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A REASONED APPROACH TO THE REFORM OF SEX OFFENSE LEGISLATION

Ronald B. Schram*

Currently there is a widespread movement toward the revision of state criminal codes. The goals of such an undertaking are varied: (1) to reduce the size of the criminal law by eliminating inconsistent, overlapping, or obsolete provisions; (2) to phrase the prohibitions in clear and concise language; (3) to introduce more modern approaches to the definition and treatment of criminal offenses; and (4) to harmonize the penalty imposed for a particular act with the severity of the act and the penalty for other acts. This paper will concentrate on sex offenses in an attempt to understand the legislative process of reform, for this subject illustrates each of the enumerated goals and poses in acute form the evidentiary and enforcement considerations that must continually be borne in mind by the drafters of a new criminal code. Moreover, the topic raises the difficult but important question whether law can affect private moral decisions or, more specifically, whether it should regulate private sexual behavior.

Much of the reform activity has been prompted and aided by the detailed research and final publication of the Model Penal Code in 1962. A fair amount has been written on various sections of the Code. However, very little has been written comparing the Model Code with newly enacted or proposed state codes. This paper will concentrate on the New York Code and the Proposed Michigan Code and, comparing their provisions with those of the Model Code, will seek to evaluate the differences and similarities in treatment and will present specific suggestions to improve the state revisions in the form of a Proposed Penal Code.1 The analysis will focus on three broad categories of sex offenses: statutory and forcible rape, private sexual behavior between consenting adults, and the miscellaneous offenses (nonconsensual sodomy, sexual misconduct, indecent exposure, and sexual assault).

I. Rape

The common law provided for statutory and forcible rape.2 The modern codes retain this classification but distinguish three degrees of the offense. The Michigan and New York Codes expand the common law coverage

*Mr. Schram is a member of the Staff of Prospectus.
1 See pp. 158-161, infra.
2 The common law's one degree of rape included forcible intercourse with a woman not married to the actor, intercourse with a physically helpless woman incapable of consent, and intercourse with a girl under 10 years old (See general discussion in R. Perkins, Criminal Law, 122-123 (1957) ).

[139]
with a more amplified and refined definition of statutory rape. These codes continue to identify the behavior proscribed as forcible rape with reference to the consent standard which focuses on the subjective state of mind of the female victim. On the other hand, the Model Penal Code's three-degree classification stems largely from a more detailed identification of the conduct which is punished as forcible rape. For this purpose, it adopts the resistance standard which concentrates attention on the actual behavior of the victim and its causal relation to the actor's conduct. The first question to which we turn is which standard is the more appropriate to govern the forcible rape offense and whether it makes any difference which one is followed.

A. Forcible Rape

1. Resistance Versus Consent Standard

The New York and Michigan Codes, although stressing the consent standard, include references to resistance. However, there is a difference between using resistance as an outward manifestation of nonconsent (as under the state codes) and using "resistance itself as the test of whether a protected interest has been violated." The resistance standard is more objective and eliminates consideration of "the participating woman's subjective attitude, which may be unclear even to herself, inaccurately reflected in her behavior, and easily distorted in recall." Moreover, the resistance standard permits the law to differentiate between "offenses which differ materially in danger to the woman, danger to the community, and heinousness of the defendant's act." Although the Model's commentary does not articulate any reasons for its adoption of the resistance standard, such reasons as the above seem persuasive. A restatement of the law of

3 MICHIGAN REVISED CRIMINAL CODE, §§ 2310(1)(c), 2311(1), and 2312 (1)(b) (Final Draft 1967) [hereinafter cited as Michigan]. N. Y. PEN. LAW, §§ 130.25(2), .30, .35(3) (McKinney 1967) [hereinafter cited as N. Y.]. These state codes also recognize two degrees of forcible rape rather than the one recognized at common law.

4 Both codes specify the victim's lack of consent as an element of every offense (with the exception of consensual sodomy in New York). See NY § 130.05 and Michigan § 2330(1).

5 MODEL PENAL CODE, § 213.1 (Proposed Official Draft 1962) [hereinafter cited as Model]. This Code goes one step beyond the common law in distinguishing two degrees of statutory rape but not as far as the New York and Michigan Codes which recognize three degrees.


7 Michigan § 2301(h), N.Y. § 130.00(8). These are identical: "Forcible compulsion means physical force that overcomes earnest resistance."

8 Resistance Standard 684.

9 Comment, Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard, 62 YALE L.J. 55, 70 (1952) [hereinafter cited as Consent Standard].

10 Resistance Standard at 683.
forcible rape in terms of the resistance displayed by the victim is desirable, for it would reflect more adequately the deterrent and rehabilitative aims of the criminal law.

One writer contends that despite its limitations, the consent standard is justified by such policy considerations as the following: it "protect[s] a significant item of social currency for women"; it encourages "a masculine pride in the exclusive possession of a sexual object"; and it channels toward rapists the vengeance that derives from a male's fear of losing his sexual partner. Yet as another writer has more recently pointed out in response to the above argument: "the 'resistance standard' . . . serves the same ends equally well and cures the serious defects in the present consent-oriented law of rape." For this reason, the merits of the argument balance out in favor of the resistance standard.

This Proposed Code adopts the resistance standard for forcible rape. Legislatures seem reluctant to embrace such a standard out of fear that the general public will interpret this reform as a lessening of the punishment of rapists. As will be shown in more detail later, this fear permeates all criminal law reform but has little basis in fact.

2. Types of Threats Covered

The Michigan, New York, and Model Penal Codes recognize that forcible rape may be committed by a man who compels a woman to submit to sexual intercourse by threatening immediate death, serious physical injury or kidnapping. The state codes have adopted two of the Model's innovations in this area by imposing liability even where the female's fear is unreasonable and by including threats which are directed toward anyone, rather than only those aimed at the victim herself or one of her relatives. The Proposed Code recommends similar treatment. A reasonableness requirement might seem desirable to eliminate the subjectivity that typically arises in rape cases. However, the more dominant consideration is that an unreasonable fear can be just as compelling from the point of view of the particular female victim. Artificial restrictions on the group of persons toward whom threats may be channeled are unlikely to isolate those threats which are so compelling as to overcome the female's will to resist. In any given case, a threat of immediate death to her fiance or boy friend, beloved teacher or family friend might be as effective as a threat of harm to her relatives.

