Approved January 31, 1983
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

The meeting was called to order by Representative Bob Frey at
Chairperson

3:30 ~~XX~~ a.m./p.m. on January 26, 1983 in room 526-S of the Capitol.

All members were present except:

Representative Mike Peterson was excused.

Committee staff present:

Mark Burghart, Legislative Research Department
Mike Heim, Legislative Research Department
Mary Ann Torrence, Revisor of Statutes Office
Nedra Spingler, Secretary

Conferees appearing before the committee:

Representative Wanda Fuller
Barbara Reinert, Women's Political Caucus
Bonnie Buchele, Women's Political Caucus, Consultant for Menninger Foundation
Michael Kaye, Professor of Law, Washburn University School of Law, Member of American Civil Liberties Union
Anna Luhman, Rape Prevention Center, Hays
Susie Sanders, Wichita Area Rape Center
David Gottlieb, Professor of Law, University of Kansas School of Law
Mike Padilla, Detective, Topeka Police Department

HB 2008 - An act relating to certain sex offenses.

The Chairman called attention to a change in the agenda for January 27, stating that the hearing on HB 2008 and HB 2009 would be continued on that day, and final action on the bills would be taken February 3.

Representative Wanda Fuller offered an amendment to HB 2008 (Attachment No.1) which would eliminate provisions for spousal immunity for adults from rape and sodomy charges. It does not cover spouses under 16 years of age. She said rape was an act of violence and not one of sex desire, and domestic rape is closely related to domestic violence. Although few statistics are available, a California study conducted of 375 women showed 37% had been raped by their husbands. These women believe there is no difference in being raped by one's husband or by a stranger. Representative Fuller noted that women cannot obtain help unless they leave their husbands. She requested the Committee to consider alternatives for assistance before the woman is forced to leave the home.

A member questioned if prosecuting a husband for a Class B felony would save the marriage. Representative Fuller believed, if anything was left of the marriage, the judge could put the husband on probation. In her opinion, creating a separate class of rape that occurs within marriage would be a better alternative than present law. Filing for separation, which would put the husband on notice, was not the only solution as this would not affect his behavior later on. She had no figures on the number of prosecutions obtained in states that have eliminated spousal immunity.

Barbara Reinert, representing the Women's Political Caucus, gave a statement for that organization in support of the bill (Attachment No.2). She said her group recommends that the bill be given the opportunity to work or that different means of dealing with domestic violence be found before spousal immunity is totally lifted.

Bonnie Buchele, Women's Political Caucus and Consultant on sexual assault at the Menninger Foundation, gave a statement supporting HB 2008 and addressing the issue of male rape. In her opinion, ideally, there should be no spousal immunity because rape is never justified under any circumstances, but the bill is a step in the right direction, and her group supports it as drafted. In regard to the suggested amendment, Ms. Buchele said she did not want to lose the bill because of the amendment. In regard

Atch. 3

to charging the husband with battery instead of rape, Ms. Buchele said rape victims are upset and insulted when prosecutors encourage them to accept a plea of attempted rape. She believed the same would be true of a battery charge. A member pointed out the difficulty prosecutors would have in getting convictions if spousal immunity was lifted.

Michael Kaye, Professor of Law, Washburn University School of Law, and a member of the American Civil Liberties Union, spoke in support of the suggested amendment to HB 2008. Spousal immunity is contrary to beliefs of the ACLU regarding due process and equal rights. New Jersey, Oregon, and Nebraska have eliminated spousal immunity, and there has been no flood of litigation because of this. The law should focus on the harm caused regardless of the relationship, and family harmony and freedom to choose sexual partners should be protected. In regard to statistics, Professor Kaye said it has been estimated that 400,000 of 2 million battered women in the United States have been raped in the home. He did not believe a prediction of the number of cases that could be prosecuted under provisions of the amendment could be made. A member pointed out that laws should not be enacted that cannot be enforced. Professor Kaye did not believe a battery charge would assist in bringing spouses to justice.

Attachment No.4 is a statement from Rose Arnhold, Professor of Sociology, Fort Hays State University, who was unable to attend this hearing.

Anna Luhman, Rape Prevention Center, Hays, said she and Rose Arnhold work together in the rape center and counsel on marital rape and battery. These numbers are increasing, and victims come from all walks of life. There is no difference if a woman is raped within marriage or by a friend or stranger. She noted the problems women have in finding legal recourse before they are forced to leave the marriage or the marriage is dissolved. They feel they have no place to go and something should be done to correct the situation rather than to dissolve the marriage completely. Ms. Luhman pointed out that children who are raised in situations of perpetual rape and battery structure their own marriages on this example. She noted the difficulty women have in getting law enforcement and attorneys to prosecute as they do not want to get involved with domestic situations. If prosecutors fail to carry out complaint charges,a wife should be able to go to another attorney. A member noted the difficulty prosecutors have with wives who want charges dropped after affidavits are obtained and pointed out that prosecutors are reluctant to take these cases because they are not simple cases when a spouse is charged with a crime.

Susie Sanders, representing the Wichita Area Rape Center, said her group supports HB 2008 and believes important points made during the interim hearings had been included in the bill. She did not oppose the suggested amendment but questioned if Kansas was ready for it. She said there had been 64 rapes in the Wichita area which did not include marital rape.

