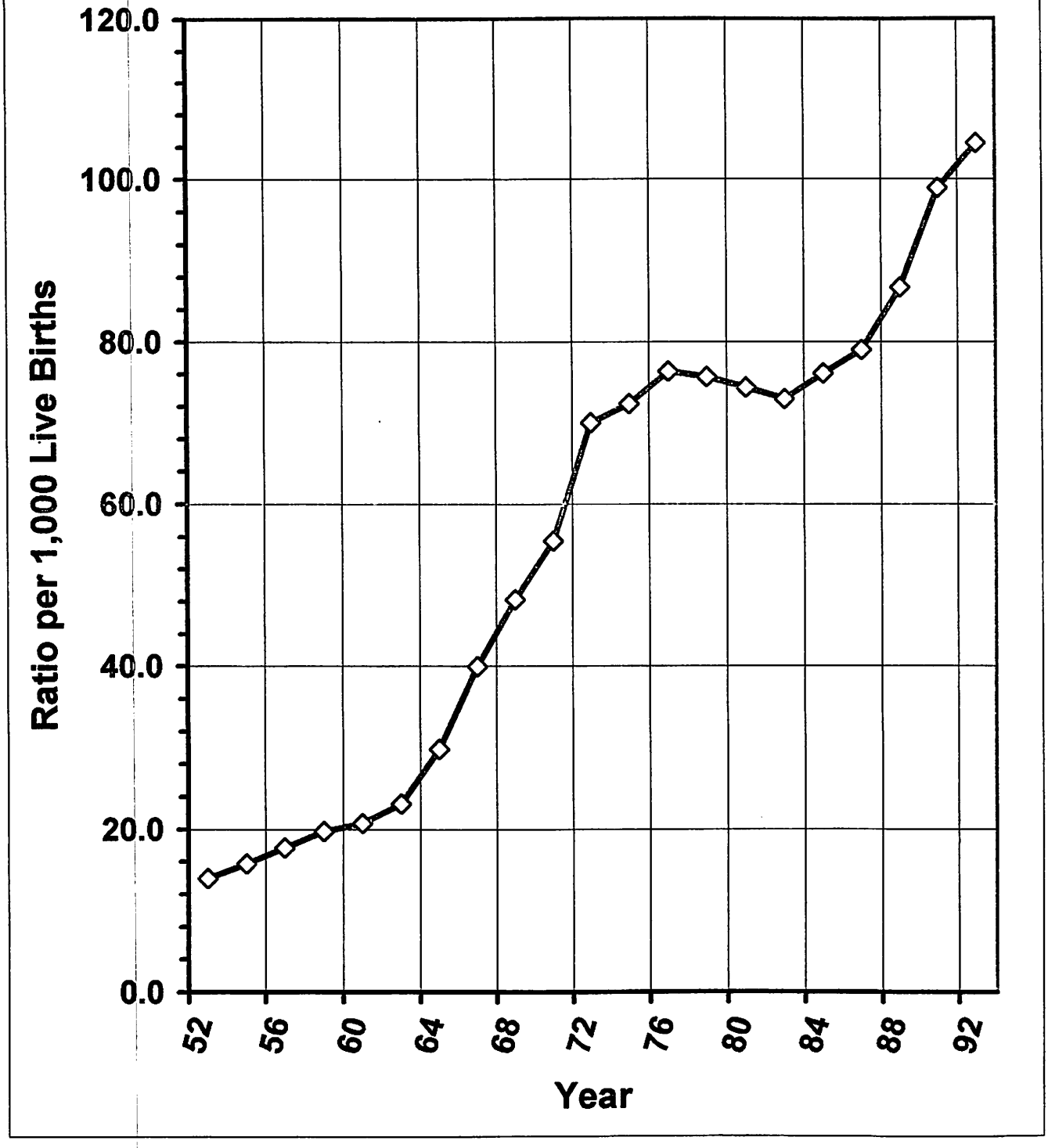
# Missouri - Illegitimate Live Births per 1,000 Live Births

Source: Vital Statistics of the United States, Vol. 1 Natality



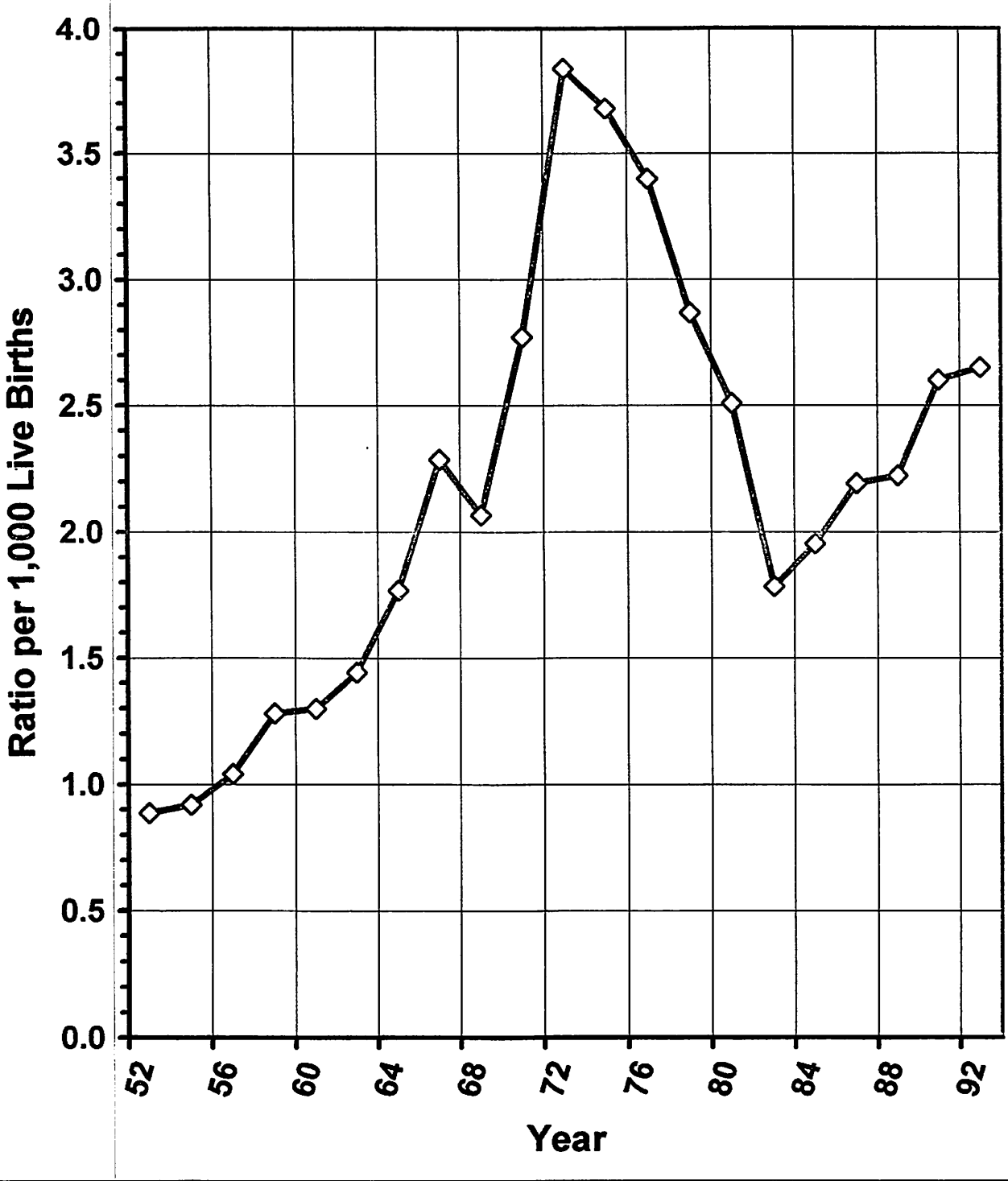
# Missouri - Illegitimate Live Births to Girls of Age 15-19, per 1,000 Live Births

Source: Vital Statistics of the United States, Vol. 1 Natality



# Missouri - Illegitimate Live Births to Under 15 Girls, per 1,000 Live Births

Source: Vital Statistics of the United States, Vol. 1 Natality



# MISSOURI LAW REVIEW

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## SYMPOSIUM—PROPOSED MISSOURI CRIMINAL CODE*

# THE MODERN CRIMINAL CODE FOR MISSOURI (TENTATIVE DRAFT)—A CHALLENGE FULFILLED AND THE CHALLENGE PRESENTED


JOHN C. DANFORTH**


*Let's have a rule*
*Which deals to crimes an equal punishment:*
*Nor tortures with the horrid lash for faults*
*Worthy a birchen twig.*

Hor. *Sat.* 1.3. 117-19.

The concept that the punishment should fit the crime is a simple one shared by both the layman and the lawyer. The concept becomes difficult in application, however, for it must be determined what acts are to be proscribed and what the consequences are to be for committing them. Our notions of fair play and due process also require that all proscribed acts and the penalties for committing them be well-defined and adequately publicized so as to provide notice to those who must regulate their conduct accordingly. Yet, the criminal laws of Missouri sometimes fail to define the prohibited acts in a readily comprehensible manner. What is more, the overall statutory scheme of punishment is uneven. Occasionally, the person acting immorally may be punished only if charged and convicted of an offense enacted to regulate unsocial conduct of lesser or greater

*Editor's note: This issue went to press before the Proposed Code was finalized. Possibly, there will be minor variations between the Proposed Code as presented in this symposium and the Proposed Code that is eventually approved by the committee. Three parts of the symposium, relating to sentencing, offenses against the person, and offenses against public order will appear in a future issue of the MISSOURI LAW REVIEW.


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importance. Too frequently, acts made criminal do not reflect present-day thought.

Deficiencies in the criminal laws of Missouri are directly related to the antique framework of those laws. Many of the present statutes are the same as, or slight variations of, those enacted in 1835, fourteen years after Missouri achieved statehood. With few exceptions[1] there has been little or no effort to improve the substantive criminal law in this state. To be sure, the antique structure has been embellished from time to time but, with the exceptions noted, only by ad hoc response to specific problems. There has been no attempt systematically and comprehensively to revamp the basic structure of the substantive law to promulgate an integrated and understandable criminal code.

There is a compelling need, which has been seen for some time,[2] for the enactment of a truly comprehensive and unified criminal code for this state. That is not to say that the Missouri legislature should be faulted for not having reworked the criminal laws into such a code. What was clearly required to meet the need was a special project concentrating the efforts of those particularly involved with the criminal law. The Modern Criminal Code for Missouri (Final Draft 1973) was produced in just such a manner.

In the Omnibus Crime Control and Safe Streets Act of 1968,[3] Congress established the Law Enforcement Assistance Administration (LEAA)[4] and made federal funds available to the states for law enforcement purposes and related projects.[5] The Missouri Law Enforcement Assistance Council (MLEAC)[6] was created to administer the allocated LEAA funds. There is a lively competition among the various governmental bodies involved in the criminal justice system—courts, police, correctional institutions, juvenile services, and others—for these funds. The office of the Attorney General of Missouri has also obtained LEAA funds for various programs and purposes. Early in 1969, it was decided that this office would submit a proposal to the MLEAC for a planning grant to fund a project that had as its objective a thorough revision of the substantive criminal laws of Missouri. The project was to be accomplished in two stages: the first stage would entail study of existing laws and evaluation of needed

1. The exceptions include the Sealing Statute, §§ 560.156-.161, RSMo 1969; the Mental Responsibility Law, §§ 552.010-.080, RSMo 1969; and the Drug Regulations Law, §§ 195.010-.270, RSMo 1969.

2. That reform is needed is clearly indicated by the work of the American Law Institute in its Model Penal Code, a work that is providing the basis for substantive criminal law reform in several states. *See* Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425 (1968).

3. 42 U.S.C. §§ 3701-95 (1970).

4. *Id.* § 3711 (a).

5. *See generally* Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. §§ 3701-95 (1970).

6. For basic information concerning the MLEAC, see DEP'T. OF COMMUNITY AFFAIRS, THE MISSOURI STATE GOVERNMENTAL SERVICES CATALOG 136-37 (1970).



changes; the second would involve the drafting of a modern criminal code. Although the difficulties that had beset revisers in other states were recognized at that time,[7] it was anticipated that Missouri revisers could use other state codes as examples so that the time required for the completion of each stage would be approximately one year. The project budget submitted with the proposal estimated expenditures at less than $20,000, including state contributions. As it turned out, the project has consumed the energies of the revisers for roughly four years and a considerably greater amount of money than originally anticipated.[8]

As proposed, the project was to be implemented by a committee that would be representative of all phases of law enforcement: the judiciary, police agencies, the prosecuting attorneys, defense attorneys, the Department of Corrections, the office of the Attorney General, and the legislature—at least one Democratic and one Republican legislator would be appointed to the committee. That idea was followed in selecting the original 13 members of the committee and necessary replacements. Two years into the project, the committee had refined its work and procedures to the point where it was felt desirable to increase its size substantially. The general principles and sentencing system that are common to the entire code and supply a unifying structure had been completed, so that the risk of becoming mired in endless argument due to a greater number of drafters had been reduced. Further, with an increased membership, additional subcommittees could be created so that the many subjects to be treated could be handled more quickly.