Threats of non-physical harm may also be compelling. Such threats are ignored by the Michigan and New York Codes possibly due to their stress on the consent standard and possibly due to the infrequency of such threats. The recognition of such threats and the espousal of "an objective test of the

11 Consent Standard at 72-73.
12 Resistance Standard at 684.
13 See §§2(1)-(3) and §§4(1)-(4), p. 159, infra.
14 Michigan §2301(h); Model §213.1(1)(a); N.Y. §130.00(8).
efficiency of the coercive element" is a further advantage of the resistance standard.16

B. Statutory Rape: Presumption of Non-Consent

1. Traditional Approach — A Conclusive Presumption

The primary issue is whether the presumption of non-consent for underage females should be made rebuttable. Traditionally codes make this presumption conclusive for two reasons. First, it is assumed that "a girl's sexual indulgence or virginity [is] a 'thing' of social, economic, and personal value."17 Since an underage female lacks the capacity to understand the nature of the sexual act, the law should protect her against her own consent. This rationale is hardly persuasive. The girl's maturity should be the relevant factor in determining her ability to comprehend sexual intercourse. "Both actual sexual experience and learning from the cultural group to which the girl belongs will determine her level of comprehension."18 The second ground on which such a conclusive presumption rests is the likelihood that underage girls will suffer psychic or physical injury from the sexual act. However, once the age of puberty is reached there is less danger of such harm.19 Recognizing such social and medical realities, the Model Code makes the presumption of nonconsent for underage girls rebuttable by either of two considerations — reasonable mistake as to age20 and previous unchastity of the victim.21


(a) Reasonable Mistake as to Age. None of the major revised codes accept the Model's position that reasonable mistake as to age should constitute an absolute defense.22 The New York Code, without articulating any reasons, totally rejects the mistake of age as a defense or a mitigating factor.23 As discussed above, this is clearly unsatisfactory. The Michigan Code, in a wordy and almost incomprehensible provision, proposes that such mistakes be a defense even if unreasonable.24 This constitutes a change from present law under which mistake as to age is no

17 Consent Standard at 76.
18 Id.
19 Id.
20 Model §213.6(1).
21 Model §213.6(3).
22 Compare with the Model Code's provision the statute suggested by the student writer in 62 YALE L.J. 55,80. It should be noted that the Model Code does not allow as a defense a reasonable mistake that the female was over 10 years old. "Any error would still have the young girl victim far below the age for sexual pursuit by normal males." Tent. Draft No. 4 at 253.
23 N.Y. §15.20(3).
24 Michigan at 192: "There is no requirement that the mistake be 'reasonable'."
defense in an action for statutory rape. The comments imply that the reason "that no 'substantive' limitation of reasonableness is required" is that the procedural rules accompanying the reliance on the defense of mistake will present the jury with an opportunity to evaluate the defendant's credibility and that the reasonableness of his mistake will be a factor to be considered by the jury. The Michigan Code denies that there can be an offense such as negligent statutory rape. It is submitted that the Michigan Code's approach goes too far in the direction of protecting defendants. Surely a person exhibits a socially dangerous abnormality by acting on an unreasonable, albeit honest, belief as to the girl's age. Both the rehabilitative and deterrent functions of the criminal law would be served by punishing him.

The Illinois Code adopts the view that mistake as to age, if reasonable, is a mitigating circumstance which reduces the offense to a misdemeanor. This is an improvement over the other two codes. However, one might ask whether such a person should be punished at all. The law is intended to protect naive young girls who lack the capacity to understand the implications of the sexual act. If it reasonably appeared that she was capable of understanding the act, the male actor has not taken advantage of her innocence. Moreover, he lacks the requisite mens rea because he did not intend to engage in sexual intercourse with an underage female. With respect to the element of the offense that the girl be less than the statutory age of consent, he was not even negligent because his mistake was reasonable. If some mens rea is required for the conviction of the felony, then it is illogical to eliminate it and impose strict liability in order to convict as a misdemeanor for the same act. If fornication were a crime (and it is not in Illinois) then perhaps such an approach would be an acceptable way to introduce another degree of punishment into the offense. Even though his mistake was reasonable he still would be engaging in an unlawful act and thus his reasonable mistake should not be a complete defense. However, even then such conduct would be more logically punished under the fornication laws than as a misdemeanor under the rape laws.

The Model Penal Code's approach is superior to the provisions enacted by the above state codes. It recommends that reasonable mistake as to age be an absolute defense because a female may be capable of understanding the nature of sexual intercourse and thus capable of consenting even though she is under the statutory age of consent. This provision might be questioned since there seems little reason for using a fixed age of consent, thereby offering the defendant a chance to rebut the presumption of non-consent when his victim is below this age. It is more logical to judge the offense of statutory rape in relation to a flexible and subjective test of

25 Id.
26 Id.
27 See Committee Comments to §11-4 & §11-5, ILL. ANN. STAT., Ch. 38 (Smith-Hurd 1964).
the female's maturity and eliminate any resort to presumptions. Although this might be more logical within the limited confines of this defense, it conflicts with the policy, stressed in the above discussed preference for the resistance standard, that the law should eliminate as far as possible such subjective considerations as the victim's state of mind. Moreover, the test of maturity seems unworkable due to its ambiguity and it might deter enforcement of the statutory rape laws by shifting the burden of proof on this element to the prosecution. For these reasons, the Proposed Penal Code adopts the Model's approach that statutory rape should be defined with respect to a fixed age of consent but that reasonable mistake as to the female's age should be a complete defense.

(b) Previous Unchastity of the Victim. Under the Model Penal Code it is a defense to statutory rape that the alleged victim has had promiscuous sexual relations with others. At first glance, this seems to be a sensible defense because the goal of the law in this area is to protect only the innocent and inexperienced youth. But both the Michigan and New York Codes reject it. The Michigan commentary suggests a preference for reliance on "the amplified doctrine of mistake" (which encompasses even unreasonable mistakes). This should provide sufficient protection to a defendant charged with statutory rape, since circumstantial evidence that suggests promiscuity is admissible as relevant to the question of mistake.