David Gottlieb, Professor of Law, University of Kansas, said he was representing himself only and furnished a statement (Attachment No.5). He suggested an intermediate approach between the bill and the amendment that would answer objections to complete elimination of spousal immunity. Iowa and Alaska have criminal rape laws that cover rapes that cause serious physical injury, abuse, or if a weapon has been used. Mr. Gottlieb will furnish prosecution figures from the 10 states that have eliminated spousal immunity. He supports the suggested amendment.

Detective Mike Padilla, Topeka Police Department, said he is assigned to the Crimes Against Persons Unit and conducts investigations on marital rape. HB 2008 is an improvement over present law in areas of proving resistance and insertion of objects, and the Department supports it. Regarding proving the element of fear, Mr. Padillo said when fear is present by any means, the victim has no problem in communicating that fear to him which he can give to the jury. He estimated there might be 18 reported rapes per month in Topeka. Mr. Padillo was asked his personal opinion on eliminating spousal immunity. As a representative of a law enforcement agency, he chose to remain mute on the question.

The meeting was adjourned at 5:10 p.m.

Attachment No. 1

~~or for relief under the protection from abuse act.~~

~~(4)~~ "Unlawful sexual act" means any rape, indecent liberties with a child, *indecent liberties with a ward, criminal* sodomy, aggravated sodomy, ~~or~~ lewd and lascivious behavior *or sexual battery*, as defined in this ~~article~~ *code*.

~~(3) "Woman" means any female human being.~~

Sec. 2. K.S.A. 21-3502 is hereby amended to read as follows: 21-3502. (1) Rape is ~~the act of sexual intercourse committed by a man with a woman not his wife, and without her consent when committed~~ *sexual intercourse with a person ~~who is not one's spouse and~~ who does not consent to the sexual intercourse*, under any of the following circumstances:

(a) When ~~a woman's resistance~~ *the victim* is overcome by force or fear; ~~or~~

(b) when the ~~woman~~ *victim* is unconscious or physically powerless ~~to resist; or;~~

(c) when the ~~woman~~ *victim* is incapable of giving ~~her~~ consent because of mental deficiency or disease, which condition was known by the ~~man~~ *offender* or was reasonably apparent to ~~him~~ *the offender*; or

(d) when the ~~woman's resistance is prevented by~~ *victim is incapable of giving consent because of* the effect of any alcoholic liquor, narcotic, drug or other substance administered to the ~~woman~~ *victim* by the ~~man~~ *offender*, or *by* another ~~for the purpose of preventing the woman's resistance~~ *person with the offender's knowledge*, unless the ~~woman~~ *victim* voluntarily consumes or allows the administration of the substance with knowledge of its nature.

(2) Rape is a class B felony.

Sec. 3. K.S.A. 21-3503 is hereby amended to read as follows: 21-3503. (1) Indecent liberties with a child is engaging in either of the following acts with a child ~~under the age of sixteen (16) years who is not the spouse of the offender~~ *who is not one's spouse and who is under 16 years of age*:

(a) ~~The act of~~ Sexual intercourse; *or*

(b) any lewd fondling or touching of the person of either the child or the offender, done or submitted to with the intent to

(3)

*

ATTACHMENT # 1

arouse or to satisfy the sexual desires of either the child or the offender or both.

(2) Indecent liberties with a child is a class C felony.

Sec. 4. K.S.A. 21-3504 is hereby amended to read as follows: 21-3504. *(1)* Indecent liberties with a ward is ~~either of the following acts when committed with a child under the age of sixteen (16) years~~ *the commission of indecent liberties with a child, as defined in K.S.A. 21-3503 and amendments thereto,* by any guardian, proprietor or employee of any foster home, orphanage~~,~~ or other public or private institution for the care and custody of minor children, to whose charge ~~such~~ *the* child has been committed or entrusted by any court, probation officer, department of social and rehabilitation services or other agency acting under color of law~~:~~

~~(a) The act of sexual intercourse;~~

~~(b) Any lewd fondling or touching of the person of either the child or the offender, done or submitted to with the intent to arouse or satisfy the sexual desires of either the child or the offender or both~~.

(2) Indecent liberties with a ward is a class B felony.

Sec. 5. K.S.A. 21-3505 is hereby amended to read as follows: 21-3505. *(1) Criminal* sodomy is ~~oral or anal copulation~~ *sodomy* between persons who are ~~not husband and wife or consenting adult~~ members of the ~~opposite~~ *same* sex~~,~~ or between a person and an animal~~, or coitus with an animal. Any penetration, however slight, is sufficient to complete the crime of sodomy~~.

(2) Criminal sodomy is a class B misdemeanor.

Sec. 6. K.S.A. 21-3506 is hereby amended to read as follows: 21-3506. Aggravated sodomy is ~~sodomy committed:~~

~~(a) With force or threat of force, or where bodily harm is inflicted on the victim during the commission of the crime; or~~

~~(b) With a child under the age of sixteen (16) years:~~

(a) Sodomy with a child who is not one's spouse and who is under 16 years of age;

(b) causing a child under 16 years of age to engage in sodomy with an animal;

(c) sodomy with a person ~~who is not one's spouse and~~ who

attachment 2-12

ATTACHMENT # 2

KWPC

KANSAS WOMEN'S POLITICAL CAUCUS

Regarding HB 2008 and Hb 2009 January 26,1983

Chairman Frey and members of the Judiciary Committee:

I am Barbara Reinert, lobbyist for the Kansas Women's Political Caucus.

