

## CONCLUSION

The purpose of this article has not been to reconcile the myriad of state court decisions involving the problems of religion and the public schools. There has been no attempt to demonstrate the existence of an internal consistency even within the very few cases decided by the Supreme Court. Nor has the endeavor been to predict the outcome of future litigation. While the recent decision in *Engel v. Vitale* has been examined, it has not been suggested that the case permits of only one interpretation. Rather, the purpose here has been to submit a rational and desirable standard for constitutional adjudication in this area, and to demonstrate its application in some specific situations. In many of these instances, "nice" distinctions have been drawn. But a "boundary line is none the worse for being narrow."<sup>567</sup> It should be made clear that "the principle offered is meant to provide a starting point for solutions to problems brought before the Court, not a mechanical answer to them."<sup>568</sup> If some of the underlying factual premises advanced here are shown to be incorrect, the results suggested must be changed. But the principle should be adhered to.

Central to the theme of this article has been the fact that it is vital to the preservation of religious liberty to recognize that although "you send your child to the schoolmaster . . . 'tis the schoolboys who educate him."<sup>569</sup> Voluntariness is a concept, not merely a word. "Compulsion which comes from circumstances can be as real as compulsion which comes from a command."<sup>570</sup> If the price for the protection of religious liberty in the public schools is the abolition of certain religious influences,<sup>571</sup> that price must be paid. Although this conclusion may be said to manifest no more than "the traditional American weakness of identifying our own preferences and predilections with the Constitution,"<sup>572</sup> the effort has been made to submerge these preferences and predilections in favor of historical and contemporary national goals.

of influences, silent as well as expressed, shape the plastic minds and characters of the young children committed to their care in accordance with their own religious views, and saddle the expense of this sectarian education upon the taxpayers.

567. *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327, 329 (1944).

568. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 6 (1961).

569. EMERSON, *THE CONDUCT OF LIFE* 123 (1860).

570. *Public Util. Comm'n v. Pollak*, 343 U.S. 451, 468 (1962) (Douglas, J., dissenting).

571. See Kirven, *Freedom of Religion or Freedom from Religion?*, 48 A.B.A.J. 816, 819 (1962).

572. Kauper, *Church, State, and Freedom: A Review*, 52 MICH. L. REV. 829, 848 (1954).

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## Proposed Revision of the Minnesota Criminal Code

*A proposed revision of the Minnesota Criminal Code is currently before the state legislature. The product of a special Advisory Committee created to study the problem, the proposed code represents changes and consolidation only in the present substantive criminal law; it does not attempt to alter existing statutes on criminal procedure. Professor Pirsig, Reporter for the Advisory Committee, has limited this article to a discussion of the proposed revisions in four areas: homicide, theft, sex offenses, and sentencing.*

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In 1955, a commission was established by the Minnesota legislature to deal with the broad problem of "juvenile delinquency, crime, and correction."<sup>1</sup> One of the early acts of the Commission was to set up a special Advisory Committee for the purpose of dealing with the revision of the criminal law and procedure.<sup>2</sup> The Committee in the early stages of its work decided that it would not undertake to make a study of criminal procedure, but would concentrate its efforts on the study and revision of the substantive criminal law. The work of this committee has now been brought to a conclusion, and a proposed revised Minnesota Criminal Code has been before the bench, the bar, and the public of Minnesota for their consideration, suggestions, and criticism before submission of the final product to the 1963 legislative session.

#### I. POLICIES OF THE ADVISORY COMMITTEE

The proposed code consists of approximately 165 sections, replacing approximately 665 sections in the present criminal code. This does not mean, however, that the substance of 500 sections of the present code has been eliminated. The proposed revision

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1. Minn. Sess. Laws 1955, ch. 789, at 1222.