At the time of the proposal, although firmly convinced that the substantive criminal law of Missouri had to be reformed, I was personally awed by the amount of effort it would take to complete the project. Now that I have had the chance to see the committee in action and review the minutes of its meetings, my awe is all the greater. Judge Norwin D. Houser, as chairman of the committee, had what must have seemed a Herculean task in keeping the work flowing and not allowing the meetings to degenerate into futile argument. Those duties he performed with remarkable skill. The four reporters, all law school professors, who served the committee and whose responsibilities included initial drafting, received meager recompense for their labors. Surely, the entire summers and leaves of absence from employment they spent on drafting and other committee work indicate a devotion to the project that money

7. For a discussion of the problems of revision in Kansas, whose "criminal code" also was basically derived from the Missouri statutes of 1835, see Wilson, *New Bottles for Old Wine: Criminal Revision in Kansas*, 16 KAN. L. REV. 585 (1968).

8. Roughly $28,000 was spent by the committee during the first two years of the project. The last two years of the project required somewhat greater expenditures because additional reporters and research assistants were employed and there were more frequent meetings and disbursements for materials. Committee members kept records of the hours they spent on the project so that the time could be considered in determining the state's contributing funds.

could not buy. That devotion was obviously shared by the members of the committee, who gave freely of their time and services. The things to be said in praise of each of the drafters of the Missouri code are so many that one does not know where to begin or end. Therefore, I will but personally thank each of them for meeting the challenge with an unswerving vigor and for a job well done.

Nevertheless, the Missouri code will be worthless unless it is adopted by the legislature. It is true that members of the legislature served on the drafting committee and, for that reason as well as because of the code's obvious merits, one would hope that the chances of the code being enacted are great. But with the support of all organizations involved in the criminal justice system as well as other legal groups, the odds that the code will meet the approval of the legislature become much more favorable. So that is my challenge to you—to speak out in favor of the code and elicit support for its enactment.

# INTRODUCTION TO A SYMPOSIUM ON THE PROPOSED NEW AND MODERN CRIMINAL CODE FOR MISSOURI

JUDGE NORWIN D. HOUSER*

## I. THE OLD

### A. *In General*

The basic criminal code of Missouri was enacted in 1835.[1] The existing statutes imposing criminal penalties consist of what may be designated loosely as "the code" (title XXXVIII, chapters 556-64, both inclusive, in 491 separate sections) plus literally hundreds of penalty sections in special statutes scattered through the four volumes of the official 1969 Missouri Revised Statutes and supplemental laws. The code contains many redundancies, inconsistencies, and needless distinctions and refinements. The language of many sections is insufficient to notify the citizen what conduct is subject to criminal penalties, or to provide the courts with adequate guidelines and standards. Missouri criminal law may fairly be characterized as an accumulation of ad hoc responses to the conceived needs of the moment, enacted at different times by different legislatures without regard to the development of a systematic, orderly, and consistent body of criminal law.

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1. RSMo 1835, at 165.



### B. *Penalties*

Penalties in the current Missouri criminal law reflect the scars of ad hoc development. Some penalties are disproportionate to the seriousness of the offense; some are too severe, while others are too lenient. When, at various sessions, the legislature created new crimes or brought new fields of human activity under expanding governmental control, the legislators gave little consideration to the severity of the penalties prescribed for the new offenses in comparison with the penalties imposed for other offenses of like gravity. Consequently, penalties for similar offenses sometimes vary greatly. For instance, willfully setting fire to any woods or to crops of another whereby any damage is done is a graded felony with a maximum penalty of 5 years' imprisonment in the penitentiary,[2] whereas willfully setting fire on any woodlot, forest, or growing vegetation on the lands of another is a misdemeanor with a maximum penalty of 1 year in jail.[3]

The penalties for some nonviolent, nondangerous crimes involving property damage or loss are greater than those for serious crimes against persons. Thus, stealing a domestic fowl in the nighttime from the messuage of another or stealing a dog, goat, or hog (regardless of value) carries a maximum penalty of 10 years in the penitentiary,[4] whereas assault with intent to kill or to do great bodily harm without malice aforethought or with intent to commit robbery, rape, or some other offense, is punishable by imprisonment not exceeding 5 years.[5]

### C. *Mens Rea*

The present criminal law, much of which is written in archaic 19th-century legalese, is a patchwork of definitions, proscriptions, and sanctions. Numerous terms are used to describe the required culpable mental states or "mens rea." The meaning of these terms may vary from crime to crime. The existing code proscribes acts done corruptly; deliberately; falsely; feloniously; fraudulently; intentionally; knowingly; knowingly and willfully; maliciously; negligently; on purpose and of malice aforethought; premeditatedly; unlawfully; willfully, willfuly and corruptly; willfully and maliciously; willfully and maliciously or cruelly; willfully, maliciously or contemptuously; willfully or negligently; wrongfully; and wrongfully and negligently. Rarely do the statutes define these vague adverbs; instead, literally dozens of judicial decisions have been required to construe and define them. Many statutes fail to mention any culpable state of mind necessary for conviction, without making clear that the mere performance or nonperformance of the act in question is criminal regardless of the actor's state of mind.[6]

2. § 560.590, RSMo 1969. Unless otherwise indicated, all section citations hereinafter refer to Missouri Revised Statutes, 1969.
3. § 560.580.
4. § 560.161.
5. § 559.190.
6. *See, e.g.*, § 563.170 (bigamy); § 563.220 (incest).

D. *Obsolete Provisions*

Criminal prohibitions relating to a bygone age remain on the books. Section 565.420 makes it a misdemeanor for the driver of a stage, coach, wagon, omnibus, or hack to be intoxicated to such a degree as to endanger the safety of any person therein. (Evidently it was not considered offensive for a hack driver to be intoxicated short of that degree). Section 564.330 requires that from November through March every electric streetcar shall be provided, at the front end, with a screen that shall protect the driver, motorman, and gripman from wind and storm. Section 563.320 prohibits the keeping of a male horse or jack for teasing or serving mares within 300 yards of any school house, college, or church. Section 563.410 provides penalties for playing cards for money, thereby criminalizing innocent social cardplaying for small stakes.

## II. The New

### A. *In General*

For some time the criminal law of Missouri has needed comprehensive revision.[7] After four years of work the Committee for a Modern Criminal Code has completed a tentative final draft of a proposed new and modern criminal code for Missouri.

Early in its work the committee decided not merely to patch up the existing code piecemeal, but rather to draft an entirely new and modern criminal code, retaining the good of existing laws, modifying or rewriting provisions susceptible of improvement, deleting undesirable or antiquated provisions, and adding new provisions considered necessary and proper for the protection of the public and the intelligent application of the criminal law to the individual. In the process, the committee has considered the existing criminal laws of this state, the Model Penal Code, the modern criminal codes lately enacted by or proposed in a number of the states, and the Proposed Federal Criminal Code.

The work product of the committee will be proposed as a new Title XXXVIII, in 23 chapters, consisting of only 238 sections. The hundreds of special statutes imposing criminal penalties presently scattered throughout the revised statutes will not be lifted from their present locations and collected as a special chapter under Title XXXVIII. They will remain where now found. In the interest of uniformity and essential justice, however, these offenses outside the code are assigned classifications; persons convicted of such offenses will be subject to the dispositions authorized by the code.

In many instances, the Proposed Code consolidates similar offenses. The 35 sections of the present code relating to gambling have been reduced to 12.[8] The proposed section on aiding escape from confinement combines six

7. *See* Hunvald, *Criminal Law in Missouri—The Need for Revision*, 28 Mo. L. Rev. 521 (1963).

8. Prop. New Mo. Crim. Code §§ 17.010-.120 (1973).



present sections and replaces six others,[9] and broadens the coverage on this crime. The proposed sections on official misconduct[10] replace 18 present sections, now scattered throughout the code. Many existing sections have been rewritten to clarify meaning. Definitions have been included that sharpen and add certitude. In some cases the scope of crimes has been broadened, or entirely new criminal offenses created, to meet the needs of society under modern conditions.

The Proposed Code is written in broader, more comprehensive language than is the old. It undertakes to define specific offenses in understandable, everyday English. Obsolete language such as "carnally knows," "ravishes," and "premeditatedly" is dropped. Technical language is avoided. Where special terms are necessary, they are given a definite legal meaning couched in layman's language. Unnecessary verbosity is eliminated. Concise language has been the committee's goal.

### B. *Penalties*

The Proposed Code corrects many of the inequities and excesses of the existing criminal law by adopting a system of classification that separates crimes into sentencing categories, with an uncomplicated range of penalties assigned to each category. Each offense is graded according to its seriousness and placed in one of the categories, thus reducing the number of different penalties, lessening the possibility of inconsistent penalties, and providing a more logical and humane system of criminal justice.

The Proposed Code relieves juries of the responsibility of fixing the punishment; it vests that power exclusively in the trial judge. The proposal to let the judge fix the punishment is calculated to result in more uniformity in sentencing, to enable the sentencing authority to obtain complete background information on the convict so that the punishment may be better tailored to fit the crime, and to serve the best interests of the community and the individual if rehabilitation is in prospect.

The committee is not recommending one way or the other on the controversial issue of the death penalty. The committee, however, has prepared a draft providing for the death penalty in certain cases; one which the committee believes meets the constitutional requirements of *Furman v. Georgia*.[11] It imposes the death penalty mandatorily where the defendant is guilty of capital murder (which can result only from an intentional killing), is over seventeen years of age, and one or more of the following factors is charged and proved: the defendant procured the commission of the murder by payment or promise of payment of anything of pecuniary value; the defendant by his own act committed the murder as consideration for the receipt of anything of pecuniary value; the defendant by his own act committed the murder during the commission or attempted commission of arson, rape, sodomy, robbery, burglary in the

9. Prop. New Mo. Crim. Code § 20.210 (1973).

10. Prop. New Mo. Crim. Code §§ 20.320, 21.040 (1973).

11. 408 U.S. 238 (1972).

first degree, kidnapping, or escape from custody or confinement; for the purpose of preventing identification or apprehension of the defendant or another as a participant in the felony being committed or attempted; the defendant by his own act committed the murder for the purpose of preventing the victim from giving testimony; the defendant by his own act committed the murder while serving a term of imprisonment of more than ten years or for life.

### C. *Mens Rea*

The new code requires that criminal liability be based on conduct that includes a voluntary act or the omission to perform an act, thus stating the accepted proposition that an "act" is an essential component of criminal liability. For an accused to be guilty of an offense he must have acted with (1) purpose, (2) knowledge, (3) recklessness, or (4) criminal negligence,[12] unless the offense is an infraction (a minor offense, newly created) or the legislative intent to dispense with a mens rea requirement is clear.[13] Each of the four culpable mental states is carefully defined and its application specifically delimited.[14] These four basic mental states cover most of those needed as well as most of those now described by the wide variety of terms employed in the existing statutes. Under the Proposed Code it will be easy to ascertain what culpable mental state, if any, is an element of a given offense. The necessity for extensive judicial interpretation of statutory language prescribing the mens rea will be minimized if not entirely eliminated.

### D. *The Personnel*

The Committee for a Modern Criminal Code as constituted in October, 1969, consisted of the following persons: Chairman, Judge Norwin D. Houser; Vice-Chairman, Hon. Donald J. Murphy, Judge of the Circuit Court of Jackson County; Senator Donald L. Manford; Senator Ronald L. Somerville (now Judge of the Missouri Court of Appeals and a continuing member); Representatives George E. Murray and James E. Spain; Prosecuting Attorneys Frank Conley and Byron L. Kinder (now Judges of the Circuit Court and continuing members); Prosecuting Attorneys Gene McNary, James Millan and John Crow; Professor Joseph Simeone (now Judge of the Missouri Court of Appeals and a continuing member); Hon. Orville Richardson (now Judge of the Circuit Court and a continuing member); Hon. Norman S. London (a practicing attorney in St. Louis), and Hon. Manford Maier (Attorney for the Kansas City Board of Police Commissioners). During the first three years of the committee's existence the following members were obliged to resign for various reasons: Senator Manford, Representative Spain and Mr. Crow. In the Fall of 1971, Attorney General John C. Danforth appointed the following new members to

12. PROP. NEW MO. CRIM. CODE §§ 7.020-.040. Comment (1973).
13. PROP. NEW MO. CRIM. CODE §§ 7.060-.070 (1973) defines these terms and explains their application.
14. *See* text accompanying note 12 *supra*.



the committee: Hon. Theodore McMillan (now Missouri Court of Appeals Judge); Hon. Frank Cottey, Circuit Judge for the First Judicial Circuit (since resigned); Senator Ike Skelton; Senator Paul L. Bradshaw; Representative Harold Holliday; Representative Robert O. Snyder; Representative Harold L. Volkmer; Jackson County Judge Harry Wiggins (now General Counsel of the Public Service Commission); Assistant Attorney General Gene Voights; Prosecuting Attorney Harold Barrick (since resigned); Prosecuting Attorney David Dalton; Hon. Curt Vogel and Hon. Raymond R. Roberts, practicing attorneys in Perryville and Farmington, respectively. Messrs. Frank Kaveney and D. Brook Bartlett have made contributions to the effort.