As one of the conferees privileged to hear and study all the testimony presented last August to the Interim Studies Special Committee on Judiciary, I want to re-affirm my organizations' support of the Committee recommendations as incorporated in House Bills 2008 and 2009.

I'll not repeat every point of our concurrence but speak only to the problem of marital rape.

We see this form of brutality as a part of the greater problem of domestic violence. We fervantly wish that this whole area of human behavior would be addressed by this legislature.

However, this bill deals with rape as a violent crime, with criminal penalties, and no mention made of diversion, offender treatment or rehabilitation. Consequently, We believe that we should work first for the protection of those women who have made a definable step toward ending marital relationships.

As political creatures, Caucus members have learned to appreciate the incremental approach to achievement of our goals. So, we'd like to see part(3) section 1; put into use and working, before taking the next step of totally lifting spousal immunity or finding support for some entirely different approach to dealing with acts of violence within the family.

Thank you for your attention. I would like you to listen to our ~~other~~ 2nd conferee, who will speak on other points of our concern; (Bonnie Buchele.)

Attachment No. 3

Testimony of Bonnie J. Buchele on behalf of the Kansas Women's Political Caucus to the House Judiciary Committee, January 26, 1983 — Re: House Bill #2008

ATTACHMENT # 3

Chairman Frey and Members of the Committee:

My name is Bonnie Buchele. I am here on behalf of the Kansas Women's Political Caucus to state our general support for House Bill #2008.

I have been asked to speak to the Committee because of my professional interest and experience in the area of sexual assault. I am the Consultant on Sexual Assault at The Menninger Foundation where I am a member of the Adult Outpatient Department. My educational background is that I have a Master's Degree in Counseling from the University of Kansas, and with a little luck, I will receive my Ph.D. in Counseling Psychology from the University of Kansas in May. During the course of my studies, I have written and researched sexual assault and am familiar with most of the current literature and thinking on the subject. During the last ten years as a counselor and treator, I have seen over 150 rape victims and have trained volunteer rape counselors for Topekans Against Crime in the City of Topeka. I also serve as their professional consultant.

In my opinion, desexing the law is a proper step. Within the last two years verified accounts of males raped by females have begun to appear in the literature. Although these accounts are few, some tentative conclusions can be drawn: It appears that male rape victims experience essentially the same psychological trauma that females do. Initial indications are that sexual impotence is often part of

the aftermath. The sexual dysfunction is probably related to the male rape victim's revulsion at the fact that he was able to obtain an erection during the assault itself. The common belief that men are incapable of obtaining or maintaining erection while experiencing overwhelming fear, such as under threat of castration or death if they do not perform sexually is not true. In fact, getting an erection as part of a fear response is not unusual. I have enclosed a newspaper article related to this topic for your reading. I have also listed several articles that pertain to the rape of males by females in my handouts.

My second specific comment has to do with penalties: It seems inconsistent to me that the crime of indecent liberties with a child (not a relative) is a Class C felony; the crime of indecent liberties with a ward is a Class B felony; and the crime of aggravated incest (which is incest between parent and child) is only a Class D felony. In other words, you can rape your own child and receive a less severe penalty than if you go next door and rape the neighbor's child. We are becoming aware in the mental health community that incest can potentially cause more severe damage than sexual assault because the violation of a trusting relationship is involved in incest. Therefore, based on my knowledge of the comparative psychological trauma involved, I want to raise the question, why is there a lesser penalty for the crime of incest? It may very well be that there is a good rationale for setting it up in this way--one of which I am unaware--but I did want to raise the question.

My third comment is that in our opinion, the penalty for prostitution and the penalty for patronizing a prostitute should be the same. In the current law prostitution is a Class B misdemeanor and patronizing a prostitute is a Class C misdemeanor. An accessory to a crime is held liable to the same extent as the perpetrator of a crime. Patronization of a prostitute would seem to be acting as an accessory to the crime of prostitution. Therefore, it would seem that patronization of a prostitute and prostitution should be punishable at the same level.

The brevity of my statement should not be construed as a lack of strong support and commitment to the passage of this bill. The Women's Political Caucus and I personally stand ready and willing to answer any questions about this matter that you might have.

REFERENCES

GROTH, A. Nicholas : Men Who Rape. Plenum Press, New York, 1979

KAUFMAN, Arthur, et al.: Male Rape Victims: Noninstitutionalized Assault. American Journal of Psychiatry, 137(2):221-223, February, 1980.

SARREL, Philip: Sexual Molestation of Men by Women. Archives of Sexual Behavior, 11(2):117-132, April, 1982.

Attachment No. 4

ATTACHMENT # 4

My name is Rose Marie Arnhold and I would like to thank Representative Fuller for allowing me this opportunity to testify on the issue of interspousal immunity.

I am an Associate Professor of Sociology at Fort Hays University and my area of specialization is Family and Domestic Relations. In addition, I am the Director of the Hays Rape Prevention and Support group. In the last two years the Rape Support group has been forced to widen its scope and to offer assistance and support to physically abused women as well as rape victims because there is no other agency or organization to address their needs.