2. When the Legislative Commission was not continued in 1961, the Governor made funds available for the Advisory Committee to conclude the work on the revision of the Criminal Code.

is a product of several basic policies pursued by the Advisory Committee. One was to recommend repeal of all obsolete and unconstitutional provisions. For example, sections have been eliminated punishing engaging in a duel, challenging another to fight a duel, or accepting a challenge to fight a duel.<sup>3</sup> Under the revision, if mutual combat does in fact take place, it will be dealt with as a form of assault. Likewise the prohibition against taking "a larger proportion than one-eighth as toll for grinding and bolting any wheat or other grain brought as a grist" to a custom mill<sup>4</sup> has no meaning under modern conditions. The same may be said of requiring streetcars to be so constructed that the operator is protected from inclement weather.<sup>5</sup> Note also this interesting, if not amusing, relic of the past:

Whoever rides or drives faster than a walk, upon any bridge, at each end of which a conspicuous signboard is placed upon which is printed the following words and figures: "\$10 fine for riding or driving on this bridge faster than a walk," shall be guilty of a misdemeanor and punished by a fine of \$10, or by imprisonment in the county jail for ten days, for each offense.<sup>6</sup>

Provisions such as these have not been retained in the revised code.

Some provisions have been deleted or modified to meet constitutional objections. One such instance is section 623.25 of the Minnesota Statutes, which undertakes to limit and control the use of gift stamps on the part of merchants. This has been held unconstitutional except insofar as the element of chance, and hence of gambling, is involved.<sup>7</sup> Again, statutes such as section 617.72, which prohibits the distribution to a minor of publications made up of "criminal news, police reports, accounts of criminal deeds, or pictures or stories of deeds of bloodshed, lust, or crime," have been held unconstitutional on the ground of indefiniteness as to

3. MINN. STAT. §§ 619.46-.50 (1961).

4. MINN. STAT. § 614.51 (1961).

5. MINN. STAT. § 614.56 (1961).

6. MINN. STAT. § 616.24 (1961). For other examples, see MINN. STAT. § 614.65 (1961):

Any person within the state who manufactures, sells, gives to any one, or uses any cigarette containing any substance foreign to tobacco shall be punished by a fine of not more than \$50.00, or imprisonment in a county jail for not more than 30 days;

MINN. STAT. § 617.61 (1961):

All persons under the age of 21 years are prohibited from playing pool or billiards or cards in any saloon or room connected therewith or in any restaurant or public place of amusement in which tobacco, confectionery, or drinks of any kind, except water, are in any manner disposed of . . . .

7. State *ex rel.* Attorney Gen. v. Sperry & Hutchinson Co., 110 Minn. 378, 126 N.W. 120 (1910).

meaning.<sup>8</sup> Sections 612.06 to 612.09 of the Minnesota Statutes, which undertake to punish various acts of disloyalty, are undoubtedly unconstitutional in light of the United States Supreme Court decision holding that federal legislation has pre-empted the field of sedition against the United States.<sup>9</sup> Hence, the corresponding revised provisions are limited to acts directed against the state.<sup>10</sup>

A number of present criminal statutes make a given fact prima facie evidence of another fact essential to the commission of a crime such as the intent to defraud. In *State v. Higgin*,<sup>11</sup> the trial court instructed the jury in a criminal trial for forgery that intent to defraud "may be presumed" from the fact that defendant signed the payee's name unless the presumption has been rebutted by the evidence. In holding this instruction erroneous, the Minnesota Supreme Court said:

[W]here specific intent is an essential element of the offense charged, it can never be presumed, at least in the sense that it *must* be found from a given state of facts in the absence of countervailing or rebutting evidence. Like every other essential element of the crime, specific intent must be established beyond reasonable doubt or be reasonably deducible from the evidence. It may not rest on a presumption. As previously mentioned, intent to defraud may be, and normally is, inferred from the established circumstances. But no matter how incontrovertible the evidence of the intent to defraud may be, the court may not declare that the evidence establishes such intent.<sup>12</sup>

The decision appears to permit, however, a provision that a given fact is sufficient evidence to permit the jury to find by inference a second fact such as intent. Hence, in the revision such language has been substituted for the present use of presumption or prima facie case.<sup>13</sup>

Another basic policy of the Advisory Committee was to confine the proposed code to those crimes that are of general application and to transfer to other chapters those sections dealing with the regulation and control of particular and limited activities. During the present century, a large number of regulatory measures have been adopted by the state and federal governments

8. See *Winters v. New York*, 333 U.S. 507 (1948).

9. *Pennsylvania v. Nelson*, 350 U.S. 497 (1956).

10. See PROPOSED MINN. CRIMINAL CODE § 609.395 (1962). [Hereinafter references to the Proposed Minn. Criminal Code will be made only by section numbers.]

11. 257 Minn. 46, 99 N.W.2d 902 (1959).

