On January 1, 1962, a new Criminal Code became effective in Illinois. This paper discusses the principles and rationale of Article II (Sex Offenses) of the new Code.

SEX OFFENSES UNDER THE NEW CRIMINAL CODE

By MORRIS J. WEXLER

Among the major problems attacked in drafting the sex offenses provisions of the New Criminal Code were those of rationalizing penalties among various offenses, eliminating inconsistencies and obscurities in the use of language, rationalizing the underlying principles among various offenses and filling gaps in the Statutes.

Article 11 (Sex Offenses) replaces the following provisions of former Chapter 38: Abduction of Chaste Female for Prostitution (Sec. 1); Adultery and Fornication (Sec. 46); Bigamy (Sec. 75); Marrying a Bigamist (Sec. 77); Indecent Liberties against Child (Sec. 109); Crime against Nature (Sec. 141); Prostitution and places for Prostitution and Pandering (Secs. 163 through 173); Incest (Secs. 374-375); Obscene Books (Secs. 468-472 (a)); Statutory and Forcible Rape (Sec. 490); and Seduction of Chaste Females (Sec. 537).

Art. 11 (Sex Offenses) seeks to rationalize the underlying principles amongst the various sex offenses by means of four policy considerations:

1. The protection of the individual from forcible sexual attacks.
2. The protection of the young and immature from sexual advances of older and more mature individuals.
3. The protection of the institution of marriage and normal family relationships from sexual conduct which tends to destroy them.
4. The protection of the public from open and notorious conduct which disturbs the peace, tends to promote breaches of the peace, or openly flouts accepted standards of morality in the community.

Criminal sanctions are applied for violations of these policy considerations. There are no criminal sanctions for sexual conduct between consenting adults unless it affects one of these policy considerations.

The Protection of the Individual From Forcible Sexual Acts

Art. 11-1 (Rape), Art. 11-2 (Deviate Sexual Conduct), and Art. 11-3 (Deviate Sexual Assault) are the crimes by which we seek to protect the individual against the forcible sexual aggressions. The provisions of Art. 11-1 (Rape) are essentially the same as former Sec. 490 except it uses the modern terminology of sexual intercourse by force and against her will rather than the former terminology of carnal knowledge of a female forcibly and against her will.

The provisions of Art. 11-2 and 11-3 replace the outmoded and outdated terminology of former Sec. 141 (Crime Against Nature). Art. 11-2 defines deviate sexual conduct to mean any act of sexual gratification involving the sex organs of one person and the mouth or anus of another, as compared to former Sec. 141 which merely prohibited the "infamous crime against nature either with man or beast." There was considerable litigation and confusion under former Sec. 141 as to the specific acts included in the crime against nature.

Art. 11-3 remolds former Sec. 141's Crime Against Nature into an unconsented to forcible sexual assault upon a person comparable to rape except that it involved deviate sexual conduct. Under former Sec. 141 there could be no consent to deviate sexual conduct. Under Art. 11-3 the deviate sexual conduct, if consented to, would not be a deviate sexual assault.

The Protection of the Young and Immature From Sexual Advances of Older and More Mature Individuals

Art. 11-4 (Indecent Liberties with a Child); Art. 11-5 (Contributing to the Sexual Delinquency of a Child) and Art. 11-6 (The Indecent Solicitation of a Child) are concerned with non-violent sexual acts with children. These acts are usually consented to by the child but because of the child's age and immaturity, we do not permit the consent to prevent the imposition of criminal sanctions.

These three provisions cover a wide range of sexual conduct under the former statutes including Statutory Rape, Indecent Liberties with Child, Contributing to the Delinquency of a Child, and Crime against Nature. Art. 11-4 is the felony sexual crime against children and Arts. 11-5 and 11-6 are the misdemeanor sexual violations.

Art. 11-4 provides that any person above the age of 17 years who performs or submits to any of the following acts with a child under the age of 16 commits indecent liberties:

(a) Any act of sexual intercourse (Statutory Rape).

(b) Any act of deviate sexual conduct (Crime against Nature).

(c) Any lewd fondling or touching of a child with the intent to arouse the sexual desires of the child or person (Sexual Crime against Children).

The felony provisions of Art. 11-4 are directed to an older person who knowingly and deliberately victimizes an immature child.

Art. 11-4 (b) provides three affirmative defenses to indecent liberties with a child. (Art. 3-2 defines affirmative defense to mean that unless the State's evidence raises the issue the defendant, to raise the issue, must present some evidence.) The affirmative defenses of Art. 11-4, Sub-section (b) were not intended to minimize the seriousness of offenses of indecent liberties with child, but rather to mitigate the possibility of a totally unjustified penalty.