As discussed above, the Proposed Code limits the mistake doctrine to reasonable mistakes. Still on the basis of the following practical reasons this Code rejects previous promiscuous behavior as an absolute defense but retains it as relevant to the issue of mistake. The Michigan Code's refusal to endorse this defense stems partly from a desire to avoid "the unwarranted slanders on the complainant's sexual life that the defendant's 'oath-helpers' are likely to perpetrate." If the defense were approved, the trial in a statutory rape case might become an unseemly examination of the complainant's character. This might deter the prosecution of legitimate complaints as well as offer little protection to the male actor who is "unable to persuade others to acknowledge unlawful sexual relations in open court." Another practical objection is that even where this defense is defined by statute to be an "affirmative" one the ultimate burden of proof on the girl's non-consent remains on the prosecution. This, of course, weakens the heart of the statutory rape offense—that the prosecution is given the benefit of a presumption of non-consent. This might effectively hinder the prosecution of such charges. Moreover, since

28 The statutory rape provisions are set out in §2(4), §3 and §4(5), p. 159, infra. The reasonable mistake defense is contained in §12, p. 161, infra.
29 Michigan at 193.
31 Michigan at 193.
the vast majority of statutory rape cases are misdemeanors, the defense is not necessary to avoid extreme penalties inflicted on defendants who themselves might have been victimized. Such practical considerations weigh against the inclusion of promiscuity as an absolute defense in the Proposed Code.

C. The Substantive Elements

The proscribed activity of sexual intercourse is defined by the Model Penal Code to include "intercourse per os or per anum, with some penetration however slight." The New York and Michigan Codes also follow this "any penetration" rule. Ploscowe has criticized this rule "as punishing attempt rather than the completed offense" but the rule seems necessary in the light of difficulty of proof. However, the New York and Michigan Codes do not adopt the broad concept of sexual intercourse offered in the other part of the Model Code's definition. Instead, these codes state that "sexual intercourse has its ordinary meaning." This definition is vague and does not clearly indicate what is deemed criminal. Yet vagueness is not a decisive consideration in this context. Unlike vague statutes that infringe on First Amendment rights and deter socially desirable conduct, overly vague rape statutes deter socially undesirable behavior. Still administration of the statute would be furthered by a clearer definition of sexual intercourse as provided in the Proposed Code.

The Model Code's commentary explains its reason for a broader coverage: "From the point of view of the woman who is attacked, these deviate forms of aggression would usually be equally shocking and abhorrent." This may be true but these deviant forms are adequately punished under the sodomy laws. The rape provisions should be limited to sexual intercourse in the sense of genital copulation.

The Model, New York and Michigan Codes all require that the sexual intercourse be with a female who is not the actor's wife. While the New York Code does not specifically define wife, the Michigan and Model Penal Codes do. Thus it is unclear whether the New York Code is intended to apply to persons living together as husband and wife but not legally married or to those living apart under a judicial decree of separation. These situations should be anticipated and covered in the Code to fulfill the goal of clearly defining the illegal conduct.

Unlike the Wisconsin Code, the Michigan and New York Codes do not explicitly outline the level of mens rea that is necessary with respect

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33 Model §213.1.
34 Tent. Draft No. 4 at 244.
35 N.Y. §130.00(1), Michigan §2301(a).
37 Tent. Draft No. 4 at 243-244.
38 Model §213.6(2), Michigan §2301(d). See also §1(4) of the Proposed Code, p. 158, *infra*. 
to the element of the offense that the female is not his wife. Reliance on the general mens rea provision is preferable since the specification that knowledge is required would demand the allegation and proof of this element beyond a reasonable doubt. It is not wise to impose such a proof burden on the prosecution in all cases since the problem is likely to arise infrequently and then the defendant will undoubtedly inject the issue himself.

The Model, New York and Michigan Codes, all "recognize that immature males may themselves be victims of adolescence rather than engaged in exploitation of others' inexperience." An effective way to exclude sexual experimentation from legal condemnation is "to require a substantial age differential in favor of the male." Any such formulation will inevitably lead to the drawing of somewhat arbitrary distinctions. For example, under the New York Code, if the victim is over fourteen but under seventeen, then a twenty-year old male commits a misdemeanor punishable under N.Y. § 130.20(1) by a maximum of one year imprisonment. Yet a twenty-one year old male who has sexual intercourse with a girl between the same age limits commits a felony under N.Y. § 130.25(2) punishable by a maximum of four years. The new statutory arrangement "eliminates some incongruities" since the twenty-one year old was subject to a maximum of ten years imprisonment under the old law. § 213.3(1) of the Model Code precludes such an arbitrary result: "A male who has sexual intercourse with a female not his wife... is guilty of an offense if... the other person is less than 16 years old and the actor is at least 4 years older than the other person." It is true that such a formulation would also necessitate the drawing of some lines — for example, between an 18 year old who had intercourse with a 14 year old and one who had intercourse with a 15 year old. Still it is this very thin line that is necessary to exclude playful experimentation from condemnation. Thus the Proposed Code adopts the approach of the Model Code.

D. Procedural Safeguards

The Model Penal Code proposes two procedural safeguards to ensure the defendant a fair trial. The first provides that failure to bring a complaint within three months of the alleged rape is a complete defense. Neither the Michigan nor the New York Code adopts such a short statute

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39 Wis. Stat. Ann. §944.01(1): "Any male who has sexual intercourse with a female he knows is not his wife, by force and against her will, may be imprisoned not more than 30 years."
40 Tent. Draft No. 4 at 253.
41 Tent. Draft No. 4 at 253.
44 Model §213.6(5).
of limitations for rape, presumably on the ground that a victim may naturally hesitate to file a complaint because of a sense of shame and the embarrassment of reliving the event at trial. Yet, since the evidence in rape cases usually consists of the subjective testimony of the participants and easily forgotten circumstantial evidence, a prompt complaint is important to ensure fresh evidence. Equally important is the need to prevent the female from converting later moralistic misgivings into a criminal complaint. A three month period is still long enough for the female to overcome her initial repression and decide to speak out against the attacker.