12. *Id.* at 52, 99 N.W.2d at 907.

13. *E.g.*, § 609.535, dealing with the issuance of a worthless check, provides: "Any of the following is evidence sufficient to sustain a finding that the person at the time he issued the check or other order for the payment of money, intended it should not be paid."

prescribing the conditions and limitations under which certain activities may be conducted. Usually such measures relate to a production or distribution of goods, foods, drinks, drugs, intoxicating liquors, and the like. Violation of these provisions is made a crime, usually a misdemeanor. These regulatory measures generally do not appear in the present criminal code.<sup>14</sup> In a few instances, repeal was recommended rather than transfer to another chapter.<sup>15</sup> The opposite policy—bringing the regulatory provisions outside the criminal code into the criminal code because criminal consequences are imposed—was considered by the Advisory Committee in the early stages of its deliberation, but it was concluded that this alternative was impossible. It would mean, for example, transfer of whole chapters (such as the traffic code) into the criminal code, most of which deal only incidentally with the criminal aspects of the subject.

The Advisory Committee also recommended that a group of essentially procedural statutes be transferred to other chapters. The Committee felt that consideration of these provisions should be

14. Examples are MINN. STAT. §§ 616.17 (conditions requiring dead domestic animal disposals), .35 (prescribing the amount of gold or silver on gold plated or silver plated items made for sale), .55 (punishing the use of false weights or measures of any commodity or article of merchandise for the purpose of injuring or defrauding another). MINN. STAT. §§ 618.01-.25 (1961), the Uniform Narcotic Drug Act, falls within this category, for the principal purpose of the act is to provide the conditions and regulations that will assure that narcotics are distributed only to those legally authorized to receive them.

15. An example is MINN. STAT. § 616.05 (1961):

Every person who, with intent that the same may be sold as unadulterated or undiluted, shall adulterate or dilute wine, milk, distilled spirits, or malt liquors, or any drug, medicine, food, or drink for man or beast; or shall offer for sale or sell the same as unadulterated or undiluted, or without disclosing to or informing the purchaser that the same has been adulterated or diluted; or shall manufacture, sell, expose, or offer for sale, as such article of food or drink, any substance in imitation thereof, without disclosing the imitation by a suitable and plainly visible mark or brand; or with intent that the same may be used as food, drink, or medicine, shall sell, offer or expose for sale, any article whatsoever which to his knowledge has become spoiled, tainted, or for any cause unfit to be used as food, drink, or medicine, where special provision has not otherwise been made by statute for its punishment shall be guilty of a misdemeanor, and punished by a fine of not less than \$25.00, or by imprisonment in the county jail for not less than 30 days.

This sweeping statute goes back to territorial days and has been amended from time to time. At the present time, however, it is almost completely superseded by provisions appearing in regulatory chapters outside the criminal code and appears to be little used, if at all. For references to the several statutes now dealing with the subject matter of MINN. STAT. § 616.05 (1961), see PROPOSED MINN. CRIMINAL CODE, app. C, at 244. For references to MINN. STAT. §§ 616.18-.19 (1961), see *id.* at 245.

deferred until the whole subject of procedure is considered by an appropriate study conducted with a view to revision of this topic. A major exception to this policy was those provisions dealing with sentencing. Sentencing was considered so vital a part of the administration of criminal justice and so badly in need of revision in Minnesota that it was included as part of the proposed criminal code. In any case, the provisions on sentencing, while not defining substantive crimes, are probably not procedural to such a degree that they would be the proper subject matter of rule making by court, which the Advisory Committee assumed will ultimately be adopted in this state.

Another basic policy of the Committee was to state the crimes retained from the present code in clear, specific, and simple language, avoiding overlapping and duplication. Several methods were employed to achieve this objective. Instead of designating each crime as a misdemeanor, gross misdemeanor, or felony, the specific sentence attached to the crime is stated in the section defining the crime itself. In this respect the Wisconsin act was followed rather than the example of the American Law Institute Model Penal Code. The Model Code undertakes to place all crimes into a few categories or degrees defined by general definitions; sections dealing with a specific crime then designate the classification into which the crime is placed. Thus, a reader of a given section dealing with a specific crime, if he is not familiar with the classification, must refer back to the classification to ascertain what the penalty for the crime is. The method adopted in the proposed code has the further merit of compelling consideration of the gravity of each crime and its appropriate sentence without reference to any general classification.