Sub-section b (1) provides the accused with a defense of "mistaken age" if, "the accused reasonably

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ABOUT THE AUTHOR

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believed the child was of the age of 16 or upwards at the time of the act giving rise to the charge." This substantially changes existing Illinois law inasmuch as Statutory Rape was an absolute liability statute in which there was no defense as to the age of the girl. The affirmative defense of b (1) removes this felony provision from the absolute liability category. Since the emphasis of Art. 11-4 is that the accused victimized the child knowingly and deliberately, a person who engages in acts with another believing honestly that such other person was of the age to exercise discretion in the matter, may have overstepped the boundaries of conduct, but such offender has not exhibited the dangerous propensity to victimize the immature.

Sub-sections (b) 2 and (b) 3 provide additional affirmative defense when a child is a prostitute or has been previously married. Since Art. 11-4 was directed to the victimization of an immature child from sexual conduct, there is little reason to protect the child prostitute or the child previously married. Realism requires that some flexibility be afforded in the assumption of immaturity based solely on age. Marriage of the parties as a defense, as was the case in Statutory Rape, is eliminated because of the public policy that marriages shall not be coerced by criminal law or substituted for punishment.

The felony provision of Art. 11-4 is directed to the more gross abuse of the young and the subjective guilt of the accused. In contrast, Art. 11-5 and 11-6 are misdemeanors and retain the absolute liability approach. Art. 11-5 provides for the misdemeanor of contributing to the sexual delinquency of a child. The provisions of the Family Court Act are still retained in Chapter 23 in regard to all other conduct which contributes to the delinquency of a child. The policy of Art. 11-5 is to discourage premature ventures into sexual experiences with children under the age of 18. Art. 11-5 is patterned after the felony provisions of Art. 11-4 but is stripped of concern for the subjective guilt of the accused. It is intended to operate as a lesser included offense to Art. 11-4. There are two elements to contributing to sexual delinquency: (1) the sexual act; (2) the participation with a child. The acts outlined in Art. 11-5 overlap with all of the acts set forth in Art. 11-4 with a further broadening of sexual participation to include any lewd act done in the presence of a child. Art. 11-5 (b) indicates that Contributing to the Sexual Delinquency of a Child is an absolute liability statute by stating that it is not a defense to contributing to sexual delinquency of a child that the accused reasonably believed the child to be of the age of eighteen or upwards. There is no defense of prostitution or previous marriage inasmuch as the public policy is to discourage sexual activities with children under 18 regardless of their prior sexual experience.

Art. 11-6 (Indecent Solicitation of a Child) proscribes a narrow class of acts, namely, the invitation or solicitation of a child to engage in some sexual act condemned in either Art. 11-4 or Art. 11-5. It is intended to cover those cases which fall short of the attempt provisions under Art. 8-4. The age limit of the child solicited is under the age of 13. This relatively low age limit was selected because this provision was directed at pathological and not impudent solicitation. This is also an absolute liability statute.

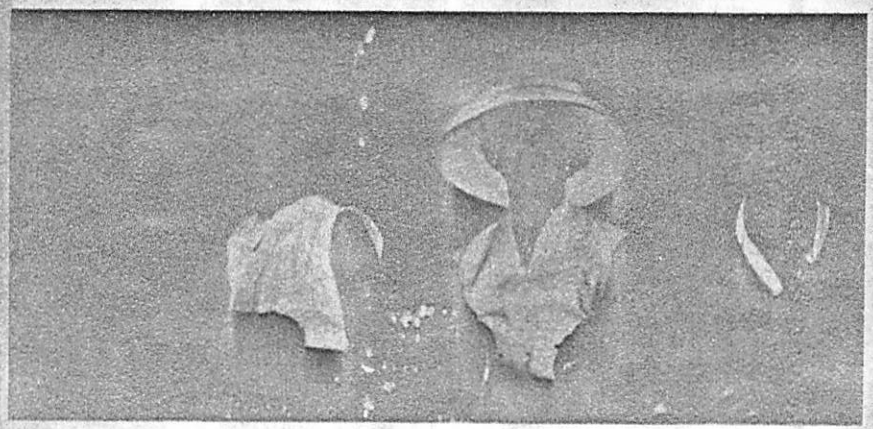
The Protection of the Institution of Marriage and Normal Family Relationship From Sexual Conduct Which Tends to Destroy Them

The policy consideration of Art. 11-8 (Fornication); Art. 11-12 (Bigamy); Art. 11-13 (Marrying a Bigamist); Art. 11-10 (Aggravated Incest) and Art. 11-11 (Incest) is to avoid the imposition of criminal penalties in matters of principally private moral concern. In Adultery (Art. 11-7) and Fornication (Art. 11-8) it is the combination of sexual intercourse and the accompanying notoriety that makes this a criminal offense. Former Sec. 46 provided criminal sanctions for a "man and woman who live in open state of adultery and fornication." Art. 11-7 and 11-8 punish this same conduct

"if the behavior is open and notorious." Thus, under both the old and new law there must be a holding out to the community that the persons cohabiting or having sexual intercourse are husband and wife. The penalty for adultery is more severe than fornication since adultery involves an affront to a specific marriage relationship rather than the general institution of marriage. Marriage of the parties is eliminated as a defense because of the policy that marriage should not be coerced by criminal law or substituted for punishment.