As a professional sociologist I am interested in the statistical data regarding domestic violence and the institutional response to the problem. As Director of the Rape Prevention and Support Group I am confronted with the same issues on a personal, on-to-one level. It is from both perspectives, professional and personal, that I offer the following observations.

Under most circumstances in American Law if one person inflicts injury on another, the injured party is allowed to obtain legal redress from the person who caused the injury. If I were physically attacked by a stranger, a cousin or a neighbor I could sue him or her for damages. If I were raped I could likewise seek legal redress even though my chances of being heard and believed would be slimmer due to the ideologies about women which have been enshrined in the law of rape.

However, if I were married and my husband intentionally inflicted injury on me I could not initiate an action for civil damages against him for his activity because in Kansas the doctrine of interspousal immunity is recognized. This doctrine of interspousal immunity in essence grants a spouse immunity from the force of the law. It is a promise that the law will look the other way in the event a wife or, as is more commonly the case, a husband beats or rapes his wife.

The origins of this doctrine of interspousal immunity are directly traceable to the early common law notion of the unity of husband and wife. Since a husband and wife were viewed in law as ONE person, a suit in which one brought charges against the other would have been a suit by one person against himself. Interspousal immunity was a natural consequence of the "in marriage the two become one" reasoning.

It is important to recognize that with the passage of the Married Women's Property Acts the husband and wife were no longer one person in the eyes of the law. Interspousal immunity should have disappeared with the "one person" assumption but, interestingly enough, it did not. Instead a new rationale was developed to maintain the rule of interspousal immunity. The new justification went something like this: Husbands and wives must not be allowed to bring suit against one another because to do such would disrupt domestic peace and harmony. A husband was thus allowed to beat his wife into a state of unconsciousness, inflict permanent physical and psychological damage, disfigurement and suffering but the law denied her the right to sue her husband because such a suit could destroy the peace of that home.

The idea was never entertained that to recognize both the husband's and wife's integrity before the law could contribute to a new level of understanding and perhaps stability in the relationship.

Some states now permit suits between husbands and wives who intentionally harm the other. The logic supporting such progressive legislation is as follows: In instances where the marriage has reached a stage in which a spouse intentionally inflicts damage on the other very little domestic tranquility remains to be preserved; the conclusion is that a healthy marital relationship does not at that time exist. A realistic assessment of the situation informs the law in these states rather than a wishful image of the family.

One individual with whom I have worked extensively reports that she was advised there was little she could do about repeated instances of physical abuse by her husband. Conditions continued to deteriorate until he raped her. She related to me that it took her two days to recover from the shock of the incident. When she could finally assess the situation, she took her child, walked out of the home and filed for divorce. She obtained a restraining order to insure her safty and even that did not protect her as two weeks prior to the final decree he attempted to rape her again. She has grown in self-confidence and self-esteem and now reports that her fear has diminished because, at a deep level, she knows that in her single state the law recognizes her rights while in the married state it did not.

Like most battered wives I encounter, this one did not want a divorce. She would like to have had a lever to equalize the relationship, to obtain the law's support to make him responsible for his behavior, to encourage him to seek counseling. As long as this state recognizes interspousal immunity and treats the family like a private sphere untouchable by the law, the divorces will continue because the only two alternatives that will remain are: 1. Live in a situation with escalating violence or 2. terminate the relationship so the law will give you protection.

Kansans need to rethink their attitude on interspousal immunity because by maintaining it, unfortunate consequences result.

1. First and foremost, it offers parties immunity from the law---it is in this respect a license to hit, to sexually assault and to injure. It is a restricted license to be sure, restricted to injuring only that party that least likely expects such treatment and is least well-equipped to deal with it, the spouse.

2. Maintaining interspousal immunity has the effect of encouraging the rocky marital relationhip to hit rock bottem. By allowing a husband to assault his wife without being answerable to anyone operates to insure the marital relationship to deteriorate until it is irreparable.

3. If women could bring civil charges against the assaultive husband, if women were granted this legal integrity, males would be less likely to engage in repeated episodes of such behavior. If the husband were forced to engage in the rather sobering thought that socity does not approve, nor will it ignore, such behavior, the relationship might be salvaged.

Rose Marie Arnhold January 26, 1983

Attachment No. 5

ATTACHMENT # 5

STATEMENT OF DAVID J. GOTTLIEB,

ASSOCIATE PROFESSOR,

UNIVERSITY OF KANSAS SCHOOL OF LAW

before the

Committee on the Judiciary

of the House of Representatives

concerning

House Bill 2008

January 26, 1983

Representative Frey, members of the Committee. I wish to thank you for providing me with this opportunity to appear before the Committee to testify on House Bill 2008, the proposed amendments to the Kansas sex offense laws.

I am an Associate Professor at the University of Kansas School of Law. I am completing my fourth year of teaching at the University in the areas of criminal law and procedure. Last year I had the privilege of serving in the initial phase of the Governor's Task Force on Domestic Violence, and I am presently engaged in writing an article on the legal system's response to the problem of spouse abuse. I am not here today as the representative of the Task Force or any other organization, but as a lawyer, husband and father concerned with the problems of domestic violence.