The committee has been assisted by four reporters: Professors Edward Hunvald, Jr., and Gary Anderson, of the School of Law at Missouri University-Columbia, and Professors Gene Schultz and Alan G. Kimbrell, of the law faculty of St. Louis University. Research has been conducted by law students under the direction of the reporters.

### E. *The Modus Operandi*

The work of the committee has been accomplished in the following fashion. Subcommittees were assigned specific topics. A reporter was assigned to each subcommittee. After reviewing existing Missouri statutes, reading all available literature on the subject, consulting and reviewing the Model Penal Code, modern criminal codes lately enacted or proposed in sister states, and the Proposed Federal Criminal Code, the reporter prepared a proposed draft on the assigned subject. The subcommittee studied the proposal, met with the reporter and accepted, rejected, or revised the text, and made its recommendations to the full committee, which in turn accepted, rejected, or revised the product of the subcommittee. The whole Committee, meeting in approximately monthly sessions, sometimes considered as many as four or five drafts before finally adopting a tentative final draft. The committee secretary, Gary Anderson, prepared extensive minutes of each meeting of the full committee to assist reporters in redrafting and to provide the General Assembly and courts with the underlying committee action on various sections of the Proposed Code. The reporters prepared extensive comments following sections of the text, reciting the history and explaining the source and reasons underlying the text as written. After the Proposed Code was prepared in tentative final draft form it was thoroughly reviewed in several sessions of the whole committee, which made appropriate changes and approved the final draft.

### F. *Presentation to the General Assembly*

The final draft was ordered published for distribution to the judiciary, the bar, and interested organizations and groups for review and criticism. After the committee makes all changes deemed advantageous, the final draft will be incorporated in a bill for presentation to the 87th Session of the Missouri General Assembly.

The committee has wrought a valuable restructuring and rewriting of the criminal code of Missouri. Enactment by the General Assembly will give to the courts, prosecuting attorneys, defense counsel, and law enforcement agencies a more practical, enlightened, understandable, and enforceable body of criminal law with which to work. It is said that the largest room in the world is the room for improvement; as the Proposed Code is submitted to the judiciary, the bar, and the public for examination the committee welcomes constructive criticism and suggestions for improvement to the end that the bill finally adopted by the General Assembly will reflect the best system of criminal laws of all the States.[15]

15. The following states have recently enacted modern criminal codes: Colorado (1972), Connecticut (1971), Georgia (1969), Idaho (1972), Illinois (1962), Kansas (1970), Kentucky (effective 1974), Louisiana (1942), Minnesota (1963), New Mexico (1963), New York (1967), Oregon (1971), and Wisconsin (1956).

# SEXUAL OFFENSES UNDER THE PROPOSED MISSOURI CRIMINAL CODE

ORVILLE RICHARDSON*

## I. INTRODUCTION

The present Missouri law as to sexual offenses is partly statutory, mostly decisional, and entirely in need of revision and reform. The statutes are scattered instead of brought together in one comprehensive, coherent, and consistent code of conduct. Many have not been altered in any essential detail since first enacted almost a century and a half ago.[1] Thus, they reflect none of the tremendous changes that have taken place in sexual mores, attitudes, and behavior since then. Since Missouri entered the Union we have vastly increased our store of knowledge about sexual conduct and methods of dealing with offenders. Sexual psychopath laws are society's only attempt to utilize that knowledge for the purpose of treating sex offenders,[2] and many psychiatrists and criminologists agree that such laws have been miserable failures.

Those sex crime statutes that are obsolete and seldom used by prosecutors should be scrapped. Most of them abound with archaisms, euphemisms and emotionally charged words such as "ravish," "carnal knowledge," "defile," "debauch," "concubinage," and "abominable and detestable crime against nature." Some statutes are so incomplete or uncertain as to be subject to serious constitutional objections on void-for-vagueness grounds. Others may be invalid insofar as they overreach any permissible legislative mark or penalize conduct wholly incapable of equal enforcement. Although some definiteness and limitation has been attained through judicial construction, the law ought to be readily found in statute books; finding it ought not require laborious sifting through mounds of moldering buckram.

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1. "The details of our current law of sexual offenses were worked out in the late middle ages, and since shortly after this country had been settled, the law of sexual offenses underwent virtually no further change, except as to procedural details and punishments." G. MUELLER, LEGAL REGULATIONS OF SEXUAL CONDUCT 16 (1961). The major sex offenses were punishable in ecclesiastical courts because crime was equated with sin. *Id.* Many such laws became unenforceable for lack of popular support. They have not been changed by the legislature in many states because

> the good people . . . speaking through their legislatures, are as yet unwilling to grant sexual liberties to their neighbors which, at least according to Dr. Kinsey, they allow themselves.
>
> . . . .
>
> Only an intellectually numb person can still maintain that the criminal law, with the traditional means at its command, can enforce the sexual standard which it endorses. It cannot, and we must face the fact.

*Id.* at 17.

2. *See* §§ 202.700-.770, RSMo 1969. *See generally* B. KARPMAN, THE SEXUAL OFFENDER AND HIS OFFENSES (1954); Slough & Schwinn, *The Sexual Psychopath*, 19 U.K.C.L. REV. 131 (1951).

But all of these deficiencies could continue to be wearily worried with as they have been for decades. We could go on forever talking in hushed, shocked tones about "lurking sex fiends," joking about the gay set, and increasing the "age of consent" in the blind belief that we are propping forbidden fruit higher away from our children. We could keep hiking penalties higher upon the sodden supposition that longer isolation of the few offenders who are caught, convicted, and incarcerated will either reform them or deter others.

The fundamental inadequacy of the Missouri law of sex offenses is the monolithic character of the major crimes of rape, sodomy, and child molestation, all of which carry extremely severe punishment.[3] What is needed is a splitting of these offenses into a number of separate crimes according to logical differentiating factors that permit appropriate grading of the penalties. As the law now stands, it is unjust to the individual offender, and only the legislature can remedy that injustice. Moreover, current law fails to serve the best interests of society. There is no deterrence and no rehabilitation. Those few who are punished are dealt with cruelly, to the satisfaction of no one except a shrinking frenetic fringe of maniacal moralists.

An unjust law will not be enforced. The public is loath to report, police to arrest, prosecutors to pursue, jurors to convict, and judges to sentence offenders. One reason is that the statutory definitions of these crimes and their heavy punishment make no allowance for innocent intent, consent, ages of maturity as distinguished from a single "age of consent," mistake as to the age of the victim, or immaturity of the accused.

Unenforceable and unenforced laws lead to disrespect for law in general. Vicious side effects develop, including blackmail, commercialized vice, police corruption, and brazen law violation. Uneven and discriminatory enforcement follows. The sex deviate is driven underground and into houses of male and female prostitution. The few who are caught are branded as "rapists" or "sodomists" and sent away to prison to enjoy their perversions with others deprived of heterosexual outlets. The many who escape prosecution lead uneasy lives of fear, evasion, and guilt.

The Proposed Missouri Criminal Code[4] offers only a *partial* solution, and one within the grasp only of the legislature.[5] The larger part of

3. *See* § 559.260, RSMo 1969 (rape); §§ 563.230 (sodomy) & .160 (child molestation), RSMo 1969.

4. The Proposed New Missouri Criminal Code [hereinafter referred to as the Proposed Code] was drafted over a period of four years and completed in the late summer of 1973 by the Committee for a Modern Criminal Code [hereinafter referred to as the committee] whose composition and work in general and in certain specific areas is described elsewhere in this symposium.

5. The task is "primarily and properly the job of legislators, not judges." Rodell, *Our Unlovable Sex Laws*, TRANS-ACTION, May 1965, at 36, 38. Missouri's sodomy statute, amended only once since enacted in 1825, is a remarkable example of an inadequate definition by judicial decision held constitutionally certain because of what the courts have added to it over a century and a half. State v. Crawford, 478 S.W.2d 314 (Mo. 1972).



needed reform must come through education, acculturation of offenders, the application of medical and social sciences to the problem, and, more than anything else, more understanding and tolerance of all of the diverse minorities that make up our society.

## II. METHODOLOGY AND GENERAL ARRANGEMENT

Chapter 11 of the Proposed Code, entitled "Sexual Offenses," is a part of article IV, which also includes crimes against public decency and the family. It defines and deals with offenses involving four types of sexual conduct: sexual intercourse (rape and related offenses); deviate sexual intercourse (sodomy and related offenses); sexual abuse (touching for the purpose of arousing or gratifying sexual desire); and indecent exposure. Other sex-related offenses are covered elsewhere in the Proposed Code under more appropriate classifications of the interests sought to be protected. For example, bigamy, incest, and endangering the welfare of a child (now "contributing to the delinquency of a minor") are basically offenses against the family and are so classified in the Proposed Code.

The committee adhered as closely as it could to its avowed policy of criminalizing only that conduct which a very substantial number of Missourians today consider either to endanger or harm significant, legally protected individual and social interests. In the field of sexual offenses, as in a few other areas, special protection was extended to those incapable of mature judgment or so incapacitated as to be incapable of making decisions for themselves. The committee did not undertake to write a moral code.[6] It sought and found valid secular aims in support of its

6. The authors of the Model Penal Code said of their seminal efforts:

> The Code does not attempt to use the power of the state to enforce purely moral or religious standards. We deem it inappropriate for the government to attempt to control behavior that has no substantial significance except as to the morality of the actor. Such matters are best left to religious, educational and other social influences. Apart from the question of constitutionality which might be raised against legislation avowedly commanding adherence to a particular religious or moral tenet, it must be recognized, as a practical matter, that in a heterogeneous community such as ours, different individuals and groups have widely divergent views of the seriousness of various moral derelictions.

MODEL PENAL CODE § 207.1, Comment (Tent. Draft No. 4, 1955). This viewpoint represents only one side of the highly controversial subject of the proper relation of law to morals. The debate began in the 19th century with the treatises of J. MILL, ON LIBERTY (1859) and STEPHEN, LIBERTY, EQUALITY AND FRATERNITY (2d ed. 1874). It was re-stimulated by the English COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION, REPORT, CMDN. 247 (1963) to which Sir Patrick Devlin replied in his lecture on "The Enforcement of Morals" (1959), later published in book form under that name in 1965. P. DEVLIN, THE ENFORCEMENT OF MORALS (1965). His principle opponent for a while was Professor Hart, who took the libertarian view of Mill. H. HART, LAW, LIBERTY AND MORALITY (1963); Hart, *Social Solidarity and the Enforcement of Morality*, 35 U. CHI. L. REV. 1 (1967). *See also*, H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968); N. MORRIS & G. HAWKINS, THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL (1970); Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 YALE L.J. 986 (1966); Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM.

decisions to criminalize some "crimes without victims," such as gambling, prostitution, marijuana use, obscenity, and consensual adult sodomy, even though religious and moral tenets were undoubtedly served coincidentally.[7]

Like all of the Proposed Code, chapter 15 was drafted upon the basic assumption that by identifying and defining socially intolerable conduct and subjecting it to legally enforceable sanctions, all interests of society would be promoted. Three questions are presented; they need not be answered in a particular order. First, what conduct is socially intolerable in Missouri today?[8] Second, of such conduct, which should be criminalized rather

L. REV. 391 (1963); Junker, *Criminalization and Criminogenesis*, 19 U.C.L.A.L. REV. 697 (1972); Kadish, *More on Overcriminalization: A Reply to Professor Junker*, 19 U.C.L.A.L. REV. 719 (1972); Kadish, *The Crisis of Overcriminalization*, ANNALS Nov. 1967, at 15; Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 837 (1972); Rostow, *The Enforcement of Morals*, 1960 CAMBRIDGE L.J. 174; Sartorius, *The Enforcement of Morality*, 81 YALE L.J. 891 (1972); Schwartz, *Morals Offenses and the Model Penal Code*, 63 COLUM. L. REV. 669 (1963); Skolnick, *Criminalization and Criminogenesis: A Reply to Professor Junker*, 19 U.C.L.A.L. REV. 715 (1972); Skolnick, *Coercion to Virtue: The Enforcement of Morals*, 41 S. CAL. L. REV. 588 (1968).

All arguments seem to weigh most heavily against the legal enforcement of morality. The Mill-Hart-Packer-Skolnik-Morris forces may invoke constitutional objections that the English Lord Devlin did not need to face. See, for example, the analogous reasoning that might be developed from the abortion case of Roe v. Wade, 410 U.S. 113 (1973) and the many decisions it cites involving privacy and other constitutional rights.

What may not have been apparent to the Model Penal Code's reporters in 1955 is that although law was originally called upon to define and punish only clearly anti-social and dangerous conduct, it is now required to take over many of the social controls formerly exercised by churches, schools, families, and other social institutions because their control has waned and become increasingly ineffective. R. PERKINS, CRIMINAL LAW 4 (2d ed. 1969). None of these institutions seems any longer able to affect the changing morality (or immorality) of our times, the white-collar crimes and all of the rest, including new attitudes of permissiveness about sexual freedom.