The second procedural protection offered by the Model Penal Code is the requirement that for all felony offenses the testimony of the alleged victim must be corroborated. The Michigan Code fails to incorporate this safeguard. However, the New York Code extends the corroboration requirement beyond felonies to include all sex offenses except third degree sexual abuse. An exception is made for that offense because "of the difficulty of obtaining corroborative evidence in such cases and of the low penalty for this offense." This implies that corroborative evidence can be obtained in rape cases, despite the fact that there are usually no witnesses to a rape other than the parties. For example, corroborative evidence can be circumstantial. Wigmore is opposed to the corroboration requirement on the ground that it is unnecessary in light of "the court's power to set aside a verdict for insufficient evidence," and that "it tends to produce reliance upon a rule of thumb." Notwithstanding this view, there can be no doubt that the testimony of a sex victim is very untrustworthy. As Glanville Williams points out,

Sexual cases are particularly subject to the danger of deliberately false charges, resulting from sexual neurosis, phantasy, jealousy, spite, or simply a girl's refusal to admit that she consented to an act of which she is now ashamed.

At least until psychologists are better able to predict the reactions of an average person in the alleged victim's position, corroboration should be required to ensure the accuracy of the female's testimony. Wigmore may be right that it is not "necessary" but it does protect defendants against

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45 Model §213.6(6).
46 N.Y. §130.15. Third degree sexual abuse is defined by N.Y. §130.55 as follows: "A person is guilty . . . when he subjects another person to sexual contact without the latter's consent; except that in any prosecution under this section, it is an affirmative defense that (a) such other person's lack of consent was due solely to incapacity to consent by reason of being less than seventeen years old and (b) such other person was more than fourteen years old, and (c) the defendant was less than five years older than such other person."
47 N.Y. at 308.
48 Tent. Draft No. 4 at 264.
49 Williams, Corroboration — Sexual Cases, 1962 CRIM. L. REV. 662, 663.
50 Id. at 662.
unfounded convictions. It is unlikely to do much harm, especially if exceptions are made for those offenses where the corroboration requirement would be very difficult, if not impossible, to satisfy.

II. Private Sexual Behavior Between Consenting Adults

The Model Penal Code does not punish private sexual conduct between consenting adults. Hence, consensual sodomy, adultery, fornication, and seduction are not crimes under the Code. The Michigan Code and this Proposed Code recommend similar treatment. Although the Illinois and New York Codes do not punish private sexual activity between spouses, neither goes as far as the Model or Michigan Codes in removing private behavior from the criminal law. The New York Draft recommended adoption of the Model Code's approach, but the New York legislature insisted on additional provisions declaring consensual sodomy and adultery criminal.51 The Illinois Code, on the other hand, makes only adultery a crime.52 Such divergent approaches suggest the emotional considerations and political constraints that plague law reformers.53

A. Arguments Against Reforms

Three closely related arguments are put forward by the opponents of any reform with respect to private sexual acts. First, it is claimed that the criminal law provides a source of moral standards for many people, especially the non-religious. This was one of the concerns expressed by the British government in the early Parliamentary debates on the reform of homosexuality laws.54 Lon Fuller eloquently stated the argument in this way:

The view I am expounding . . . concedes that the effective deterrents which shape the average man's conduct derive from morality, from a sense of right and wrong. What it asserts is that these conceptions of right and wrong are significantly shaped by the daily functionings of the legal order, and that they would be profoundly altered if the legal order were to disappear.55

51 N. Y. §130.38, §255.17.
52 ILL. ANN. STAT. Ch. 38, §11-7 (Smith-Hurd, 1964).
53 Cf. Comment, Deviate Sexual Behavior: The Desirability of Legislative Proscription, 30 ALBANY L. REV. 291, 292 (1966): "It seems inconsistent that those who base their opposition to deviate sexual activity on grounds of 'immorality' do not object to fornication for the same reason."
54 Commons Debate on the Wolfenden Report, 122 J.P. 796 (1958): "... [M]any people who were outside the influence of religion found no other basis for their notions of right and wrong but in the criminal law. Could they [the Government] be sure that if they removed the support of the criminal law from those people they would find any other support?"
Fuller's premise is subject to question since there is evidence that our moral standards are only "minimally affected" by our awareness of the law. The argument also loses much of its persuasiveness when we consider the side effects of the present laws. The search and seizure limitations of the Fourth Amendment make it difficult to enforce such laws against private behavior. Selective enforcement of these laws not only increases the possibility of blackmail, but also breeds disrespect for law in general. Moreover, it is not true that law is the only restraint on sexual behavior. One writer has pointed out that "the concerted effort of home, school, and church, supplemented if need be by various forms of social ostracism, suffices to inculcate individual restraint in private sex relations." 

The second argument often advanced in favor of the present sex laws is that a vote for repeal would be interpreted as a vote for immorality. Discussing the Wolfenden Report which recommended the repeal of British laws that condemned private homosexual behavior between consenting adults, British legislators initially feared that "[m]any people would at present misunderstand the removal of the prohibition as implying, if not approval, at least condonation by the legislature of homosexual conduct." Yet these fears were finally overcome with the passage of repeal legislation in mid-1967. Repeal will not be considered as a vote for immorality if the legislature and public understand the crucial distinction between sin and crime that underlies the Wolfenden Report and the Model Penal Code. If private sexual acts are not deemed crimes, it will be because the law prefers to leave these to the province of the church, and not because the law declares them to be moral. As the Model Code sees it, the law "cannot undertake or pretend to draw the line where religion and morals would draw it." Instead a vote for repeal would be more accurately viewed as "the admission of a reality." For one thing, the laws are not being enforced. For another, it is doubtful if the law can change the behavior of homosexuals. "Changes in their patterns of behavior can be brought about only by influences more personal than the mailed fist of the law."

Thirdly, it is argued that repeal of the laws would increase the incidence

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58 Committee on Homosexual Offenses and Prostitution, Report, CMND. No. 247 (1957).
59 122 I. P., note 54 supra, at 796.
60 Model Penal Code, Comment at 150 (Tent. Draft No. 9, 1955).
62 Id.
of such acts with consequent harmful effects upon society.\textsuperscript{63} This was basically the ground on which the Catholic Welfare Committee, a powerful force but not an official church organ, opposed the changes recommended by the New York Draft.\textsuperscript{64} Repeal of the homosexuality laws did not lead to any noticeable increase in such behavior in either Sweden\textsuperscript{65} or The Netherlands.\textsuperscript{66} It is conceded that such arguments "are hard to refute on empirical grounds, especially where the effects, if any, are likely to be subtle and only shown over a long time span."\textsuperscript{67} Still this argument is far outweighed by the benefits that would derive from removing the legal condemnation of private consensual sexual conduct.