In particular, I'm here to urge that the current form of the bill be amended to prohibit a serious and brutal form of violent crime--rape within marriage. As you know, at present, it is legal in Kansas to rape or sodomize your spouse. The current form of House Bill 2008 would amend the present state of the law by eliminating the rape privilege when spouses are separated. I applaud the Committee for taking this long-needed step. However, I believe we can do even better. I urge this Committee to eliminate the exemption altogether, or at the very least, to criminalize spousal rape when it is accompanied by other physical injury, when a weapon is used, or when the abusing spouse is aided by another.

It is important to recognize what the current exemption means. While people may understand that the rape exemption allows forced sex where a wife pleads a headache but is verbally coerced into sexual intercourse with her husband, the exemption also applies to far more grotesque conduct. Under the marital exemption if a husband comes home from a poker game with four friends, invites them into his home, and allows them to watch while he forces his wife to have sex, he is not guilty of rape. If he points a gun at his wife's head and forces her to have sex he may be guilty of assault, but he is not guilty of rape. If he beats her senseless and then engages in forcible intercourse, he may be guilty of battery, but he is not guilty of rape.

While no one knows for certain how serious the problem of spousal rape really is, in the past year, two studies have been published which attempt to measure the prevalence of spousal rape. One study, recently published as a book called Rape in Marriage,[1] involved a random sample of married or formerly married women in San Francisco. The study questioned women on how upset they were by instances of spousal rape. On the whole, the women reported husband-rape as a traumatic experience, particularly when the rape was committed in connection with other physical abuse.[2] The study also confirmed that marital rape occurs with surprising frequency.[3]

A second study, published in Crime and Delinquency,[4] sampled clients of a New England family planning agency. The article reported incidents of rape coupled with truly gross abuse. The report concluded that many of the acts were not sex acts as much as acts of revenge.[5]

What these studies seem to show is that both qualitatively and quantitatively, rape in marriage is a serious problem. It is often

committed out of revenge and results in serious physical abuse. It occurs more frequently than we would like to admit.

The arguments which have been made in favor of retaining the exemption are, to my mind, unconvincing. One claim, made in other states, is that the exemption is necessary to preserve marital harmony. The argument is weak for two reasons. First, it assumes there's harmony left to preserve in a situation where this kind of behavior occurs. Moreover, the fact is we already allow "disruption" of the family unit by assault and battery prosecutions.

Next we come to the claim that if the rape exemption is ended, we'll be deluged by a flood of false or trivial claims of marital rape. So far, the evidence from those states which have abolished the rape exemption seems to show that this isn't a real problem. Rape prosecutions are traumatic and embarassing for victims. Not only are wives not rushing to file charges, prosecutors are cautious in filing cases. In fact, prosecutions are infrequent, and usually occur where rape is accompanied by serious abuse,[6] or the parties are separated.[7]

Another argument advanced by supporters of the exemption is that spousal rape shouldn't be criminalized because it will be difficult to prove. While this may be true, to say that prosecutions may be difficult is not a reasonable ground to forbid them. Many types of white collar crime--such as complex mail fraud--may be difficult to prove, yet no one argues for decriminalizing fraud. Moreover, there are certain recurring situations --such as rape accompanied by gross physical abuse--where prosecutions of cohabiting spouses have occurred with success.[8]

If the Committee is concerned about problems in prosecuting spousal rape cases, I urge it to adopt an amendment which provides for criminal penalties for at least the most gruesome and easily proven acts of marital rape. For example, in Iowa, husbands are guilty of rape if aided and abetted by another, if serious physical injury is committed, or if a weapon is used. In Alaska, a cohabiting husband can be charged with rape if, in addition to the rape, he causes physical injury. Copies of the Alaska and Iowa statutes we annexed to this statement.

Without question, the Committee's proposal to allow prosecutions when the couple is separated is an important improvement over the present statute. Regrettably, however, this revision will almost certainly leave the vast majority of spousal rapes legal. While the results of the two studies I've cited support the Interim Committee's view that wife rape is particularly likely to occur when "marital discord is evident," the studies supply no support for an argument that most wife rapes occur when the parties are separated. Thus, the study in Rape in Marriage reported that in 8% of the cases, the first act of rape occurred after the parties were separated.[9]

The Governor's Task Force on Domestic Violence recommended that the husband's exemption to rape be eliminated in toto. Such a step was recently taken in Nebraska, and is in place in about 10 other states. I urge this Committee to consider an amendment which adopts the Task Force recommendation.

ENDNOTES

1. D. Russell, Rape in Marriage (1982).

2. Id. at 190-205.

3. Id. at 57.

4. Finkelhor and Yllo, Forced Sex in Marriage: A Preliminary Research Report, 28 Crime and Delinquency 459 (1982).

5. Id. at 476-77.

6. "Kansas House to Debate Changes in Rape Law," University Daily Kansan, p. 8. (Statement of Clark Owens, Sedgwick County District Attorney).

7. See, e.g., Schwartz, The Spousal Exemption for Criminal Rape Prosecution, 7 Vermont L. Rev. 33, 48-51 (1982); D. Russell, Rape in Marriage, 362-374 (1982).

8. Cohabiting husbands have been prosecuted successfully in California, Delaware and Pennsylvania. Socio-Legal Charts on Marital Rape, National Clearinghouse on Marital Rape.