7. No one can win the argument when pitched on the plane of morals; the trick is to find *secular* benefits that will support one side or the other. Thus, those opposed to "crimes without victims" argue the practical problems stemming from laws against gambling, drunkenness, prostitution, etc. Olivieri & Finkelstein, *Report on "Victimless Crime" in New York State*, 18 N.Y.L. FORUM 77 (1972). *See also* note 54 and accompanying text *infra*, dealing with consensual adult sodomy. The committee took the view that in a democracy the majority has a right within constitutional limits to enact any law, whether enforceable or not, if it does nothing more than express society's values. Some of these matters were touched upon in a symposium on the Model Penal Code. *See* Henkin, *supra* note 6; Schwartz, *supra* note 6. The committee's view that it could propose laws defensible for secular reasons even if the community's moral or religious beliefs happened to agree is put rather well in a limerick recited by one of the participants in *A Symposium on Morality*, 34 AM. SCHOLAR 347, 360 (S. 1965):

> [There was] the young lady named Wilde
> Who kept herself quite undefiled
> Through thinking of Jesus
> And social diseases
> And the dangers of having a child.

8. Conduct "socially intolerable" varies from social culture to social culture, from time to time, and from place to place; it even varies within a particular state according to social, racial, economic, and other structures. "In many states,



than left to nonlegal social controls?[9] Third, what legal sanctions should be imposed?[10] Thus, to consider what appears to be the most critical example, is consensual sodomy between adults not married to one another socially intolerable in Missouri today? If so, should its practice be made a crime? If so, what punishment or other methods of dealing with the crime should be adopted where violations occur?[11]

all sexual behavior (including fornication and in some places solitary masturbation by an adult) is illegal except for face-to-face intercourse with one's spouse." Slovenko & Phillips, *Psychosexuality and the Criminal Law*, 15 VAND. L. REV. 797, 799 (1962). But neither our criminal laws nor our publicly-voiced moral codes as to impermissible conduct are obeyed by a substantial segment of society. Kinsey reported in 1948 as to males and in 1953 as to females that about one-half of all married males and about one-quarter of all married females commit at least one adulterous act, and one out of every six females who did not do so at least wanted to or considered it. A. KINSEY, W. POMEROY & C. MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE 585 (1948) [hereinafter cited as KINSEY, HUMAN MALE]; A. KINSEY, W. POMEROY, C. MARTIN & P. GEBHARD, SEXUAL BEHAVIOR IN THE HUMAN FEMALE 416, 419-20 (1953) [hereinafter cited as KINSEY, HUMAN FEMALE]. There is a high incidence of premarital sex (fornication) in the United States, even though it is prohibited, at least when indulged in "openly and notoriously," in all but about 10 states including Missouri. *Id.* at 801. "The president of a mid-western university recently remarked that three things are essential for a happy and alert university: parking for the faculty, athletics for the alumni, and, most important, sex for the students." *Id.* at 799 n.6. It is estimated that there are about 2,600,000 men and 1,400,000 women who are exclusively homosexual in the United States. NATIONAL INSTITUTE OF MENTAL HEALTH, FINAL REPORT OF THE TASK FORCE ON HOMOSEXUALITY 4 (1969); TIME, Oct. 31, 1969, at 56. Some 56 percent of all males have had some homosexual contact by age 55. KINSEY, HUMAN MALE 650-51. This means that almost everyone in the United States could at one time or another during his life have been convicted of a *felony* for a *sexual offense* or, at least, that everyone has violated his avowed moral code. "Not one in a million such episodes is likely to be discovered, none in a hundred million prosecuted." Rodell, *Our Unlovable Sex Laws*, TRANS-ACTION, May 1965, at 36.

9. There are many reasons why some "socially intolerable conduct" should not be criminalized, and, surprising enough, one is criminogenesis. Rose, *Law and the Causation of Social Problems*, 16 SOC. PROB. 33 (1968). Labeling a person as a "homo" or criminal sodomist will not only affect his future conduct and condition in life but will open up other disturbing public problems of blackmail, police corruption, and efficiency in criminal law enforcement and processing. Smith & Pollack, *Less, Not More: Police, Courts, Prisons*, FED. PROB., Sept. 1972, at 12; *see* note 6 *supra* and authorities therein cited.

10. This is the most important question of all: what to do with the offenders. There are some who doubt the efficacy of placing a habitual sexual pervert in prison in the company of others of the same sex who are similarly inclined and have no other sexual outlet except masturbation. Fisher, *The Sex Offender Provisions of the Proposed New Maryland Criminal Code*, 30 MD. L. REV. 91, 93 (1970).

11. One is reminded of the multiple considerations affecting the decision in Roe v. Wade, 410 U.S. 113 (1973) involving abortion statutes. Much of any code of sexual offenses is an "inevitable fusion of secular law and religious belief." P. GEBHARD, J. GAGNON, W. POMEROY & C. CHRISTENSON, SEX OFFENDERS 3 (1965) [hereinafter cited as GEBHARD]. Moreover, "sexual morals are so intimate a part of religious belief that a flagrant breach of them is often felt to be an assault on religion itself." M. GUTTMACHER, SEX OFFENSES 15 (1951). But a criminal code ought to be more than a mere declaration of righteous principles. It must be practical and take into account the operation of the entire criminal justice system, including the public's disposition, or lack thereof, to make com-

The committee was well aware of the impermanence of any set of laws. It was not writing an eternal code of conduct, and certainly not one dealing with sexual offenses.[12] On the other hand, it knew that laws once enacted tend to become entrenched for many reasons, including the vigor of militant reformists.[13] Hence, the committee considered itself compelled to offer laws that might persist for a considerable time as a positive code of conduct even though unleavened by judicial construction or legislative amendment.

The committee did not intend to ease the hand of the law in dealing with crimes that must be punished. On the contrary, the Proposed Code proposes to strengthen those statutes dealing with the serious crimes involving force, threats, the abuse or corruption of children, offensive sexual behavior in public, and all forms of commercial obscenity and prostitution. It would also bring some order to the "vast and varied jungle of sex legislation," cut away underbrush found to be "anachronistic asininity," close the gaps between our laws and our sex attitudes and behavior, grade crimes to give more flexibility to prosecutors, juries, and judges in prosecuting and punishing crime, and scale penalties in a more rational way compatible with modern notions.[14]

plaints and cooperate with law enforcement officials, prosecutors, and judges. It must make allowance and provision for discretionary screening out of cases at any point in the criminal process. According to the National Opinion Research Center, which did certain statistical studies for the President's Crime Commission in the middle 1960's, half of all crimes are not reported to the police. There are four times as many forcible rape cases as are recorded in the Uniform Crime Reports. The police did not even respond in 23 percent of the cases reported to them. Where they did respond, they did not call the incident a crime 25 percent of the time. Arrests were made in only 20 percent of those cases. Only 42 percent of these were brought to trial, and 52 percent of them were convicted. Attrition in the legal process means that a conviction is obtained in only 1 out of every 40 incidents the people consider criminal. Ennis, *Crime, Victims and the Police*, TRANS-ACTION, June 1967, at 36.

12. "Sexual freedom, on a private and mutually consenting level, has steadily increased throughout this century." Reiss, *How and Why America's Sex Standards are Changing*, TRANS-ACTION, Mar. 1968, at 26. Others have predicted that the old standards of sexual immorality are disappearing, but add the hopeful note that "new standards, even if personally unwelcome, probably will work out to the satisfaction of everyone." Prof. George Murdock, Professor of Anthropology at Yale University, N.Y. Times, Dec. 29, 1949, at 28, col. 6. Reiss contends that the notions that a sex revolution is taking place and that a more permissive sexual code is a sign of breakdown in morality are only myths based upon lack of reliable information concerning American sexual behavior. We are in a period of evolution, not revolution, a period of normalcy, not anomie.

13. Speaking to the need of decriminalizing much conduct, including unorthodox set practices of consenting adults, which diverts police, congests courts, and overpopulates jails, the Smith and Pollack article states:

> On a practical level, we must hope that the alliance that preserved prohibition, the tacit partnership between moralists and gangsters, between the Women's Christian Temperance Union and the bootleggers, will not re-form to thwart the most feasible plan for alleviating the present crisis.

Smith & Pollack, *Less, Not More: Police, Courts, Prisons*, FED. PROB., Sept. 1972, at 18.

14. Rodell, *supra* note 5 at 38.



The first two sections of chapter 15 of the Proposed Code deal with chapter definitions and matters of general applicability, such as consent, mistake as to capacity to consent, and mistake as to age. The balance of the chapter defines, classifies, and grades eleven separate sexual offenses. This was accomplished by first selecting four types of sexual acts (as distinguished from "misconduct") susceptible of and needing regulation[15] and then defining the eleven separate crimes as instances in which one of the four sexual acts should be proscribed. The factors that determine whether a particular situation amounts to one of these instances include the use of force, the lack of consent, the age of the victim, the age of the actor, and the physical or mental capacity of the victim to give or refuse consent. Provisions for appropriate penalties were added; the full range of felonies from class *A* through class *D* and two of the three classes of misdemeanors, *A* and *B*, were employed.[16] Nine of the eleven crimes were escalated one grade if serious bodily injury was inflicted or if a deadly weapon was displayed in a threatening manner.

Every move that the committee made in constructing chapter 15 involved a number of critical decisions based upon multiple considerations derived from the wealth of background material supplied by the reporters, which was supplemented by reading, study, and extended discussion by members of the committee. The committee did not hesitate to depart from the formulations of the Model Penal Code, recent legislation in other states, or the existing law of Missouri where that action seemed wise. The balance of this article will be devoted to pointing out most of the decisions made by the committee and at least sketching a few of the reasons therefor.

## III. THE PROSCRIBED SEXUAL ACTS

Chapter 11 deals with two broad forms of sexual conduct: first, sexual intercourse, both vaginal (such as rape) and deviate (such as sodomy), and second, other sex-oriented acts not involving sexual intercourse, such as indecent exposure and the touching of certain intimate parts of the person, either directly or through clothing, for purposes of sexual arousal or gratification.

Section 11.010 defines some of the terms or acts referred to. "Sexual intercourse" carries its traditional meaning of "penetration, however slight, of the female sex organ by the male sex organ, whether or not an emission results." "Deviate sexual intercourse" is defined as "any sexual act involving the genitals of one person and the mouth, tongue or anus of another person." The Proposed Code defines "sexual contact" as meaning "any touching of the genitals or anus of any person, or the breast of any female person, or any such touching through the clothing, for the purpose of arousing or gratifying sexual desire of any person." The phrase "indecent ex-

15. *See* pt. III of this article.

16. PROP. NEW MO. CRIM. CODE §§ 11.030-.130 (1973).

posure" is not separately defined. The Proposed Code crime is the knowing exposure of genitals under circumstances known to be likely to cause affront or alarm.

It is neither desirable nor necessary to include as "sexual offenses" a number of other forms of sexual gratification or arousal, such as sexual acts with animals[17] or corpses, adultery or fornication,[18] peeping, and certain minor forms of possible annoyance, such as the touching of bodily zones not highly intimate or erogenous. Nor should mere solicitation to participate in a sexual act for purposes other than prostitution be criminal. Prosecutions for any such conduct have been virtually nonexistent in this state and there is no discernible demand for laws making such conduct a crime. Most of these forms of conduct have no "victim." They are primarily offenses against morals, and more amenable to psychiatric care than rehabilitation through the criminal justice system. Finally, most such conduct is probably punishable, where that is desired, as some other kind of offense under other sections of the penal code.

Seduction should not be treated as a sexual offense.[19] In classical seduction the victim consents to sexual intercourse under promise of marriage. Whether it should even create a civil cause of action is a matter of considerable controversy. A legitimate question may arise whether the woman yielded her favors in exchange for an exacted promise of marriage, in which case it is difficult to identify which one was the seducer and which the victim. If the principal damage or harm is to the reputation of the female, as would seem to be the theory, then a public prosecution or imprisonment of the man can only aggravate the victim's injury.

17. The present Missouri sodomy statute prohibits bestiality. *See* § 563.230, RSMo 1969. In the last 140 years one conviction reached the appellate courts. State v. Wilson, 361 Mo. 78, 300 S.W. 710 (1927) (sexual intercourse with a mare). The use in privacy of animals for sexual release, a common practice, perhaps, in rural areas, "differs little in essence from solitary masturbation." Time is not yet appropriate to criminalize the latter. Rodell, *supra* note 5 at 38.

18. Under the Missouri Digest topic of "Fornication" only two cases are cited. The act never rose to the dignity of a common law crime, and according to Blackstone, it and adultery were "left to the feeble coercion of the spiritual court according to the rules of the canon law". 4 W. BLACKSTONE, COMMENTARIES *65. The early English canon law seems to have been concerned with illicit intercourse only if it might adulterate the blood. Hence, the sin of fornication could be committed only if the female was unmarried, adultery only if she was married. R. PERKINS, CRIMINAL LAW 329 (2d ed. 1969). When Missouri adopted its first incest statute in 1835, it condemned the conduct by those related persons who committed "adultery or fornication with each other" or "who shall lewdly and lasciviously cohabit with each other." § 6, RSMo 1835 [now § 563.220, RSMo 1969]. Prior to that, a statute made it criminal for persons to live in "a state of open and notorious adultery," and for "every man and woman, one or both of whom are married, and not to each other, who shall lewdly and lasciviously abide and cohabit with each other." § 77, RSMo 1825 [now § 563.150, RSMo 1969]. Thus, some threads of the canon law were woven into Missouri law where they remain today, although prosecutions under the statute are extremely rare.