\textbf{B. Arguments For Reform}

There are essentially three reasons that reform is desirable in this area. First, issues of morality are personal, and to promote moral responsibility the law should allow each individual to make his own decision.\textsuperscript{68} The ascendancy of situation ethics among today's young adults has an important bearing on this problem. It is difficult for the law to proscribe any private behavior because there is little consensus on which behavior is immoral. The answer depends on the situation, the context and the prior relationship of the parties. As one sociologist has acutely observed:

\begin{quote}
In part, the lack of clarity of sex codes is due to the specificity of sex attitudes. Whether premarital intercourse is viewed as acceptable or not depends on many features of the relation between the couples.\textsuperscript{69}
\end{quote}

Secondly, reform is necessary to eliminate the undesirable consequences of our present sex laws with respect to private consensual behavior. Such laws do not promote the rehabilitative or deterrent goals of the criminal law. The short term of imprisonment (three months under the New York Code) offers little opportunity to rehabilitate the convicted offender. Criminal penalties are not able to cure such persons. As the Michigan Comments point out "homosexuality is symptomatic of psychological disorder, stemming from a failure to achieve mature psychic development, and . . . it cannot be cured unless the underlying psychological deviation is cured."\textsuperscript{70} Similarly, the infrequency with which such violations are

\textsuperscript{63} "Could they [the Government] be certain that homosexual conduct between consenting adults was not a source of harm to others?" 122 J.P. 796 (1958).
\textsuperscript{64} 30 ALBANY L. REV., note 53 supra, at 293.
\textsuperscript{66} N. Y. Times, Nov. 12, 1967, §6 (Magazine), at 66.
\textsuperscript{67} Wheeler, Sex Offenses: A Sociological Critique, 25 LAW & CONTEMP. PROB. 258, 262 (1960).
\textsuperscript{68} 30 ALBANY L. REV., note 53 supra, at 294.
\textsuperscript{69} Wheeler, note 67 supra, at 269.
\textsuperscript{70} Michigan at 186.
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reported and the consequent low penalty renders the deterrent effect of the law quite weak. Furthermore, without invading the privacy of a person who is engaging in unlawful conduct with a consenting adult, the police will not have sufficient evidence to establish a violation. Such intrusions are limited by the search and seizure strictures of the Fourth Amendment. If the police ignore this constitutional protection, the exclusionary rule of *Weeks v. United States*,\(^7^1\) as applied to the states by *Mapp v. Ohio*,\(^7^2\) will prevent the use of such unlawfully obtained evidence at trial. Hence, these laws encounter practical enforcement problems which encourage blackmail and the resort to such disrespected enforcement practices as entrapment.

Finally a strong argument can be formulated that the enforcement of such laws is unconstitutional. These laws infringe upon the individual's privacy both by promoting "police surveillance of private activities" and by encroaching on the individual's right to decide for himself whether to engage in certain sexual activities in private.\(^7^3\) Mr. Justice Goldberg's opinion in *Griswold v. Connecticut* suggested that the constitutionality of adultery and fornication statutes is "beyond doubt" because they are necessary to safeguard marital fidelity and discourage extra-marital relations which are legitimate state concerns.\(^7^4\) That dictum might be questioned, for *Griswold* involved a state statute that prevented the use of birth control devices by married couples. The Court held that this statute contravened the "right of privacy in the marital relation"\(^7^5\) which emanated from various guarantees in the Bill of Rights especially from the Ninth Amendment. If such a limited right of privacy emanates from these Amendments which do not mention the marital relation, arguably a more general right of privacy can be found in these Amendments. If so, the law may not legitimately proscribe private consensual sexual behavior. An individual would have the right to engage in any behavior he so desired if this was done in private and with a consenting adult so that no one was harmed. The constitutional objection grows even stronger with respect to the homosexuality laws. Here the state's interest in preserving the marriage relation is less relevant. The Supreme Court has said: "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling."\(^7^6\) Since no one is harmed by private consensual conduct, it is difficult to imagine a state interest that is sufficiently "compelling" to support the legal condemnation of homosexuality.\(^7^7\)

\(^7^1\) 232 U.S. 383 (1914).
\(^7^2\) 367 U.S. 643 (1961).
\(^7^3\) 30 ALBANY L. REV., note 53 supra, at 295.
\(^7^4\) 381 U.S. 479, 498 (1964).
\(^7^5\) *Id.* at 499.
\(^7^7\) Cf. 14 UCLA L. REV. 581, note 56 supra.
C. Legislative Hurdles

On balance, there seems little doubt that the arguments for reform are more persuasive. Why then did the New York legislature override the draft committee's recommendations and decline to change the laws? It has been pointed out that the Catholic Welfare Committee played an important role in opposition. But it is perplexing to explain the underlying reason for its opposition and the persuasiveness of its position. Other predominantly Catholic countries like France, Italy, Mexico, and Uruguay "make no attempt to enforce by law what the church forbids as sin." Moreover, official Catholic thinking in Britain did not unalterably oppose the elimination of the prohibition against homosexual acts between consenting adults. The Archbishop of Westminster pointed out that:

As regards the moral law, Catholic moral teaching is:

(i) Homosexual acts are grievously sinful.
(ii) That in view of the public consequences of these acts, e.g., the harm which would result to the common good if homosexual conduct became widespread or an accepted mode of conduct in the public mind, the civil law does not exceed its legitimate scope if it attempts to control them by making them crimes.79

Yet the Archbishop also stressed two questions of fact on which "Catholics are free to make up their own minds":

(i) If the law takes cognizance of private acts of homosexuality and makes them crimes, do worse evils follow for the common good?
(ii) Since homosexual acts between consenting males are now crimes in law, would a change in the law harm the common good by seeming to condone homosexual conduct?80

It has been argued above that the answers to these "questions of fact" support repeal of the laws regulating private consensual sexual behavior. The treatment of such behavior as criminal does have undesirable consequences for society. And the repeal of these laws will not signify that the conduct is moral, but only that it is more appropriately treated by church authorities as sin than by the law as crime.