Except in the case of homicide, breaking up specific crimes into degrees has been largely eliminated, again following the Wisconsin example. In some instances, like rape, assault, arson, and forgery, the crime is divided into aggravated and simple forms. At other times, different sentences are specified for different kinds of violations of the section without attempting a characterization.<sup>16</sup> Simplification was further secured by placing related provisions now appearing in independent sections as clauses or subdivisions in a single section. This rearrangement was particularly successful in achieving condensation and simplification in cases of theft, forgery, and criminal damage to property.

16. See, e.g., §§ 609.225 (aggravated assault), .335 (prostitution), .60 (dangerous trespasses and other acts). Different sentences for theft are based primarily on the value of the property taken. See text accompanying notes 81-86 *infra*.

To avoid present confusion, an attempt was also made to state more clearly than do present statutes the particular criminal intent or purpose required for each particular crime. Terms in the present statutes such as "willful," "maliciously," "knowingly," and "wantonly" have produced much confusion and uncertainty as to what mental state is intended. Throughout the proposed criminal code, the word "intentionally" or "with intent to" has been used. Section 609.02(9) defines these terms. For example, clause (3) of that subdivision provides:

"Intentionally" means that the actor either has a purpose to do the thing or cause the result specified or believes that this act, if successful, will cause that result. In addition, except as provided in clause (6),<sup>17</sup> the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word "intentionally."

All sections of the proposed code in which these terms are used must therefore be read in connection with the definitions.

Also, the proposed code states the several crimes in terms of the general acts sought to be prohibited and avoids enumeration of specific instances that exemplify the general act. In addition, it was deemed unnecessary surplusage to state that an act should not be done "directly or indirectly" or that the defendant should not "cause or procure it to be done." To prohibit the act is all that is needed.<sup>18</sup>

An illustration of what can be achieved by these methods is illustrated by the proposed code's treatment of the substance of section 621.341 of the Minnesota Statutes, which reads:

Any person who shall operate or cause to be operated or who shall attempt to operate or attempt to cause to be operated any automatic vending machine, coin-box telephone or other receptacle designed to receive lawful coin of the United States of America in connection with the sale, use or enjoyment of property or service, by means of a slug or of any false, counterfeited, mutilated or sweated coin, or by any means, method, trick or device whatsoever not lawfully authorized by the owner, lessee or licensee of such machine, coin-box telephone or receptacle; or who shall take, obtain or receive from or in connection with any automatic vending machine, coin-box telephone or other receptacle designed to receive lawful coin of the

17. Clause (6) eliminates knowledge of the age of a minor even though age is a material element in the crime in question. This is particularly applicable to §§ 609.31 (sexual intercourse with a female child), 335 (prostitution), 30(4) (sodomy and other like crimes).

18. An exception to this statement appears in the section on bribery. It adds to the meaning of the crime that one is guilty if he "offers, gives, or promises to give, directly or indirectly . . . any benefit, reward or consideration . . ." § 609.42(1). (Emphasis added.)

United States of America in connection with the sale, use or enjoyment of property or service, any goods, wares, merchandise, gas, electric current, article of value, or the use or enjoyment of any telephone or telegraph facilities or service, or of any musical instrument, phonograph or other property, without depositing in and surrendering to such machine, coin-box telephone or receptacle, lawful coin to the amount required therefore by the owner, lessee or licensee of such machine, coin-box telephone or receptacle, shall be guilty of a misdemeanor.

The substance of this provision is covered in the theft section of the proposed code, which provides that anyone commits theft who:

Intentionally obtains property or services, offered upon the deposit of a sum of money or tokens in a coin or token operated machine or other receptacle, without making the required deposit or otherwise obtaining the consent of the owner.<sup>19</sup>

Finally, the methods described required in some instances a narrowing of the scope of the crime as it is now defined. A striking example is section 621.13 of the Minnesota Statutes, which reads:

Every person who shall make or mend, or cause to be made or mended, or have in his possession, in the day or night-time; any engine, machine, tool, false key, picklock, bit, nippers, implement, or explosive adapted, designed, or commonly used for the commission of burglary, larceny, or other crime, under circumstances evincing an intent to use or employ, or allow the same to be used or employed, in the commission of a crime, or knowing that the same is intended to be so used, shall be guilty of a felony. The having in possession any such engine, machine, tool, false key, picklock, bit, nippers, implement, or explosive shall be prima facie evidence of an intent to so use or employ the same in the commission of a crime.