19. *But see* MODEL PENAL CODE § 213.3 (1962).
The current Missouri statute is § 559.310, RSMo 1969. The last prosecution thereunder was in 1935.



Where a pregnancy results the woman has much to gain by access to a criminal liability charge since she has a strong lever to force marriage. Consequently many criminal seduction statutes allow the villain to purge himself, so to speak, by marrying the woman.[20] On the other hand, she has at least two better means of redress: a civil action for damages based upon the seduction and civil and criminal action based upon nonsupport of the child.

## IV. DIFFERENTIATING FACTORS

### A. *Sex*

In its chapter on sexual offenses, the Proposed Code makes no distinctions based upon the sex of the actor or the victim. Women are given equal protection of the laws, but they are held equally responsible. The criminal law should not be based upon "the premise that women are weak-willed, naive, and easily preyed upon by men who are more clever and always stronger."[21] Such a policy would not preclude legislation taking into account physical characteristics unique to one sex.[22] Nor is it nullified by the fact that men are more likely to commit certain crimes than women, or vice versa.[23] The plain fact is that in this modern day the male victim of a sex crime is entitled to the same protection as a woman, and the female offender should be subject to the same punishment as a man.[24]

20. § 559.310, RSMo 1969, provides in part:
[I]f, before the jury is sworn to try the defendant upon an indictment or information, he shall marry the woman thus seduced, it shall be a bar to any further prosecution of the offense. . . .

21. Note, *Sex Discrimination in the Criminal Law: The Effect of the Equal Rights Amendment*, 11 AM. CRIM. L. REV. 469, 473 (1973). For an excellent symposium on the subject, see *Women and the Criminal Law*, 11 AM. CRIM. L. REV. 291 (1973).

22. *See* Note, *supra* note 21, at 470. The Proposed Code defines "sexual contact" as including the touching of the breast of a female.

23. *Id.* at 471 n.10. The author cites statistics as to murder and robbery, but omits prostitution. It is true, however, that males far outnumber females in the commission of crime. Sexual offenses committed by females are so rare that the studies of the Kinsey Institute excluded them. *See* GEBHARD, *supra* note 11, at 9. Some of the reasons given were society's tolerance or tendency to ignore female sex offenses other than prostitution, hesitance to make complaints against females, reluctance of juries to convict, the discreetness observed by lesbians, the average female's "much weaker 'sex drive' than the average male," rare resort to violence by the female, scarcity of female peepers and exhibitionists, and, of course, the bald fact that females do indeed commit fewer illegal sexual acts than males.

24. A classic example of sex discrimination under the present law is the observation that a man caught watching through a window while a woman undresses may be arrested as a voyeur, whereas if the sexes are reversed the undressing man may be held as an exhibitionist. The present Missouri sex crime laws are highly discriminatory against males. Sex differences between male and female have a great deal to do with the active role of males and the passive role of females in normal sexual conduct as well as criminal sexual activities. Simon & Gagnon, *Psychosexual Development*, TRANS-ACTION, Mar. 1969, at 9. Today, parity is being approached. Reiss, *How and Why America's Sex Standards are Changing*, TRANS-ACTION, Mar. 1968, at 26. Seduction, for example, is fading both as a crime and cause for civil action.

### B. *Status*

The prohibitions of chapter 11 do not apply to a man and woman living together as man and wife, regardless of the legal status of their relationship, and "[s]pouses living apart pursuant to a judgment of nullity or legal separation are not married to each other for purposes of this Chapter."[25]

At common law a man could not rape his wife because the sexual intercourse was not "unlawful," but either party might be guilty of sodomy.[26] Although wife-beating is a punishable battery, a forcible *sexual* assault is probably not a crime under the present law unless it is deviate, i.e., sodomistic. The difficult problems of proof and enforcement and the desirability of not attempting to interfere with otherwise aggressive or offensive advances of one spouse upon another lead to the conclusion that the law, not the spouse, should adopt a "hands off" policy.

Although the Code would prohibit consensual deviate sexual intercourse between unmarried adults for reasons discussed later, it does not attempt to criminalize such conduct of married people. Some of it is advised or encouraged by marriage manuals and counselors, medical and otherwise.[27] If there is any "crime" it is a moral one without a "victim."

### C. *Age*

One of the objections most often voiced to existing sex crime legislation is that it establishes a high "age of consent" with the same severe penalties attached to "statutory" as to forcible rape.[28] Historically, the "age of consent" in Missouri and elsewhere has ascended, and the punishment has become increasingly severe.[29] The "age of consent" for rape began in Missouri in 1825 at 10 years; advanced to 12 years in 1879, to

25. PROP. NEW MO. CRIM. CODE § 11.010(4) (1973).

26. R. PERKINS, CRIMINAL LAW 156 (2d ed. 1969). Of course, a man may be guilty of rape of his wife if he is an accessory. State v. Drope, 462 S.W.2d 677 (Mo. 1971).

27. Ploscowe, *Sex Offenses in the New Penal Law*, 32 BROOKLYN L. REV. 274, 275-76 (1966). Ploscowe, a former judge in New York and considered an authority on sex crimes, thought that New York's new penal code (1965) was "stupid" in prohibiting adult consensual homosexuality. With respect to New York's relaxation of that rule in the case of man and wife living together, he wickedly observed that "if a man or woman want sex legitimately through deviate means, he or she must marry some one with similar tastes". Ploscowe, *supra* at 276. But how can a holy sacrament convert sybaritic sin into mere domestic dalliance?

28. At common law the age of consent was 10 years. 4 W. BLACKSTONE, COMMENTARIES *210, 212. "Age of consent" usually refers to the rape statutes under which lack of consent is not an essential element of the crime where a child below a certain age is "carnally known." Because mistake as to age is no defense at common law and intent to rape is an automatic ingredient, the offense becomes one of "strict liability." The only issue of fact is penetration. State v. Coffman, 360 Mo. 782, 230 S.W.2d 761 (1950). Emission is not required. State v. Cobb, 359 Mo. 373, 221 S.W.2d 745 (1949).

29. It has been suggested that the age of majority was not based on sexual maturity or judgment, but rather rose from 14 to 21 as the weight of arms borne into battle increased. Fadeley, *Sex Crime in the New Code*, 51 ORE. L. REV. 515, 520 n.31 (1972).



14 years in 1889, and to 15 years in 1913; and came to rest at 16 years in 1921.

Although the adoption of an "age of consent" or the use of age differences in grading sex crimes has been criticized,[30] it seems an unavoidable result of attempting to enact special laws designed (1) to protect those deemed inexperienced and immature in judgment, and (2) to deny them a taste of that forbidden fruit that would give them the experience they lack. Establishing an age of consent and then grading various offenses according to the age of the victim or the age of the actor or both involve crucial and difficult differentiations. The higher the age of consent, the greater the number of crimes created. An arbitrary age does, indeed, ignore individual differences.

One solution would be to create overlapping offenses, and thus permit prosecutor and, perhaps, jury discretion. However, our experience with the Habitual Criminal Law alone, where the jury could and did completely ignore undisputed facts, was a dismal one. Therefore, the committee decided upon a straightforward approach.

The Proposed Code treats victims under 16 years of age as incapable of consenting to any of the prohibited sexual conduct except sexual contact (touching other than by intercourse) of a person 14 or 15 years of age by another person less than 17 years of age. However, various offenses are graded according to the age of the victim with appropriate adjustments of the penalties. Sexual intercourse or deviate sexual intercourse between persons not married to each other is sexual assault in the first degree where the child is 12 or 13 years of age, and sexual assault in the second degree where the child is 14 or 15 and the actor is over 17 years old. These crimes carry lesser penalties under the Proposed Code than does rape.

Under the Proposed Code "rape" is sexual intercourse between persons not married to each other either (1) by forcible compulsion, or (2) with a child under 12 years of age. Deviate sexual intercourse under the same circumstances is sodomy, which is punished as severely as rape. Sexual abuse under the same circumstances is a felony. Indecent exposure is a crime no matter what the age of the victim. In the first three crimes the word "or" should not be overlooked. No matter what the age of the victim may be, if forcible compulsion is used the crime is rape, sodomy, or sexual abuse in the first degree.

The committee selected the age of 12 as the critical age for the

30. With respect to age gradations in the newly enacted Oregon Penal Code, one writer said:

> The conclusion seems inescapable that the Commission viewed greater sexual freedom as potentially fulfilling to adults but usually corrupting to the young. . . . The use of an arbitrary chronological age as an absolute criterion for sexual maturity or adulthood denies the reality of individual differences and does not comport with common sense solutions to social problems.

*Id.* at 521.

heaviest penalties for rape, sodomy, and sexual abuse in the first degree for a number of reasons. The age of 12 is the commonest one for the outset of puberty; indeed "it is known that significant numbers of girls enter the period of sexual awakening as early as the tenth year."[31] Society strongly condemns intercourse with a prepubescent child, whether force is used or not. Children who have entered puberty generally are subjected to sex offenses different from those that the below-12 children suffer.[32] Usually, the child who has reached puberty is more sexually and emotionally mature, more wise in the ways of the world, and more physically capable of resisting sexual advances. The chances of persisting psychological or physical harm from the assault are considerably reduced. A substantial number of these young people have had sexual experience of one kind or another.[33] The female dresses and acts older than her years in many cases, and may in various ways lead the male into a situation where he lacks the moral and social stamina to refrain from sexual acts.[34] Where

31. MODEL PENAL CODE § 207.4, Comment at 252 (Tent. Draft No. 4, 1955). Puberty in the female is that age at which she is capable of bearing children. The majority of children under 12 are prepubescent; they have "not developed pubic hair, breast enlargement and other adult sexual characteristics that are sexually attractive to ordinary men." GEBHARD, *supra* note 11, at 54. The average age of the onset of puberty in 5,000 girls in Boston and St. Louis around the turn of the century was between 13½ and 14½ years. MODEL PENAL CODE § 207.4, Comment at 252 n.134 (Tent. Draft No. 4, 1955). The age of the onset of menstruation has declined by three years in the last century, thus accelerating or lowering the age of *physical* maturity, which is at least one of the indications of maturing judgment about sexual matters. J. TANNER, GROWTH AT ADOLESCENCE 152 (1962); Eisenberg, *Student Unrest; Sources and Consequences*, 167 SCIENCE 1689 (1970).

32. *See* GEBHARD, *supra* note 11, at 54-55, 83-85, 106, 133-34, 155-56, 177-79, 272-73, 298-99, 324-26. For example, few adult male homosexuals seem particularly interested in boys under 12; rather, they seek only adolescent or young adult males. *Id.* at 272.

33. Many studies have been made on the increasing numbers of teenagers who have had consensual heterosexual or homosexual experiences. *See* A. KINSEY, HUMAN MALE, *supra* note 8; A. KINSEY, HUMAN FEMALE, *supra* note 8; R. SORENSEN, ADOLESCENT SEXUALITY IN CONTEMPORARY AMERICA (1973). Sorensen found that by age 16 about 37 percent of all children had had sexual intercourse one or more times. Of the remaining 63 percent, about 17 percent were "sexual beginners," *i.e.*, virgins who had actively or passively experienced sexual petting. Kinsey's earlier studies may now be outdated. Even then he found that of girls born in the 1920's, 30 percent had petted to orgasm in their teens. KINSEY, HUMAN FEMALE, *supra* at 244. The most telling of Sorensen's statistics are those that indicate that there is a tremendous expansion in sexual experience between the ages of 16 and 19. By age 20, 64 percent of all teenagers had had sexual intercourse one or more times; 21 percent were "sexual beginners." The boys who had had sexual intercourse outnumbered the girls by a few percentage points, but girls outnumbered boys among "sexual beginners." Other studies, including those of Kinsey, indicate that many young people have one or more homosexual experiences in their teens; those experiences are generally purely experimental and do not persist in adulthood.

34. The story is told of a man who met a good-looking girl given to heavy cosmetics, high heels, tight dresses, provocative mannerisms, and a propensity for drink and sexual banter. The anticipated sequence of events occurred. When he next saw her on the witness stand in court, "they had braided her hair in pigtails and given her a rag doll to hold." GEBHARD, *supra* note 11, at 84.



*no forcible compulsion is used*[35] the actor does not deserve the punishment or label of "rapist" or "sodomist" when the object of his advances is over 12 years old.[36]

The age of 12 was selected by the Kinsey Institute for its study by classes of various types of sex offenders as a significant age differentiating offenders against "children" (defined as those under 12) from offenders against "minors" (those 12 or older but less than 16 years of age). The

35. The importance of determining whether "forcible compulsion" was used cannot be overemphasized. Resort to force or threats draws the heaviest penalties under the present law and under the Code. It renders the age of the victim irrelevant, just as it is irrelevant in statutory rape. Whether "forcible compulsion" was used in any particular case necessarily depends upon all of the circumstances. This is especially important where children are the victims, because many children between the ages of 6 and 16 *have* been taught to refrain from most sexual acts permitted adults. In many cases they *do* withhold consent and resist sexual advances. However, their capabilities are usually limited, so that what may not be "forcible compulsion" against an adult may well qualify where a child is involved. The Kinsey Institute found it necessary and appropriate to classify sex offenders by types. One of the variables was the age of the victim. Another was whether force had been used. Obviously, the younger the child the more difficult it is to say whether force was used.