A similar analytical scheme could be presented to American legislatures to counteract the arguments of those constituents of key legislators who oppose such legislation on religious or moral grounds. In addition, law reformers might be advised to take an opinion poll among Catholics on this issue to ease the conscience of a legislator who wants

78 Tent. Draft No. 4 at 278.
79 Quoted in Cavanagh, Sexual Anomalies and the Law, 9 Catholic Law. 4, 6-7 (1963).
80 Id. at 7.
to approve reform but feels constrained by the nature of his own religion or that of his constituency. Moreover, it should be continually stressed that this conduct is more appropriately treated as a sin than as a crime. This is likely to appeal to church groups and garner needed support for the reforms. In this connection the testimony given to the Wolfenden Committee by the Church of England Moral Welfare Council is relevant:

It is not the function of the State and law to constitute themselves guardians of private morality, and thus to deal with sin as such belongs to the province of the Church.81

The bulwark of opposition does not appear to be invincible on this issue. Yet it will take an effective effort of education and public relations for the reformers to secure legislative approval. As one theologian has aptly put it: “The range and complexity of sex laws at present ‘on the books’ is a monument to tongue-in-the-cheek legislation and to the ‘prohibitionist fallacy.’”82 Where reform is so badly needed we should be able to convince our legislators not to abdicate their responsibility.

III. Miscellaneous Sex Offenses

This section will treat four offenses which raise less controversial problems than rape and private consensual conduct: sodomy (non-consensual), sexual misconduct, indecent exposure, and sexual assault. As above, the relation of the offense to the goals of criminal law and a clear definition of the forbidden conduct are the hallmarks of a well-drafted code.

A. Sodomy

The sodomy laws traditionally proscribe various forms of deviant sexual intercourse including fellatio (oral stimulus of the male sex organ), cunnilingus (oral stimulus of the female sex organ), bestiality (intercourse with an animal), and necrophilia (intercourse with a corpse). In general, under the Michigan, New York and Model Codes, what would be unlawful heterosexual activity under the heading of rape constitutes sodomy if it involves deviate sexual intercourse. This organizational similarity is an attempt to facilitate the administration of the law. Much of the discussion above in reference to rape — resistance standard, mistake of female’s age, etc. — is equally relevant to the sodomy provisions.

The Model Penal Code declares bestiality a crime,83 a course followed by the New York Code with a maximum one-year imprisonment (rather

81 Quoted in Cutter, note 55 supra, at 96.
82 Fletcher, Sex Offenses: An Ethical View, 25 LAW & CONTEMP. PROB. 244, 248 (1960).
83 Model §213.2(1).
than the 20-year maximum provided under the old New York Code). The Proposed Code, like the Michigan and Illinois Codes, finds the retention of bestiality as a crime to be unnecessary. The Michigan commentary stresses that such conduct "is rare and is of course pathological." It points out that any prosecution for this activity can be laid under the cruelty to animals provision, if a defense for mental disease is not available. Since one of the goals of a criminal code revision should be an elimination of overlapping or rarely used laws, this is the more satisfactory approach. The comments to the Illinois Code suggest a second reason for not making bestiality a crime: "focusing public attention on the person who happens to be found in such an act serves no useful social purpose and may seriously impair the development of the accused to normal life." The New York drafters recognized that "the offender is a sick individual who injures himself more than he does the public." However, they concluded that "misdemeanor punishment is more than adequate for this crime." (Emphasis added) The goal of criminal law is to match the level of punishment to the crime and not to overpunish an individual. It appears that the New York Code has erred in this respect. Recognizing the need for rehabilitative treatment, an alternative to punishment or total freedom might be civil commitment.

The New York Code, unlike the Michigan or Model Codes, also punishes necrophilia. Criticism of such a provision might be made on grounds similar to the above. The rare prosecution for such activity is better handled under the abuse of corpse provisions.

B. Sexual Misconduct

The New York and Michigan Codes provide that a person commits the crime of sexual misconduct if:

"(a) Being a male, he engages in sexual intercourse with a female without her consent; or

(b) Being a female, she engages in sexual intercourse with a male without his consent; or

(c) He engages in deviate sexual intercourse with another person without the latter's consent."

For two reasons, this is an undesirable provision. First, it seems questionable to shield the immature from sexual activity by "indiscriminate imposition of criminality upon young boys and girls." Recognizing that

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84 N. Y. §130.20(3).
85 Michigan at 182.
86 ILL. ANN. STAT. Ch. 38, §11-2 commentary at 592 (Smith-Hurd, 1964).
87 New York Proposed Penal Law at 344.
88 Id.
89 N.Y. §130.20(3).
90 Michigan §2305; N.Y. §130.20 omits sub-section (b).
91 64 COLUM. L. REV., note 32 supra, at 1544.
"immature males may themselves be victims of adolescence," the Model Code, in its statutory rape and sodomy provisions, requires that the male be four years older than the female. The Model Comments express the opinion that "existing statutory provisions under which the rape label is applied to sexual experimentation by a girl just under and a boy just over 16 seem harsh and unreasonable." This would be the situation under the New York or Michigan Codes. The New York Comments recognize this argument:

The young defendant here does not force the victim into committing the act, nor is the victim suffering from any physical or mental infirmity. In fact the defendant may well have been persuaded by the "victim" to commit the act.

The New York drafters felt that this was a reason for reducing the offense to a misdemeanor. Yet there is no good reason to punish the defendant at all if he might have been induced by the victim to engage in such acts.

The second reason for dissatisfaction with the sexual misconduct provisions is that these embrace the sodomy and rape provisions and thus constitute catch-alls virtually assuring a conviction. These provisions may be necessary in order to facilitate plea bargaining and ensure reasonably satisfactory enforcement of the law. Still they may be used to harass the defendant, since the sexual misconduct provisions suggest that "the defendant is regarded as guilty to begin with, and all effort must be made to convict the guilty, no matter how many innocent people may suffer." C. Indecent Exposure

The Model Code makes it a crime "if, for the purpose of arousing or gratifying sexual desire of himself or of any person other than his spouse, [a person exposes] his genitals under circumstances in which he knows his conduct is likely to cause affront or alarm." The Michigan Code follows substantially the same form and its commentary stresses that "it is not the place, but the purpose of the exposure and the likelihood of psychological harm to others, that determine the actor's criminality." The approach of the New York Code is quite different. It requires that the act be committed "in a public place." This formulation does not

92 Tent. Draft No. 4 at 253.
93 Id. at 254.
96 Model §213.5
97 Michigan §2325.
98 Michigan at 190.
99 N. Y. §245.00.
adequately reflect the reasons for punishing indecent exposure. Moreover, it is sufficiently ambiguous to raise the difficult definitional problem of what is a public place. The New York provision suffers from vagueness in other respects too. Instead of punishing the exposure of “genitals” as under the Michigan Code, it proscribes the exposure of “private or intimate parts of his body” or the commission of “any other lewd act.” While neither of these phrases clearly specifies or defines the forbidden conduct, vagueness may not be too critical in this area since if persons steer away from such conduct out of fear that it might be covered by the statutory language, society does not lose anything of value.