9. Russell, Rape in Marriage, p. 114, 237.

Sentences upheld.
In accord with original. See Davis v. State, Ct. App. Op. No. 23 (File No. 5100), 635 P.2d 481 (1981).

Sentence found excessive. — See Hintz v. State, Sup. Ct. Op. No. 2334 (File No. 3541), 627 P.2d 207 (1981).

Sec. 11.41.370. Definitions.

NOTES TO DECISIONS

Exemption. — The new criminal code, which states that it is an affirmative defense that defendant was a relative of the victim, provides for a broader exemption from the kidnapping statute than the absolute exemption for the abduction of a minor by his parent under former AS 11.15.260. Crump v. State, Sup. Ct. Op. No. 2309 (File No. 4546), 625 P.2d 857 (1981).

Article 4. Sexual Offenses.

Section
410. Sexual assault in the first degree
440. Sexual abuse of a minor

Cross references. — For provisions authorizing the videotaping of testimony by young victims of sexual offenses, see AS 12.45.047. For provisions authorizing the exclusion of the public from trial during testimony by a young victim of a sexual offense, see AS 12.45.048.

Sec. 11.41.410. Sexual assault in the first degree. (a) A person commits the crime of sexual assault in the first degree if,

(1) being any age, he engages in sexual penetration with another person without consent of that person;

(2) being any age, he attempts to engage in sexual penetration with another person without consent of that person and causes serious physical injury to that person;

(3) being 16 years of age or older, he engages in sexual penetration with another person under 13 years of age or aids, induces, causes or encourages a person under 13 years of age to engage in sexual penetration with another person; or

(4) being 18 years of age or older, he engages in sexual penetration with another person who is under 18 years of age and who

(A) is entrusted to his care by authority of law; or

(B) is his son or daughter, whether adopted, illegitimate, or stepchild.

(b) Sexual assault in the first degree is an unclassified felony and is punishable as provided in AS 12.55. (§ 3 ch 166 SLA 1978; am § 8 ch 102 SLA 1980; am § 6 ch 143 SLA 1982)

Impotency as defense to charge of rape, 26 ALR 772.

Competency of prosecutrix as witness in prosecution for rape of feebleminded female, 26 ALR 1502; 148 ALR 1153.

Liability of parent or person in loco parentis for rape of minor child, 19 ALR 460.

75 C.J.S., Rape, §§ 1 to 19, 36 to 88

Sec. 11.41.420. Sexual assault in the second degree. (a) A person commits the crime of sexual assault in the second degree if he compels another person to engage in sexual contact by the express or implied threat of imminent death, imminent physical injury, or imminent kidnapping to be inflicted on anyone or by causing physical injury to the person, regardless of whether the victim resists.

(b) Sexual assault in the second degree is a class B felony. (§ 3 ch 166 SLA 1978)

For cases construing former crime of rape, see note to AS 11.41.410.

Sec. 11.41.430. Sexual assault in the third degree. (a) A person commits the crime of sexual assault in the third degree if he engages in sexual penetration with a person who he knows

(1) is suffering from a mental disorder or defect which renders him incapable of appraising the nature of the conduct under circumstances in which a person who is capable of appraising the nature of the conduct would not engage in sexual penetration; or

(2) is incapacitated.

(b) Sexual assault in the third degree is a class C felony. (§ 3 ch 166 SLA 1978)

For cases construing former crime of rape, see AS 11.41.410.

Sec. 11.41.440. Sexual abuse of a minor. (a) A person commits the crime of sexual abuse of a minor if, being 16 years of age or older, he engages in

(1) sexual penetration with a person who is under 16 years of age but 13 years of age or older; or

(2) sexual contact with a person who is under 13 years of age.

(b) Sexual abuse of a minor is a class C felony. (§ 3 ch 166 SLA

Editor's note. — The cases cited in the note below were decided under former AS 11.15.134.

State's authority to control sexual conduct of children. — Although juveniles may have certain rights to sexual privacy, the state may nevertheless exercise control over the sexual conduct of children beyond the scope of its authority to control adults. Anderson v. State, Sup. Ct. Op. No. 1407 (File No. 2641), 562 P.2d 351 (1977).

While juveniles have certain rights to sexual privacy and to express their own sexuality, the state's interest in the well-being of children may justify legislation which may not properly be applied to adults. Anderson v. State, Sup. Ct. Op. No. 1407 (File No. 2641), 562 P.2d 351 (1977).

As to constitutionality of statute making lewd and lascivious conduct toward children a crime, see Anderson

State, Sup. Ct. Op. No. 1407 (File No. 2641), 562 P.2d 351 (1977).

Physical conduct punished under former statute. — See Anderson v. State, Sup. Ct. Op. No. 1407 (File No. 2641), 562 P.2d 351 (1977); Smiloff v. State, Sup. Ct. Op. No. 1637 (File No. 3006), 579 P.2d 28 (1978).

Former section prohibited fellatio. — See Anderson v. State, Sup. Ct. Op. No. 1407 (File No. 2641), 562 P.2d 351 (1977).

Consent is not at issue. — The state may prohibit an adult to have fellatio with a child under the statutorily prescribed age regardless of whether the child consents to the act. Anderson v. State, Sup. Ct. Op. No. 1407 (File No. 2641), 562 P.2d 351 (1977).