> Force ranges from unmitigated violence to, let us say, holding a child by the wrist; threat runs the gamut from specific verbal threat or brandishing a weapon to a subtle implication. In any relationship between a child and an adult there is always in the background an element of duress; the inevitable disparity in strength and social status is an omnipresent factor. A man, even though a stranger, is in an authoritarian, superior position.

GEBHARD, *supra* note 11, at 54.

There are a substantial number of heterosexual aggressors who *do* use force against children from 6 to 16 years of age. The grading of sex offenses by age is intended, therefore, only to punish in a more just fashion the *consent* cases, which remain after all of the forcible compulsion cases are eliminated.

36. In the last 15 to 20 years, a vast amount of literature has developed concerning the processes by which society labels conduct as deviate and the consequences thereof for the individual and society. One psychiatrist suggests dropping entirely the category of "sexual offenses" because it blocks effective handling and treatment of individuals. Sadoff, *Sexually Deviated Offenders*, 40 TEMPLE L.Q. 305 (1967). The labelling theory hypothesizes that "social groups create deviance by making the rules whose infraction constitutes deviance, and by applying those rules to particular people and labelling them as outsiders." H. BECKER, OUTSIDERS 8-9 (1963). A deviant label generates special and consequential difficulties for the person. A spoiled public identity in many cases reinforces deviance rather than inhibits it, because it negatively affects the deviant's interpersonal relationships. In a "milieu of suspicion and social disapprobation" he finds it difficult to resume or continue conventional roles. Thus, individuals tend to become fixed in deviance once labelled. Yet, labelling is often followed by "deviance disavowal," such as blaming alcohol or engaging in other rationalization in the struggle to maintain a self-image of normalcy. This is particularly true of sex offenders, because alcohol sometimes increases the tendency to commit sex crimes. All of this tends to hinder psychotherapy.

General discussion and bibliographies may be found in Chiricos, *Inequality in the Imposition of a Criminal Label*, 19 SOC. PROB. 553 (1972); McCaghy, *Drinking and Deviance Disavowal: The Case of the Child Molesters*, 16 SOC. PROB. 43 (1968); Rooney, *Reactions to "Crimes Without Victims"*, 13 SOC. PROB. 400 (1966). *See also* Liazos, *The Poverty of the Sociology of Deviance: Nuts, Sluts, and Perverts*, 20 SOC. PROB. 1031 (1972).

committee made this same important age classification. The Model Penal Code and the Proposed New Federal Criminal Code denominate as "rape" sexual intercourse by force, threats and other means, including such conduct with a female less than 10 years old. The same age marks off "sodomy" as a crime under those proposals. Delaware adopted the age of 12; the Proposed New Jersey Code recommends the same age. In 1955 eleven states fixed the *age of consent* for sexual intercourse at 12 and in several jurisdictions the age was lower.[37]

Just as there are logical reasons for making distinctions based upon the age of the victim, there are equally good reasons for penalizing actors 17 years of age or older more severely than those less than 17 years old.[38] The latter are processed as juveniles unless certified for trial in the circuit court. At 17 the average juvenile—certainly the male of the species—is sexually mature and experienced and probably physically superior to the average female of 14 or 15.[39] Below the age of 17 the average male has less judgment, socialization, and self-restraint than the average person in the large class above 17 years of age. For these reasons and others sexual assault, deviate sexual assault, and sexual abuse are given a higher offense grading when committed by actors 17 years of age or older on 14- or 15-year-old victims than when committed by persons under 17 years of age.

### D. *Chastity, Promiscuity, Character, and Reputation*

Chastity and "good repute" are mentioned in only two Missouri sex offense statutes.[40] However, evidence of chastity or lack of it and good character or reputation or lack of them may creep into any sexual offense

37. MODEL PENAL CODE § 207.4, Comment at 251n.126 (Tent. Draft No. 4, 1955).

38. Some criminal code revision proposals predicate liability upon the age differential between actor and "victim," rather than fixing a specific age below which those actors not using forcible compulsion will not incur maximum liability. *See generally* Comment, *Sex Offenses and Penal Code Revision in Michigan*, 14 WAYNE L. REV. 934, 945 (1968).

39. The Kinsey Institute did not attempt to study sex offenders under 16 years of age. First, younger persons are "swallowed up and concealed by the secret and anonymous workings of the juvenile court system." Second,

> The male in the last half of his teens is ordinarily a physical adult or essentially so . . . . We cannot rule him out of adulthood on the basis of poor judgment or impulsiveness, for he has no monopoly on these attributes . . . . At any rate, by age 16 the average male meets at least the minimal requirements for adult life; he can function in society as an adult if permitted to do so, and he knows what society expects of him.

GEBHARD, *supra* note 11, at 11. But the human female is equally ready for adulthood at age 16. *Id.* at 106. Feminists would agree and denounce any overt discrimination between the sexes, such as a two-year "lead time" implicit in the Committee's proposals. Note, *Sex Discrimination in the Criminal Law*, 11 CRIM. L. REV. 469 (1973). We say "implicit" because the term "actors" is neutral so far as the Proposed Code is concerned.

40. *See* § 559.300, RSMo 1969 (carnal knowledge by a person over 17 of any unmarried female between the ages of 16 and 18 of previously chaste character) *and* § 559.310, RSMo 1969 (seduction of any unmarried female of good repute under age 18).



trial in several ways. As a result, a considerable amount of decisional law on the subject has encrusted the law of sex crimes in Missouri.[41] That law of *evidence* would undoubtedly be applicable to the trial of cases under a new penal code unless new statutes attempted to inject new concepts into the substantive or procedural law or—perish the thought—attempted to codify the existing decisional law on the admissibility of evidence of chastity and character or reputation in sex offense cases.

At common law prior unchastity of the female was not a defense to either forceful or "statutory" rape,[42] and that is the law in Missouri today. Since the Proposed Code proceeds on the hypothesis that persons under 16 lack capacity for judgment as to whether to refrain from sexual intercourse, "it is something of a farce to inquire into their virtue." "Previous sexual experience in this situation might well betoken previous victimization, which should not be a defense to a subsequent victimizer."[43]

On balance, therefore, the committee concluded that a rule essentially involving credibility should not be reduced to a fixed rule.[44] The present decisional law is preferable, particularly in light of the partial allowance of mistake as to age as an affirmative defense in section 11.015(3) of the Code,[45] and "the unwarranted slanders on the complainant's sexual life that the defendant's 'oath-helpers' are likely to perpetrate. . . ."[46]

### E. *Consent*

Some of the sexual offenses in the Proposed Code require proof of lack of consent by the victim; others do not.[47] The policy decisions of the committee were based in part upon the following.

#### 1. Lack of Consent in General

One convenient classification of sexual offenses is based upon the presence or absence of forcible compulsion. The force-or-threat cases need no discussion, because lack of consent can be implied from the use of threats or force overcoming reasonable resistance. The cases not involving

41. The Missouri cases touching on this subject generally involve rape. It would serve no useful purpose here to trace the winding path of the law. Missouri probably follows majority rules. *See generally* Hibey, *The Trial of a Rape Case*, 11 AM. CRIM. L. REV. 309, 325 (1973); Note, *The Victim in a Forcible Rape Case: A Feminist View*, 11 AM. CRIM. L. REV. 335, 343 (1973).

42. 4 W. BLACKSTONE, COMMENTARIES *213.

43. MODEL PENAL CODE § 207.4, Comment at 254 (Tent. Draft No. 4, 1955).

44. PROP. NEW FED. CRIM. CODE § 1648, Comment at 193 (1971).

45. PROP. NEW MO. CRIM. CODE § 11.020(2) (1973) provides:

> Mistake as to age. (a) Whenever in this Chapter the criminality of conduct depends upon a child's being under the age of 14, it is no defense that the defendant believed the child to be 14 years old or older. (b) Whenever in this Chapter the criminality of conduct depends upon a child's being 14 or 15 years of age, it is a defense that the defendant reasonably believed that the child was 16 years old or older. (c) Reasonable belief that the child was 16 years old or older under Subsection (2)(b) is an affirmative defense.

46. MICH. REV. CRIM. CODE § 2331, Comment at 193 (1967).

47. Lack of consent is not an essential element of any offense defined in chapter 11 unless specifically set out in the definition.

force may then be divided into two subclasses: (a) those involving incapacitated victims, and (b) those involving others. The cases involving incapacitated victims require no explanation; those victims are incapable of consent, so that no showing of lack of consent need be made. The mistaken consent cases will be discussed *infra*.[48] That leaves a class of victims not incapacitated physically or mentally, a class that may be subdivided into those under 16 and those 16 years of age and older.

Those under 16 years of age are capable, under the Proposed Code, of consenting to only one act (sexual contact).[49] This exception is a recognition of the facts of life. Many children 14 or 15 years of age and some much younger indulge in "heavy petting." This conduct is not only common but probably normal in the psychosexual development of children in these age groups who are not inhibited by other influences. It may involve the touching of the female breast or touching of the sexual organs of either or both parties. If consented to it should not be criminalized.[50]

2. Consensual Deviate Sexual Intercourse Between Competent Adults Not Married to One Another

The Proposed Code makes it a crime for any person less than 17 years old to engage in deviate sexual intercourse with any other person of any age to whom he is not married.[51] Consent is no defense, and whether the act took place in private or in public is irrelevant. Thus, Missouri's existing policy criminalizing such conduct would be adhered to with only two exceptions: (1) persons married to one another would not be punishable, and (2) four classes of the crime would be created with differing penalties. Bearing in mind the first underlying exception (persons married to each other), the four classes would be differentiated according to age, capacity to consent, and the use of forcible compulsion. It would be sexual misconduct where both parties were over 17 years of age,[52] deviate sexual assault in the second degree where one party was 17 or older and the other party was 14 or 15 years of age,[53] deviate sexual assault in the first degree where the actor was 17 or older and the other party 12 or 13 years of age or incapacitated,[54] and sodomy if forcible compulsion was used or if the victim was under 12 years of age.[55]

The committee's decision to continue to make it a crime for competent, consenting adults not married to one another to engage in deviate sexual intercourse in private may provoke more controversy than any

48. *See* pt. IV, § 3 (b) of this article.
49. PROP. NEW MO. CRIM. CODE § 11.120 (1973).
50. The rationale is that as to "heavy petting" between contemporaries "[p]rivate morals must be relied upon to regulate personal behavior, and criminal sanctions are inappropriate to punish a breach of the moral law." PROP. KY. CRIM. CODE § 1127, Comment at 138 (1971).
51. PROP. NEW MO. CRIM. CODE § 11.090 (1) (b) (1973).
52. *Id.*
53. *Id.* § 11.080 (1).
54. *Id.* § 11.070 (1).
55. *Id.* § 11.060 (1).



other part of the committee's work.[56] A vociferous, militant, well-orga minority with an increasing number of adherents and encouragement many places may vigorously challenge this provision of the Proposed C They will be met by powerful opposition, equally vociferous, militan well-organized. Religion, morals, the medical and social sciences, pc legal administration, and constitutional law will be drawn into the and called upon by both sides for support.

The arguments pro and con have been marshalled so well by that it seems unnecessary to pitch them against one another here. over, it would be impossible to state authoritatively *which* argumen majority of the committee considered valid. The committee was at *consistent*, because it also decided to criminalize other "crimes wi victims," such as certain aspects of gambling, abortion, prostitution, juana use, and obscenity.

Three major lines of reasoning may be urged in support of the mittee's position. The first is derived from Lord Devlin: A cor morality is a necessary bond holding society together, and "mar which needs society, must pay the price" by sacrificing some of its to otherwise unlimited freedom. The whole deadweight of sin cann put upon either the criminal law, which deals with minimum stan of conduct and punishment, or the moral law, which establishes maxi standards and relies upon teaching, training, and exhortation. R or wrongly, most Missourians today regard homosexuality as imn if the law fails to support that notion, disrespect for law and a gc loosening of the bonds of society must follow.

56. "The proposed change [decriminalizing consensual adult sodomy the Proposed Maryland Criminal Code] presents an issue of legislative which may well rival capital punishment and abortion in its potential for ar public controversy." Fisher, *The Sex Offender Provisions of the Proposed Maryland Criminal Code: Should Private Consenting Adult Homosexu havior Be Excluded?*, 30 MD. L. REV. 91 (1970).

The topic has provoked a great deal of law review commentary. *See* Cantor, *Deviation and the Criminal Law*, 55 J. CRIM. L.C. & P.S. 441 ( Spence, *The Law of Crime Against Nature*, 32 N.C.L. REV. 312 (1954); Com *Government-Created Employment Disabilities of the Homosexual*, 82 HA REV. 1738 (1969); Note, *Homosexuality and the Law—An Overview*, 17 FORUM 273 (1971); Project, *The Consenting Homosexual and the Lav Empirical Study of Enforcement and Administration in Los Angeles Coun* U.C.L.A.L. REV. 643 (1966); Comment, *Deviate Sexual Behavior Under the Illinois Criminal Code*, 1965 WASH. U.L.Q. 220 (1965); Comment, *Private sensual Homosexual Behavior: The Crime and Its Enforcement*, 70 YALE L. (1961).