The codes also differ in the degree of punishment attached to indecent exposure. The Model Code sets the maximum at one year imprisonment, but New York lowers this to a three-month maximum and Michigan lowers it even further to thirty days. It might seem that only the Model Code’s proposed penalty would promote the deterrent and rehabilitative aims of the law with respect to the exhibitionist. Yet more vigorous enforcement of this offense would probably result if the punishment for a first offender were less than a year. Ploscowe notes that “stiffer penalties may be necessary in particular cases, to help the exhibitionist control his compulsion.” However, this could be provided in the form of higher penalties for recidivists.

D. Sexual Assault

The Model, New York and Michigan Codes all deal specially with the sexual as distinguished from the ordinary assault. This is desirable because the focus of concern in this area is “on the outrage, disgust or shame engendered in the victim rather than fear of physical injury or violence.”

Each of the codes prohibits “sexual contact” which is defined in substantially the same manner as “any touching of the sexual or other intimate parts of a person not married to the actor, done for the purpose of gratifying sexual desire of either party.” The addition of the phrase “other intimate parts” is objectionable on two grounds. First, it is vague and indefinite and does not provide a clear standard of criminality. Second, it does not promote the main aim of the section which should be “to protect children against either heterosexual or homosexual genital manipu-

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100 Model §213.5 makes indecent exposure a “misdemeanor,” punishable by a one year maximum under Model §6.08.
101 N.Y. §245.00 declares indecent exposure to be a “class B misdemeanor.” The maximum penalty for such an offense is set by N.Y. §70.15(2).
102 Michigan §2325 declares indecent exposure to be a “class C misdemeanor” under Michigan §1415(c); the maximum term of imprisonment is set at 30 days.
104 Model §213.4, Michigan §§2320-2322, N.Y. §§130.55-.65.
105 Tent. Draft No. 4, at 292.
106 Michigan §2301(c).
A hand on a girl’s leg even in a darkened theatre does not engender the "outrage, disgust or shame . . . in the victim" that is thought to constitute the rationale for special treatment of the sexual assault.

The major difference between the Model Code and the state codes with respect to sexual assault is in grading. The New York and Michigan Codes provide a three-fold classification on the basis of the victim's age which corresponds in general with their classifications for rape and sodomy. The Model, on the other hand, provides for only a single degree of this offense. This seems unsatisfactory. Clearly the shocking nature of the sexual contact will vary at least with the degree of responsibility of the actor for the victim's incapacity to consent. Where the sexual contact is brought about by forcible compulsion or the administration of drugs, it should be punished more heavily. Moreover, the Model Code itself recognizes that heavier punishment is appropriate for rape and sodomy where the female is less than 10 years old than where she is less than 16 years old. Why it should fail in the area of sexual assault to apply this same principle, punishing behavior with younger children more severely than with older, is inexplicable.

The Model Code makes it a crime to have sexual intercourse, engage in deviate sexual behavior or maintain sexual contact with a ward or with a person "in custody of law or detained in a hospital [where] the actor has supervisory or disciplinary authority over him." Neither the New York nor the Michigan Codes explicitly cover this situation. There is no doubt that such acts constitute "presumptive abuse of authority" for which punishment is proper. However, there may be sufficient coverage under other provisions to eliminate the need for special treatment of this situation. If not, then special provision should be made because "little distinction exists between the use of threats to prevent resistance and taking advantage of a position of authority to render resistance unlikely."

IV. Conclusion

A consistent criminal code for sex offenders is unlikely to emerge until there is agreement on the fundamental aims of the criminal law in this area.

The inconsistency inherent in the punishment of some consensual private

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107 Ploscowe, note 103 supra, at 281.
108 Michigan at 189.
109 Tent. Draft No. 4 at 292.
110 Model §213.3(1)(b) and (c).
111 Model §213.4(7) and (8).
112 Model at 147.
113 Michigan at 183.
114 64 COLUM. L. REV., note 32 supra, at 1541.
115 Wheeler, note 69 supra, at 261.
acts but not others and the frequent disregard of the deterrent and rehabilitative aims of the law have been emphasized throughout this article. The Proposed Penal Code draws upon the best features of the Michigan, New York and Model Codes in an effort to outline a scheme which is consistent, reflective of the goals of criminal law, and enforceable. With respect to the three major offenses — rape, sodomy, and sexual assault — the Proposed Code consistently and with substantially similar language defines the circumstances which will convert particular conduct into a crime. It removes the legal condemnation of private consensual behavior because of the basic unenforceability and weak deterrent effect of such laws. It refuses to declare bestiality, necrophilia, or homosexuality crimes due to the inability of punishment to rehabilitate such persons. The Proposed Code strives to ensure maximum fairness for the defendant without sacrificing the protection of youth, the preservation of public order or the prevention of violence. It clearly and precisely defines the forbidden conduct. It seeks to eliminate as much of the subjectivity from the trial as possible by adopting the resistance standard for forcible rape and by allowing the actor to defend by proving that he reasonably believed that the female was over the statutory age of consent. The Code further requires that a complaint be brought within three months of the alleged crime and that all testimony be corroborated in order to convict an actor of a felony. The newly enacted New York Code and the Michigan Draft achieve some of these desirable results but further improvement and rationalization of the criminal law in this area is still possible and much needed.