Art. 11-12 (Bigamy) and Art. 11-13 (Marrying a Bigamist) are substantially the same as former Secs. 75 and 77. Bigamy involves an affront to the institution of marriage and the abuse by one of the spouses that becomes entangled in such an affair. Further affirmative defenses are provided in Art. 11-12 for a reasonable mistake as to the death of a prior spouse and when the accused remarries based on a foreign divorce decree.

Art. 11-10 (Aggravated Incest) and Art. 11-11 (Incest) replace former Secs. 374 and 375. The major policy considerations in aggravated incest is the conflict between whether the conduct between the persons should be prohibited because of the biological risk of genetically defective offsprings or to prevent the abuse of family authority. The policy consideration in Art. 11-10 is to prevent abuse of family authority and the destruction of the family. Accordingly, where former Sec. 374 stated: "rudely and licentiously cohabit" we have stated that the father commits aggravated incest with his daughter if he has sexual intercourse, or any act of deviate sexual conduct even though no genetically defective offspring would be the result of deviate sexual conduct. Similarly, until a female arrives at the age of 18 years, she is not sufficiently mature to be free from undue parental pressure to submit to sexual advances. Accordingly, the definition of "daughter" was broadened to include a blood daughter regardless of age (genetic policy consideration) and also a stepdaughter or adopted daughter under the age of 18, without regard to genetically defective offspring.



The Board of Governors of the Association of Wives of Illinois Lawyers held a meeting at the ISBA Workshop session September 14 in Chicago. Shown (left to right) are Mrs. Horace A. Young, Chicago; Mrs. Stanford S. Meyer, Belleville; Mrs. Peter Fitzpatrick, Chicago; and Mrs. Mason Bull, Morrison, AWIL President.

The provisions of Art. 11-11 (Incest) contracts the former law so that incestuous relationships are no longer based on the relationship set forth as prohibited by the Marriage Act, which led to the anomalous situation of Illinois recognizing as valid a marriage between first cousins consummated in another state but condemning as incest each act of sexual intercourse.

The Protection of the Public From Open and Notorious Conduct Which Disturbs the Peace; Tends to Promote Breaches of the Peace; or Openly Flouts Accepted Standards of Morality in the Community

The provisions of Art. 11-9 (Public Indecency); Art. 11-14 (Prostitution); Art. 11-15 (Soliciting for Prostitution); Art. 11-16 (Pandering); Art. 11-19 (Pimping); Art. 11-17 (Keeping Place of Prostitution); Art. 11-18 (Patronizing a Prostitute) and Art. 11-20 (Obscenity), are concerned with the protection of the public from sexual conduct which flouts accepted standards of morality.

Art. 11-9 (Public Indecency) is directed at sexual conduct which falls into the public nuisance category. There are two elements: (1) a sexual act (intercourse — deviate sexual conduct — lewd exposure — lewd fondling or caressing the body of another person of the same sex), (2) performance in a "public place," which is specifically defined for purposes of this Section.

Art. 11-14 (Prostitution) is directed to the criminal sanctions to be applied against prostitutes. The common law did not punish the prostitute per se but only punished the public nuisance aspect of prostitution. Former Section 163 punished an inmate of a house of ill fame or assignation or a person who solicited on a street, alley, park, or other place in any Village, State or Incorporated Town. Under the former law a discrect prostitute could carry on her trade if she avoided soliciting in certain places and performed the sexual act outside a bawdy house. It was a historic accident rather than a policy decision that limited the criminal controls of prostitution. Under Art. 11-14 a prostitute may be a male or female and all methods of soliciting are punished. There are

no inmate or "situs" provisions but rather a definitive statement of the act proscribed.

Art. 11-15 prohibits soliciting for a prostitute. This is directed at the runner or contact man for the prostitute. Under former Secs. 163 and 327 the accused not only had to actively solicit the invitee, but the invitee must have been prevailed upon to visit the place of prostitution before he could be convicted. Under Art. 11-15 the success or failure of the solicitor, the response of the prospective customer and the locale of the solicitation are not relevant to the commission of the crime.