Sentence under AS 11.15.134 upheld. — See Noble v. State, Sup. Ct. Op. No. 1286 (File No. 2468), 552 P.2d 142 (1976); Buchanan v. State, Sup. Ct. Op. No. 1316 (File No. 2553), 554 P.2d 1153 (1976).

Am. Jur., ALR and C.J.S. references. — 36 Am. Jur., Mayhem and Related Offenses, § 1 et seq.

Mayhem as dependent on part of body injured and extent of injury, 16 ALR 955; 58 ALR 1320.

Mayhem by use of poison or acid, 58 ALR 1328.

57 C.J.S., Mayhem, §§ 1 to 12.

Sec. 11.41.445. General provisions. (a) In a prosecution under §§ 410 — 440 of this chapter, it is an affirmative defense that, at the time of the alleged offense, the victim was the legal spouse of the defendant and

(1) the spouses were living apart; or

(2) the defendant caused physical injury to the victim.

(b) In a prosecution under §§ 410 — 440 of this chapter, whenever a provision of law defining an offense depends upon a victim's being under a certain age, it is an affirmative defense that, at the time of the alleged offense, the defendant reasonably believed the victim to be that age or older, unless the victim was under 13 years of age at the time of the alleged offense. (§ 3 ch 166 SLA 1978)

Sec. 11.41.450. Incest. (a) A person commits the crime of incest if, being 18 years of age or older, he engages in sexual penetration with a person who is related to him, either legitimately or illegitimately, as

(1) his ancestor or descendant of the whole or half blood;

(2) his brother or sister of the whole or half blood; or

(3) his uncle, aunt, nephew, or niece by blood.

(b) Incest is a class C felony. (§ 3 ch 166 SLA 1978)

Death of defendant abated prosecution under former section. Hartwell v. State, Sup. Ct. No. 391 (File No. 704), 423 P.2d 687 (1967), decided under former AS 11.15.

Am. Jur., ALR and C.J.S. references. — 41 Am. Jur., Incest, § 1 et seq.

Aiding and abetting offense of incest by person related to party, 5 ALR 784.

Relationship created by adoption as within statute regarding incest, 151 ALR 1146.

Consent as element of incest, 36 ALR2d 1299.

42 C.J.S., Incest, §§ 1 to 18.

Sec. 11.41.455. Unlawful exploitation of a minor. (a) A person commits the crime of unlawful exploitation of a minor if, in this state and with the intent of producing for any commercial purpose a live performance, film, photograph, negative, slide, book, newspaper, or

necessarily show impossibility to have intercourse. Id.

It is not error to refuse to allow the physician to testify as to such experiments, where he has been permitted to testify as an expert that sexual intercourse, under the conditions described by plaintiff was impossible. Id.

In an action for rape, where plaintiff has testified as to the ravishment, it is competent to allow a witness to testify that she stated to her, after the offense was committed, that she had been "hurt in the most brutal way any one could be hurt," since that is evidence of a complaint made by her of the injury done her, and not of the particulars of the rape. Id.

In an action for rape, the testimony of plaintiff's mother that plaintiff had, two weeks after the alleged rape, during which time she had continued at her work, and while she was not under treatment by a physician, complained that she had pains in her back and side, is inadmissible, since such declarations were not the natural result and expression of suffering, nor made to a physician for the purpose of treatment. Id.

141. —— Damages, civil actions

Defendant in civil action for damages is liable only for such damages, mental and physical, as reasonably and probably resulted from alleged assault. Wildeboer v. Petersen, 1925, 201 Iowa 1202, 203 N.W. 284.

Defendant is liable only for damages reasonably and probably resulting from alleged assault. Id.

In action for forcible defilement, where plaintiff claimed expenditures of $200, instruction to award actual damages including physical pain, mental suffering, loss of capacity to work, and medical treatment not to exceed $200 was misleading in respect to amount of actual damages. Wildeboer v. Petersen, 1918, 182 Iowa 1185, 166 N.W. 464.

In actioh for forcible defilement, where the actual damages allowed were $150, exemplary damages of $5,000 were excessive. Id.

A verdict of $8000 damages for rape resulting in pregnancy and birth of a child was excessive, where the evidence did not disclose great physical disability, and but slight mental pain and suffering. Garvik v. Burlington, C. R. & N. R. Co., 1906, 131 Iowa 415, 108 N.W. 327, 117 Am.St.Rep. 432.

In an action against a railroad for a rape committed on a passenger by a brakeman, which resulted in pregnancy, an instruction that plaintiff was entitled to recover for time lost by reason of the wrong complained of, did not warrant an inference that damage might be awarded for time lost in caring for the child. Id.

For an assault and battery committed in an attempt to rape, a recovery of four hundred dollars cannot be said to be excessive. Rogers v. Winch, 1889, 76 Iowa 546, 41 N.W. 214.

709.2 Sexual abuse in the first degree

A person commits sexual abuse in the first degree when in the course of committing sexual abuse the person causes another serious injury.

Sexual abuse in the first degree is a class "A" felony.

Acts 1976 (66 G.A.) ch. 1245, ch. 1, § 902, eff. Jan. 1, 1978.