The authors of the Model Penal Code decided that consensual adult d sexual intercourse should not be a crime. The draftsmen of new codes in Calif Kentucky, Michigan, and New Jersey agreed, as did the draftsmen of the Pro New Federal Criminal Code. So did the legislatures of Illinois and Oreg enacting their new criminal codes.

57. The widespread organization of homosexuals for better treatme society in terms of social acceptance, equal job opportunities, and freedom criminal prosecution may not be discounted. Humphreys, *New Styles in I sexual Manliness*, TRANS-ACTION, Mar. 1971, at 39.

The second point is that a majority of the people in Missouri still regard homosexuality as disgusting, degrading, degenerate, and a threat to society. Whether this is rational or not, so long as the feeling persists the majority will insist that its condemnation be reflected in a positive manner in a criminal code even if it is unenforceable. It has the right to do so, subject only to constitutional limitations, and it has the political power to make its notions of the Good become True if not Beautiful.[58]

The third argument cautions practicality in politics. If the Proposed Code does not make consenting adult homosexuality a crime, the legislature may react violently and reject the entire Proposed Code, leaving Missouri with many laws, including those on sodomy, unreformed and much worse than the compromises proposed by the committee.

None of these arguments is susceptible of reasoned and reasonable analysis. This is not to suggest that the committee weaseled out of its obligation to construct a rational criminal code by adopting a narrow construction of its commission. Legislators have a dual responsibility to legislate wisely and to reflect the wishes of the constituencies they represent. The antinomy can be resolved only by some reasonable accommodation of the one to the other. The committee's approach involves an attempt to reflect society's general disapproval of consensual deviate sexual intercourse while dealing more justly with offenders.

### 3. Mistake as to Capacity to Consent

Sexual intercourse, deviate sexual intercourse, or sexual contact are crimes under the Proposed Code when committed with a person who is "incapacitated." The comment to section 11.010 defines "incapacitated" as "that physical or mental condition, temporary or permanent, in which a person is unconscious, unable to appraise the nature of his conduct, or unable to communicate unwillingness to an act," and provides that "a person is not 'incapacitated' with respect to an act committed upon him if he became unconscious or unable to appraise the nature of his conduct after consenting to the act." Section 11.020(1)(a) of the Proposed Code then provides:

> [W]henever in this Chapter the criminality of conduct depends upon a victim's being incapacitated, no crime is committed if the actor believed that the victim was not incapacitated and believed that the victim consented to the act. The burden of injecting the issue of mistake is on the defendant, but this does not shift the burden of proof.

58. The majority does not invariably prevail, of course. Organized minority groups with well-conceived, adequately financed, and properly propagandized "power plays" determine the ultimate legislative result in some critical cases. *See, e.g.*, Roby, *Politics and Criminal Law: Revision of the New York State Penal Law on Prostitution*, 17 SOC. PROB. 83 (1969) (history of New York Penal Code's prostitution provision).



All of these sections are in substantial accord with existing Missouri law. It is important to note that "mistake as to capacity to consent" must be distinguished from "mistake as to age," which is covered as a separate part of section 11.020.

### a. Capacity to Consent

The law is clear enough as to what constitutes physical incapacity to consent.[59] As to persons mentally incapable of consenting, Missouri cases have held that a woman with "weak intellect" may be yet capable of consent to intercourse.[60] Some of the decisions indicate that the victim must be able to understand "the immoral nature" of the act.[61] Although no issue was raised as to the propriety of the charge to the jury, several cases quoted without disapproval instructions presenting the issue of whether the victim was of such "unsound mind" or of "such weak intellect or intelligence" or of "such weak and disordered mind" that she was not able "to comprehend the nature and consequence of such act, and could not understand right from wrong."[62]

The right-from-wrong test should not be applied in determining mental capacity to consent to a sexual act for several reasons. The statutes do not attempt to define or condemn immorality, except in the area of consensual sodomy. Current Missouri law recognizes that the legal tests of mental capacity to perform various acts may differ widely. Even the Mental Responsibility Law differentiates between mental capacity to commit crimes and mental capacity to proceed at various stages of the trial. Here we are concerned with a very personal choice by the victim rather than the actor. The interests to be protected so far as adults are concerned are the individual's right of privacy, bodily integrity, human dignity, and freedom from distasteful or traumatic sexual experiences.

### b. Mistake as to Capacity to Consent

The Proposed Code again is in substantial accord with existing Missouri law, under which a defendant is not guilty of rape of a person mentally incapable of consenting unless he *knows* of that incapacity, providing of course, that the victim appeared to consent and force or threats were not employed.[63] The defendant's knowledge is subjectively tested, thou-

59. Sexual intercourse with a woman who is asleep is rape because the act is without her consent. State v. Stroud, 362 Mo. 124, 240 S.W.2d 111 (1951); State v. Welch, 191 Mo. 179, 89 S.W. 945 (1905) (dictum). The same rule undoubtedly applies to a victim rendered unconscious by force, drugs, or drink, or a person paralyzed as to be incapable either of resisting or signaling nonconsent.

60. State v. Cunningham, 100 Mo. 382, 12 S.W. 376 (1889).

61. State v. Schlichter, 263 Mo. 561, 173 S.W. 1072 (1915); State v. Warren, 232 Mo. 185, 134 S.W. 522 (1911).

62. State v. Schlichter, 263 Mo. 561, 173 S.W. 1072 (1915); State v. Williams, 149 Mo. 496, 51 S.W. 88 (1899).

63. State v. Robinson, 345 Mo. 897, 136 S.W.2d 1008 (1940); State v. Helderle, 186 S.W. 696 (Mo. En Banc 1916); State v. Schlichter, 263 Mo. 561, 173 S.W. 1072 (1915); State v. Warren, 232 Mo. 185, 134 S.W. 522 (1911); State v. Cunningham, 100 Mo. 382, 12 S.W. 376 (1889).

proof of constructive knowledge may be made by circumstantial evidence.[64] The actor's mistaken belief as to mental capacity to consent is distinguishable from his mistaken belief that the victim was of a sufficient age to have the capacity to consent, because while every person is presumed to be sane, there is no presumption that one has attained a certain age. Further, for reasons of public policy the onus should be on the actor to be certain that his victim is not under age.[65]

### F. *Forcible Compulsion and Other Aggravating Circumstances*

#### 1. Force and Threats

The Proposed Code provides higher penalties for illegal sexual intercourse, deviate sexual intercourse, and sexual abuse ("sexual contact") where they are accomplished by "forcible compulsion," a phrase defined in section 11.010 as "either (a) physical force that overcomes reasonable resistance, or (b) a threat, express or implied, that places a person in reasonable fear of death, serious bodily injury or kidnapping of himself or another person." The decision to regard the use of force or threats as particularly reprehensible in the sexual offense cases was an easy one for the committee to make. In a very real sense, forcible rape or sodomy resemble felonious assault.[66] Rape subjects the victim not only to the unaccepted risk of unwanted pregnancy or venereal disease but also to the likelihood of bodily harm in resisting the attack.

#### 2. Infliction of Injury or Display of a Deadly Weapon

The present Missouri statutes recognize no aggravating circumstances, such as gang rape, abuse of a position of guardianship or trust, pregnancy, infection with a venereal disease, infliction of various bodily injury, or use of a deadly weapon, as grounds for imposing an increased penalty for rape. Statutes relating to assault and other crimes increase the punishment where deadly weapons are used or where injury is threatened or committed.[67]

The committee concluded that not only should rape and sodomy be upgraded, increasing the penalties, where serious injury was inflicted or a deadly weapon was displayed, but that simple logic required similar treatment of almost all of the sexual offenses in chapter 11. This decision, which involved a value judgment, gives considerably more flexibility in the application of the law and justifies heavier penalties where these aggravating circumstances are present.

## V. Penalties

The penalty provisions of other modern criminal codes cannot be readily compared with each other or with the Proposed Code for at least

64. State v. Warren, 232 Mo. 185, 134 S.W. 522 (1911).

65. State v. Helderle, 186 S.W. 676 (Mo. En Banc 1916) (opinions of Faris, J. and Woodson, J.)

66. *See* § 559.190, RSMo 1969.

67. *See* § 556.140, RSMo 1969.



two reasons: differences in defining and grading sexual offenses, and differences in alternative sentencing procedures relating to all of the criminal laws. Nevertheless, there is rough agreement on several propositions.

First, it is difficult for most people to think rationally about the punishment that ought to be administered to a sex offender. He is an "outsider" regarded emotionally with contempt and disgust, one who has violated not only the criminal law but religious, moral, and social codes as well. A vast amount of misinformation surrounds all sex offenses. We know few of the facts that we should know in order to deal with sex offenders, and we tend to fill the gap of ignorance with myths, rationalizations, and over-punishment.[68] Second, the most serious types of offenses are rape and sodomy; less serious are the sexual contact cases; the least serious are the noncontact offenses. Third, where the actor applies forcible compulsion or where the victim is a prepubescent child, sexual offenses should be regarded as aggravated and deserving of heavier punishment than when those circumstances are not present. They should be upgraded even further where a serious bodily injury is inflicted or where a deadly weapon is displayed. Fourth, most sexual offenses should be felonies but some should be misdemeanors, and, if possible, significant differentiating factors ought to be written into the law to express the legislature's notions of the suitability of the punishment to the crime.

Perhaps the most significant contributions of the Proposed Code are a complete overhauling of the sanctions imposed for criminal violations and a combination of new methods and improved old methods for dealing with convicted persons. A full treatment of this subject is beyond the scope of this article. Suffice it to say that the committee's primary goal in classifying and grading the sexual offenses was to enable the *legislature initially* to provide for that type and range of punishment suitable to the *crime* rather than to the *person* committing the crime.

Therefore, it is at once obvious that the committee's recommendations as to separation or classifications of different types of crimes are merely *suggestions*, albeit carefully reasoned ones. If the general assembly thinks that indecent exposure ought to be a class *A*, *B*, *C*, or *D* felony instead of a class A misdemeanor, then its will can be done.

There was little, if any, dissent within the committee as to the penalty recommendations in the Proposed Code. Forcible rape and sodomy and sexual intercourse or deviate sexual intercourse with a child under the age of 12 years ought to be heavily punished; in the aggravated cases these offenses deserve a class *A* felony designation.[69] Sexual intercourse

68. Little agreement exists among legal and psychiatric experts as to what may properly be regarded as sex offenses or as to what punishment sex offenders should face. Gebhard, *supra* note 11, at 1-13; B. Karpman, The Sexual Offender and His Offenses 4-20, 42-48, 215-90, 404-14 (1954); G. Mueller, Legal Regulation of Sexual Conduct 10-13 (1961); Sadoff, *Sexually Deviated Offenders*, 40 Temple L.Q. 305 (1967).

69. Prop. New Mo. Crim. Code § 11.030 (1973).

and deviate sexual intercourse with incapacitated persons and those 12 or 13 years of age should not carry as severe a penalty, especially where mistake as to age is no defense and the victim may have not only consented but deliberately solicited the sexual act. And so on, through the 11 crimes set out in chapter 11.

Consensual adult homosexual contacts remain, as today, punishable under the Proposed Code. However debatable that decision may be, a substantial majority will agree that the offense should not be labeled "sodomy" or allotted the same punishment as cases involving forcible compulsion or deviate sexual intercourse with persons under 16 years of age.

## VI. Summary and Conclusions

The Proposed Code would make no essential change in most respects in the present Missouri law of sexual offenses. Forcible and statutory rape would remain severely punished crimes. The "age of consent" of 16 years would be retained but would apply to all sex offenses, including the prohibitions against touching in the current child molestation statute.[70] Consensual adult deviate sexual intercourse would continue to be a crime, but the punishment would be reduced; persons married to one another would be exempted.[71] The most frequent sexual offenses—indecent touching and indecent exposure—are extended to protect adults. The decisional law respecting consent, incapacity to consent, mistake as to capacity to consent, resistance, corroboration, prompt complaint, and instructions to juries would remain undisturbed.

In addition to a few minor changes in the law, some of which have been mentioned, a great deal is proposed by way of pruning out dead-letter statutes, replanting some offenses in other sections of the Code, and replacing vague and obsolete phrases[72] with clear, modern terms.

The important major changes proposed are few. First, the principal sex offenses (rape, sodomy, and sexual contact) would be split into a number of graded offenses and labeled "rape," "sexual assault" in two degrees, "sodomy," "deviate sexual assault" in two degrees, "sexual misconduct," and "sexual abuse" in three degrees. Under this classification the four basic offenses involving sexual intercourse, deviate sexual intercourse, sexual contact, and indecent exposure would be subdivided into the eleven offenses *for the purpose of grading the punishment* according to the use of forcible compulsion, the capacity or incapacity of the victim to consent, the age of the victim, and the age of the actor. Second, there would be one new defense, mistake as to age, but it would be limited to mistake as to the age of 14- or 15-year-old persons.[73]

70. The only exception is that a 14 or 15 year old could consent to "sexual contact." *Id.*, § 11.120 (2).
71. *Id.*, § 11.060 (1) (a).
72. *See, e.g.*, § 563.230, RSMo 1969.
73. *See* statute quoted note 45 *supra*.