PROPOSED PENAL CODE

Section 1 Definitions

(1) "Sexual intercourse" means genital copulation and occurs upon any penetration, however slight; emission is not required. (Derived from Michigan § 2301(a))

(2) "Deviate sexual intercourse" means any act of sexual gratification between persons not married to each other, involving the sex organs of one person and the mouth or anus of another. (Derived from Michigan § 2301(b))

(3) "Sexual contact" means any touching of the genitalia of a person not married to the actor, done for the purpose of gratifying sexual desire of either party. (Derived from Michigan § 2301(c))

(4) "Female" means any female who is not married to the actor. Persons living together as man and wife are married for purposes of this Article, regardless of the legal status of their relationship otherwise. Spouses living apart under a decree of judicial separation are not married to one another for purposes of this Article. (Derived from Michigan § 2301(d))
Section 2  Rape in the First Degree

A male who engages in sexual intercourse with a female is guilty of rape in the first degree if

1. he uses force to overcome resistance at least as great as the maximum resistance a female in the circumstances of the alleged victim could reasonably offer to prevent penetration while avoiding serious risk of death or serious bodily injury (Derived from 18 Stan. L. Rev. 680, 688); or

2. he threatens to inflict on her or another person imminent death, serious bodily injury or kidnapping, and she refrains from resisting because of a reasonable belief that he will carry out his threats (Derived from Model § 207.4(1)(a) (Tent. Draft No. 4) and 18 Stan. L. Rev. 680, 688); or

3. the female is physically powerless to resist or to communicate unwillingness to an act and he knows of her condition (Derived from 18 Stan. L. Rev. 680, 689 and Michigan § 2301 (g)); or

4. she is less than 11 years old. (Derived from Michigan § 2310 (1)(c))

Section 3  Rape in the Second Degree

A male who engages in sexual intercourse with a female is guilty of rape in the second degree if she is less than 14 years old and he is at least 4 years older.

Section 4  Rape in the Third Degree

A male who engages in sexual intercourse with a female is guilty of rape in the third degree if

1. he compels her to submit by any threat that would prevent resistance by a woman of ordinary resolution (Derived from Model § 213.1(2)(a) and 18 Stan. L. Rev. 680, 689); or

2. he has substantially impaired her power to appraise or control her conduct by administering or employing drugs, intoxicants, or other means for the purpose of preventing resistance (Derived from 18 Stan. L. Rev. 680, 689); or

3. he knows that she suffers from a mental disease or defect which renders her incapable of appraising the nature of her conduct (Derived from Model § 213.1(2)(b)); or

4. he knows that she is unaware that a sexual act is being committed upon her or that she submits because she falsely supposes that he is her husband (Derived from Model § 213.1(2)(c)); or

5. she is less than 16 years old and he is at least 4 years older (Derived from Model § 213.3(1)(a)).

Section 5  Sodomy in the First Degree

A person who engages in deviate sexual intercourse with another person is guilty of sodomy in the first degree if
(1) he uses force to overcome resistance at least as great as the maximum resistance a person in the circumstances of the alleged victim could reasonably offer to prevent the act while avoiding serious risk of death or serious bodily injury; or

(2) he threatens to inflict on the alleged victim or another person imminent death, serious bodily injury or kidnapping, and the alleged victim refrains from resisting because of a reasonable belief that he will carry out his threats (Derived from Model § 207.5(1)(a) (Tent. Draft No. 4)); or

(3) the alleged victim is physically powerless to resist or to communicate unwillingness to the act and the actor knows of the other's condition;

(4) the alleged victim is less than 11 years old (Derived from Michigan § 2315(1)(c).

Section 6  Sodomy in the Second Degree

A person who engages in deviate sexual intercourse with another person is guilty of sodomy in the second degree if the other person is less than 14 years old and the actor is at least 4 years older.

Section 7  Sodomy in the Third Degree

A person who engages in deviate sexual intercourse with another person is guilty of sodomy in the third degree if

(1) he compels the other person to participate by any threat that would prevent resistance by a person of ordinary resolution (Derived from Model § 213.2(2)(a)); or

(2) he has substantially impaired the other person's power to appraise or control his conduct by administering or employing drugs, intoxicants, or other means for the purpose of preventing resistance (Derived from Model § 213.2(1)(b)); or

(3) he knows that the other person suffers from a mental disease or defect that renders him incapable of appraising the nature of his conduct (Derived from Model § 213.2(2)(b)); or

(4) he knows that the other person submits because he is unaware that a sexual act is being committed upon him (Derived from Model § 213.2 (2)(c)); or

(5) the other person is less than 16 years old and the actor is at least 4 years older.

Section 8  Sexual Assault in the First Degree

A person commits the crime of sexual assault in the first degree if he subjects another person to sexual contact under any of the conditions of Section 5 of this Article.

Section 9  Sexual Assault in the Second Degree

A person who subjects another person to sexual contact is guilty of
sexual assault in the second degree if the other person is less than 14 years old and the actor is at least 4 years older.

Section 10 *Sexual Assault in the Third Degree*

A person commits the crime of sexual assault in the third degree if he subjects another person to sexual contact under any of the conditions of Section 7 of this Article.

Section 11 *Indecent Exposure*

A person commits the crime of indecent exposure if, for the purpose of arousing or gratifying sexual desire of himself or of any person other than his spouse, he exposes his genitals under circumstances in which he knows his conduct is likely to cause affront or alarm (Derived from Model § 213.5).

Section 12 *Mistake as to Age*

(1) Whenever in this Article the criminality of conduct depends on a child's being below the age of 11, it is no defense that the actor did not know the child's age, or reasonably believed the child to be older than 11 (Derived from Model § 213.6(1)).

(2) However, when criminality depends on the child's being below a critical age other than 11, it is a defense for the actor to prove by a preponderance of the evidence that he reasonably believed the child to be above the critical age (Derived from Model § 213.6(1)).

(3) The burden of injecting the issue of mistake is on the defendant, but this does not shift the burden of proof. For this purpose the defendant may introduce any relevant evidence of the female's previous experience in, or knowledge of, sexual matters (Derived from 62 Yale L. J. 55, 80 and Michigan § 2331(2)).

Section 13 *Prompt Complaint*

No prosecution may be instituted under this Article unless the alleged offense was brought to the notice of public authority within 3 months of its occurrence or, where the alleged victim was less than 16 years old or otherwise incompetent to make complaint, within 3 months after a parent, guardian or other competent person specially interested in the victim learns of the offense (Derived from Model § 213.6(4)).

Section 14 *Corroboration*

No person shall be convicted of any felony under this Article upon the uncorroborated testimony of the alleged victim. Corroboration may be circumstantial. In any prosecution before a jury for an offense under this Article, the jury shall be instructed to evaluate the testimony of a victim or complaining witness with special care in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private (Derived from Model § 213.6(5)).