Historical Note

Derivation:

Codes 1977, 1975, 1973, 1971, 1966, 1962, 1958, 1954, 1950, 1946, §§ 698.1, 698.4.
Codes 1939, 1935, 1931, 1927, §§ 12966, 12968.
Acts 1927 (42 G.A.) ch. 233.
Acts 1925 (41 G.A.) ch. 197, § 1.
Code 1924, §§ 12966, 12968.
Acts 1921 (39 G.A.) ch. 192, §§ 1, 3.
Code 1897, §§ 4756, 4769.

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709.3 Sexual abuse in the second degree

A person commits sexual abuse in the second degree when the person commits sexual abuse under any of the following circumstances:

1. During the commission of sexual abuse the person displays in a threatening manner a deadly weapon, or uses or threatens to use force creating a substantial risk of death or serious injury to any person.

2. The other participant is under the age of twelve.

3. The person is aided or abetted by one or more persons and the sex act is committed by force or against the will of the other participant.

Sexual abuse in the second degree is a class "B" felony.

Acts 1976 (66 G.A.) ch. 1245, ch. 1, § 903, eff. Jan. 1, 1978.

Historical Note

Derivation:

Codes 1977, 1975, 1973, 1971, 1966, 1962, 1958, 1954, 1950, 1946, § 698.1.
Codes 1939, 1935, 1931, 1927, § 12966.
Acts 1925 (41 G.A.) ch. 197, § 1.
Code 1924, § 12966.
Acts 1921 (39 G.A.) ch. 192, §§ 1, 3.
Code 1897, § 4756.
Acts 1896 (26 G.A.) ch. 70.
McClain's Code 1888, § 5160.
Acts 1886 (21 G.A.) ch. 114, § 1.
Code 1873, § 3861.
Revision 1860, § 4204.
Code 1851, § 2581.

Cross References

Accomplices and accessories, generally, see § 703.1.
Dangerous weapon, defined, see § 702.7.
Evidence, past sexual conduct, see § 813.2, Rule 20.
Forcible felony defined, see § 709.3.
Maximum sentence for felons other than class A, see § 902.9.
Serious injury, defined, see § 702.18.

Library References

Assault and Battery ⇐59.
Infants ⇐20.
Rape ⇐6, 9 to 13.
C.J.S. Assault and Battery § 74.
C.J.S. Infants §§ 95, 100 to 107.
C.J.S. Rape §§ 7, 11 to 16.

Notes of Decisions

1. In general

Consent of the woman to sexual intercourse from fear of personal violence is void, and though the man lays no hand on her, if, by an array of physical force he overpowers her so that she dares not resist, he is guilty of rape. State v. Morrison, 1920, 189 Iowa 1027, 179 N.W. 321.

2. Indictment and information

Where indictment accused defendant and another of rape as defined by a spe-

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defendant and another conspired to commit the crime, and that defendants were present and aided and abetted in the crime, an instruction that if there was a conspiracy, and defendants participated therein, and were present and took part in carrying it out, they would be as guilty as the man who accomplished the joint object, is erroneous, since it conveys the impression that it is intended to define the consequences resulting from the conspiracy, and also from aiding and abetting a crime, and one who aids and abets a crime is not equally guilty with the principal. State v. Wolf, 1900, 112 Iowa 458, 84 N.W. 536.

Where defendants are alleged to have aided and abetted in the commission of rape, an instruction which states that the jury must find that the defendants were actually present or about the place of the commission of the offense, or so near as to give countenance and support to the act complained of, before they can be found guilty, is erroneous, since mere presence alone does not constitute aiding and abetting a crime. Id.

In a prosecution for rape against A. and B., there being no evidence that B. touched the complainant, but only that he aided A., an instruction that the jury must find A. guilty before they can convict B. is not prejudicial to A. State v. Mitchell, 1885, 68 Iowa 116, 26 N.W. 44.

709.4 Sexual abuse in the third degree

Any sex act between persons who are not at the time cohabiting as husband and wife is sexual abuse in the third degree by a person when the act is performed with the other participant in any of the following circumstances:

1. Such act is done by force or against the will of the other participant.

2. The other participant is suffering from a mental defect or incapacity which precludes giving consent, or lacks the mental capacity to know the right and wrong of conduct in sexual matters.

3. The other participant is a child.

4. The other participant is fourteen or fifteen years of age and the person is a member of the same household as the other participant, the person is related to the other participant by blood or affinity to the fourth degree, or the person is in a position of authority over the other participant and used this authority to coerce the other participant to submit.

5. The person is six or more years older than the other participant, and that other participant is fourteen or fifteen years of age.

Sexual abuse in the third degree is a class "C" felony.

Acts 1976 (66 G.A.) ch. 1245, ch. 1, § 904, eff. Jan. 1, 1978. Amended by Acts 1977 (67 G.A.) ch. 147, § 12, eff. Jan. 1, 1978; Acts 1978 (67 G.A.) ch. 1029, §§ 47, 48.

Historical Note

Derivation:

Codes 1977, 1975, 1973, 1971, 1966, 1962, 1958, 1954, 1950, 1946, §§ 698.1, 698.3, 700.1.
Codes 1939, 1935, 1931, 1927, §§ 12966, 12967, 12970.
Acts 1925 (41 G.A.) ch. 197, § 1.
Code 1924, §§ 12966, 12967.