The practical effects of the Proposed Code's proposals in the area of sexual offenses may now be assessed. First, the major goals of the criminal law would be easier to attain because of the availability of punishment befitting the crime but adjustable to the individual offender for purposes of deterrence and rehabilitation. Second, many objectives of a modernized criminal code would be served, including a significant narrowing of the gap between what people say they believe and how they actually behave. Third, the enforcement of sex offense laws would become easier and the prosecution and processing of sex offenders would become more certain and equal without sacrificing the flexibility needed for individual cases.

Much remains to be done. We need to know much more about sex offenders, their motivations and characteristics, their recidivism rates, their amenability to treatment, and their response to punishment of themselves and others. Accurate statistics must be kept so that trends can be noted and projected and appropriate adjustments can be made in the entire criminal justice system. Other disciplines, such as the social sciences, must be drafted to help so that a massive, coordinated, informed approach can be taken to the entire subject.

The studies already begun should be continued. We cannot afford to let the substantive criminal law slumber for another century and a half in Missouri. But it will surely do so unless there is some permanent, compact body charged with the continuing responsibility of conducting empirical studies, review, and realignment of maladjusted parts of the system.[74] Such a project requires financial support either from the legislature or some charitable foundation and the willing assistance of the bench, bar, and law schools. The committee's work has been completed, but it should be regarded as only an interim report on work that will never be finished. "The end of any great enterprise should also be a beginning."[75]

74. Other governments have effectively employed such a body. Pound, *Introduction* to M. Ploscowe, Sex and The Law, at v (1951).
75. Packer, *The Model Penal Code and Beyond*, 63 Colum. L. Rev. 594, 607 (1963).

APPENDIX: A

## HISTORICAL REVIEW OF MISSOURI LAWS RELATING TO CERTAIN SEXUAL OFFENSES

### A. RAPE

Missouri Territorial law punished the forcible "carnal knowledge" of any woman by castration "to be performed by the most skillful physician at the expense of the territory, in case the party convicted shall not have sufficient property to pay the same and costs." 1 Mo. Terr. Laws, Nov. 4, 1808, at 307, § 8. The same punishment was prescribed for slaves. *Id.* at 323, § 35. Missouri enacted the same law (§ 9, at 283, RSMo 1825) shortly after gaining statehood, with a new section 10 making it an offense to "carnally know and abuse any female child under the age of 10 years." Missouri's law provided for castration of slaves for rape or attempted rape of a white person.

Section 23, at 170, RSMo 1835 covered forcible and statutory rape in essentially the same language as the current statute, § 559.260, RSMo 1969, except for the child's age and the punishment. The statute prohibits "carnally and unlawfully knowing any female child under the age of _____ years, or . . . forcibly ravishing any woman of the age of _____ years or upward." Under the 1835 law, the punishment for whites was imprisonment for not less than 5 years. For any negro or mulatto who raped or attempted to rape a white female, or forced or attempted to force her to marry him, or "defiled" or attempted to "defile" or take her away for prostitution or concubinage, the punishment was castration. § 28, at 170-71, RSMo 1835. In 1879, the legislature raised the age of consent to 12 years and changed the punishment for rape for all offenders to death or not less than 5 years imprisonment "in the discretion of the jury." § 1253, RSMo 1879. The age of consent was increased to 14 years in 1889 (§ 3480, RSMo 1889), to 15 years in 1913 (Mo. Laws 1913, at 219, § 2), and to 16 years in 1921 (Mo. Laws 1921, at 284a, § 1). Capital punishment, abolished in 1917, was restored by Mo. Laws 1919, Ex. Sess., at 779, § 1.

### B. SODOMY

Missouri's sodomy statute, § 563.230, RSMo 1969, is essentially the same as § 7, at 206, RSMo 1835. The punishment, initially not less than 10 years imprisonment, was reduced in 1879 to not less than 2 years imprisonment. The present words "with the sexual organs or with the mouth" were added by Mo. Laws 1911, at 198, § 1. The statute provides that "[e]very person who shall be convicted of the detestable and abominable crime against nature, committed with mankind or with beast, with the sexual organs or with the mouth, shall be punished by imprisonment in the penitentiary not less than 2 years." § 563.230, RSMo 1969.

### C. RAPE OF A DRUGGED VICTIM

§ 559.270, RSMo 1969, provides that

> [e]very person who shall have carnal knowledge of any woman above the age of 14 years, without her consent, by administering to her any substance or liquid which shall produce such imbecility of mind or weakness of body as to prevent effectual resistance, shall, upon conviction be adjudged guilty of rape, and be punished by imprisonment in the penitentiary for a term not less than 5 years.

This law is identical to § 24, at 170, RSMo 1835, except that the latter statute set the victim's age at 10 years. The victim's age was raised to 12 years in 1879 (§ 1254, RSMo 1879), and to 14 years in 1889 (§ 3481, RSMo 1889). It is doubtful that this statute is enforced. No conviction under it has ever reached an appellate court.

### D. FORCING A WOMAN TO MARRY

§ 559.280, RSMo 1969, provides that

> [e]very person who shall take any woman unlawfully against her will, and by force, menace or duress, compel her to marry him, or to marry any other person, or to be defiled, upon conviction thereof shall be punished by imprisonment in the penitentiary not less than 3 years.

This statute is identical to the original enactment except that formerly the punishment was not less than 3 or more than 10 years imprisonment. § 25, at 170, RSMo 1835. This statute may have been overlooked in 1913 when the anti-prostitution statutes were passed. A similar provision, in the chapter on offenses against morals, § 563.010, RSMo 1969, makes it a mixed felony, punishable by a term of two to five years in prison, for any person to, *inter alia*, "take or detain a female with intent to compel her by force, threats, menace or duress to marry him or to marry any other person or be defiled."

We find no statute ever enacted in Missouri making "shotgun marriages" of males unlawful.

### E. ABDUCTION OF A WOMAN UNDER 18 YEARS OF AGE

It is a felony punishable by imprisonment up to five years to "take away any female under the age of 18 years from her father, mother, guardian or other person having the legal charge of her person, either for the purpose of prostitution or concubinage." § 559.290, RSMo 1969. Subject to the same punishment is "the father, mother, guardian or other person, having the legal charge of her person who shall consent to the same." *Id.* The statute is unchanged since § 27, at 170, RSMo 1835, was enacted.

### F. GUARDIAN DEFILING WARD

This statute provides that

> [i]f any guardian of any female under the age of 18 years, or any other person to whose care or protection any such female shall have been confided, shall defile her, by carnally knowing her, while she remains in his care, custody or employment, he shall, in cases not otherwise provided for, be punished by imprisonment in the penitentiary not exceeding 5 years, or by imprisonment in the county jail not exceeding one year and a fine not less than $100.

§ 559.320, RSMo 1969. When first passed the punishment was not less than 2 years imprisonment or a fine of $500 or both. § 9, at 207, RSMo 1835.

### G. SEDUCTION UNDER PROMISE OF MARRIAGE

This statute was passed in 1879 and provided that "[i]f any person shall, under promise of marriage, seduce or debauch any unmarried female of good repute, under twenty-one years of age, he shall be deemed guilty of a felony" and imprisoned in the penitentiary for not less than 2 nor more than 5 years or fined not over $1,000. Prosecution was barred if the accused married the girl before judgment. § 1259, RSMo 1879. The female's age was lowered to 18 in 1889, § 3486, RSMo 1889. It was increased to 21 years by Mo. Laws 1897, at 106, § 1. In 1907 the latter half of the statute was amended to read as follows:

> [b]ut, if before the jury is sworn to try the defendant upon an indictment or information, he shall marry the woman thus seduced, it shall be a bar to any further prosecution of the offense, but an offer to marry the female seduced by the party charged shall constitute no defense to such prosecution; and in all cases where the defendant marries the woman seduced the case shall be dismissed at the defendant's costs, and in no event shall the state or county be adjudged to pay, or pay, any cost made or incurred by the defendant when said cause has been dismissed as aforesaid.

Mo. Laws 1907, at 229-30, § 1. § 559.310, RSMo 1969, is identical. § 546.340, RSMo 1969, provides that the complaining witness's evidence as to the promise of marriage "must be corroborated to the same extent required of the principal witness in perjury."

### H. CARNAL KNOWLEDGE OF FEMALE BETWEEN AGES 16 AND 18

This statute provides that "[i]f any person over the age of 17 years shall have carnal knowledge of any unmarried female, of previously chaste character, between the ages of 16 and 18 years of age, he shall be deemd guilty of a felony" and either imprisoned in the penitentiary for 2 years, or fined from $100 to $500, or held in the county jail for not less than 1 but not over 5 months, or be subjected both to the jail and fine penalties "in the discretion of the court." § 559.300, RSMo 1969. The first enactment was Mo. Laws 1895, at 149, § 1. Mo. Laws 1913, at 219, § 2 raised the male's age from 16 to 17, the minimum female's age from 14 to 15, and increased the penitentiary confinement to "not

exceeding 5 years." The legislature raised the minimum female's age to 16 in 1921, but failed to insert the changes regarding the male's age and the punishment that had been made in 1913. Mo. Laws 1921, at 284a, § 1. The statute was corrected in § 4394, RSMo 1939.

I. Adultery and Gross Lewdness

The present law, § 563.150, RSMo 1969, is substantially unchanged since enactment. The original act punished any person living in "a state of open and notorious adultery or fornication" or guilty of "open lewdness, or any notorious act of public indecency grossly scandalous, and tending to debauch the morals and manners of the people." § 77, at 306, RSMo 1825. The penalty was light: a fine of not over $200 or not over one year in jail or both "at the discretion of the court." *Id.* In 1835, the statute was changed to its present form, providing that

> [e]very person who shall live in a state of open and notorious adultery, and every man and woman, one or both of whom are married, and not to each other, who shall lewdly and lasciviously abide and cohabit with each other, and every person, married or unmarried, who shall be guilty of open, gross lewdness or lascivious behavior, or any open and notorious act of public indecency, grossly scandalous, shall, on conviction, be adjudged guilty of a misdemeanor.

§ 563.150, RSMo 1969. It is said that the statute contains five separate offenses; finding them, however, is similar to identifying faces hidden in a nature drawing entitling one to a chance for a Shetland pony. Those unable to find the five faces may see State v. Sekrit, 130 Mo. 401, 32 S.W. 977 (1895), for the answer.

> The court in State v. Barnes, 256 S.W. 496 (St. L. Mo. App. 1923), said that it is not the object of the statute to establish a censorship over the morals of the people, nor to forbid the violation of the seventh commandment. . . . Its evident object was not to forbid and punish furtive illicit interviews between the sexes, however frequent and habitual their occurrence, but only to make such acts punishable as it plainly designates; acts which necessarily tend by their openness and notoriety, or by their publicity, to debase and lower the standard of public morals.

*Id.* at 498.

Early Missouri courts eagerly found technical grounds for reversing convictions under § 563.150. As a result, discouraged prosecutors abandoned attempts to enforce it. Appellate courts have decided less than 10 cases in the last 50 years. In the last reported case, 20 years ago, the court reversed a conviction, having found that sex in a cemetery at 2:35 A.M., although near a driveway used by the public during the day, was not sex in a "public" place. State v. Metje, 269 S.W.2d 128 (St. L. Mo. App. 1954). It is not a crime to arrange "furtive, illicit interviews" in a modern tourist cabin, State v. Parker, 233 Mo. App. 1037, 128 S.W.2d 288 (Spr. Ct. App. 1939), or in an old log cabin without windows, lined inside with clapboards, and the doors closed. State v. Phillips, 49 Mo. App. 325 (St. L. Ct. App. 1892).

J. Contributing to the Delinquency of a Child

Statutes on this subject date back to 1907. The most recent one, § 559.360, RSMo 1969, enacted in 1959, provides that

> [a]ny person who encourages, aids or causes a child under 17 years of age to commit any act or engage in any conduct which would be injurious to the child's morals or health or who commits any act or omits the performance of any duty which contributes to, causes or tends to cause a child under the age of 17 years to come within the provisions of [the juvenile court's laws], shall be punished by imprisonment in the county jail for a term not exceeding 6 months or by a fine, not exceeding five hundred dollars or by both. . . .

The court, however, "may impose conditions upon a person found guilty under this section and so long as such person complies to the satisfaction of the court, the sentence imposed may be suspended." § 559.360, RSMo 1969. This provision is probably directed toward parents.



K. Molesting Minor with Immoral Intent

§ 563.160, RSMo 1969, enacted in 1949, provides for imprisonment in the penitentiary for a term of not more than 5 years, or a jail sentence of not over one year, or fine of $500, or both, for

> [a]ny person who in the presence of any minor shall indulge in any degrading, lewd, immoral or vicious habits or practices; or who shall take indecent or improper liberties with such minor; or who shall publicly expose his or her person to such minor in an obscene or indecent manner; or who shall by language, sign or touching such minor suggest or refer to any immoral, lewd, lascivious or indecent act; or who shall detain or divert such minor with intent to perpetrate any of the aforesaid acts . . . .

Intent is not an essential element of the crime and consent is not a defense. A "minor" is any person under the age of 21 years. State v. Chapple, 462 S.W.2d 707 (Mo. 1971). Because the statute proscribes all types of sexual offenses, including rape, sodomy, touching, indecent exposure, and even mere mention of sexual intercourse, the true "age of consent" in Missouri is 21 years.