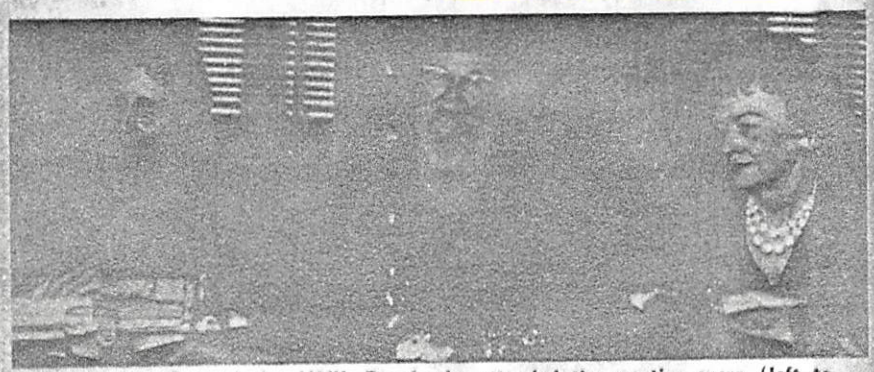
Art. 11-16 (Pandering) is directed at the recruiter or the business manager of prostitutes. The emphasis of this article is shifted from the technique by which the panderer accomplishes his objective and is directed to the striving to accomplish the objective of placing the prostitute in business or keeping her in business.

Art. 11-19 (Pimping) is directed at the prostitute's consort who lives off her earnings. A person who regularly receives money from a prostitute is essentially in the entrepreneur class in the business complex of prostitution. Art. 11-18 does not place criminal liability on those who deal with the prostitute in normal business transactions.

Art. 11-17 (Keeping a Place of Prostitution) is directed at the person who has or exercises control over the use of any place which could offer seclusion or shelter for the practice of prostitution. This provision is broader than the former provision and imposes liability on a person who knows or obtains indirect knowledge that a place under his control is being used for prostitution.

Art. 11-18 (Patronizing a Prostitute) applies criminal sanctions to a person who patronizes a prostitute. The age of the parties, the privacy of the place and consent are not relevant to the prohibition of this conduct.

Art. 11-20 (Obscenity) is directed at the commercial dissemination of obscenity. The affirmative defenses in this Section reserve criminal punishment for those situations in which obscenity is disseminated to strangers for gain. The private non-commercial dissemination between adults is not a criminal offense. ■



Other members of the AWIL Board who attended the meeting were (left to right) Mrs. Albert Saikley, Danville, Board Secretary; Mrs. Owen Rall, Chicago, immediate past president of the Board; and Mrs. Amos M. Pinkerton, Springfield.

APPLICATIONS FOR MEMBERSHIP

The association by-laws provide that the names of persons who have applied for membership shall be published in the Illinois Bar Journal. Members are urged to examine the following list and advise the Committee on Admissions, in a signed letter, as to the fitness or unfitness of any applicant. Correspondence should be forwarded no later than the 10th day following the receipt of the Journal to the Illinois State Bar Association, 424 South Second Street, Springfield, Illinois. The information shown includes the applicant's address, year admitted to the bar and sponsors.

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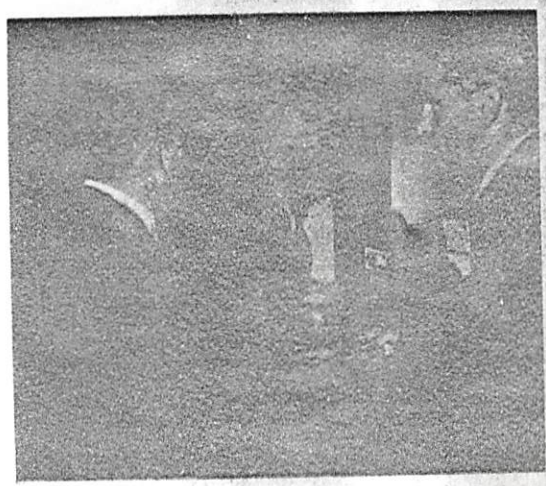
PHILIP J. SIMON, 134 S. LaSalle Street, Chicago 3, 1930; Jacob Levy, J. M. Taussig.

JAMES T. TIGANI, JR., Prudential Plaza, Chicago 1, 1962; Harvey B. Stephens, Gene K. Edlin.

STANLEY ZAX, 208 S. LaSalle Street, Chicago 4, 1961; John W. Kearns, Jr., Robert S. Jacobs.



Lyle W. Allen (left), Peoria, editor of the Insurance Law Section's Newsletter, has a few words at the Workshop session with two members of the ISBA Board of Governors, Peter Fitzpatrick (center), Chicago, Third Vice President, and George F. Nichols, Dixon.

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Footnote analysis

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Other Authors

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