Note that the words "or other crime" encompass misdemeanors as well as felonies. Hence, the mere possession of an "implement" or tool for the purpose of committing a misdemeanor becomes a felony with a possible sentence of seven years imprisonment. The section appears to mean that anyone who carries a gambling device, including probably a deck of cards, with intent to engage in gambling, or who has in his possession fishing tackle or a gun intending to fish or hunt out of season or catch or shoot protected fish or game, or who has a firecracker intending to explode it on the Fourth of July, or who carries a contraceptive with fornication in mind, is a felon subject to the penalty indicated since these are "tools" or "implements" "adapted" or "commonly used for the commission of" these crimes. Such a statute ought not to

19. § 609.52(2)(7). Clause (7) quoted in the text also covers the substance of MINN. STAT. § 621.342 (1961).

exist. The corresponding section in the proposed code is confined to the possession of any device, explosive, or other instrumentality with intent to use or permit the use of the same to commit burglary.<sup>20</sup>

These several devices resorted to by the Committee led to a very substantial reduction in the total number of sections, although much of the present law appearing in independent sections appears in the proposed revision as subdivisions or clauses of single sections. About 85 sections are recommended for repeal and about 185 transfer to other chapters.

The Advisory Committee was faced at the outset with the question of whether it should undertake merely to restate the law as it presently exists or to recommend improvements in its substance as well. The original 1955 act creating the Commission directed the recommendation of improvements. Merely to restate the present law without change would meet neither the needs of the state nor the intent of the legislature. The ten year study devoted to the preparation of the Model Penal Code by the American Law Institute indicates recognition of the need for improvement in the criminal codes of this country by a national organization of judges and lawyers. The illustrations already given sufficiently show that this need exists in Minnesota. The legislation creating the Commission was enacted shortly after Wisconsin made many changes in and greatly modernized its criminal law, and it is fair to assume that the Minnesota legislature had a similar objective in mind. A similar position was taken in the preparation of the Illinois Revised Criminal Code, adopted in 1961.

The proposed code, therefore, contains many modifications in existing law that the Committee felt were required to incorporate the product of experience, scholarship, and modern conceptions of criminal behavior and its causes and control. But in so doing, the Committee operated within the framework of the existing criminal code. For the most part, it did not undertake to incorporate new criminal offenses. Rather it restated existing crimes with such changes and improvements as appeared justified in the light of present day knowledge and principles.

It is not possible, of course, to include in this discussion all the crimes covered by the proposed code. Four subjects have been selected that should sufficiently illustrate the approach of the Committee and the character of the provisions of the code as a whole: homicide, theft, sex offenses, and sentences.

20. § 609.59.

## II. HOMICIDE

### A. MURDER IN THE FIRST OR SECOND DEGREE

Prior to 1959, murder in both the first and second degrees carried mandatory life imprisonment sentences. Murder in the first degree consisted of a killing "perpetrated with a premeditated design to effect the death of the person killed or of another."<sup>21</sup> Murder in the second degree encompassed two different categories: (1) the killing of a human being with a design to effect the death of the person killed or another, but without deliberation and premeditation; and (2) a death arising out of the commission of or attempt to commit designated sex offenses.<sup>22</sup> The existence of these two degrees, both carrying identical mandatory life imprisonment sentences, made little sense and undoubtedly many juries believed that they were exercising leniency on behalf of the defendant in returning a verdict of murder in the second degree rather than in the first degree.

This anomaly was partially eliminated in 1959. The punishment for murder in the second degree was reduced to not less than 15 nor more than 40 years when there is a design to effect the death of the person killed or another, but it is without deliberation and premeditation. However, the punishment for death resulting from the commission of or attempt to commit a sex offense was left as it had been earlier—mandatory life imprisonment.<sup>23</sup>

The proposed revision undertakes to remove the anomaly in its entirety. Death resulting from the commission of or attempt to commit a sex offense is removed from the crime of murder in the second degree and added as a second category to murder in the first degree. In addition, the scope of sex offenses falling within the provision is limited to that of rape or sodomy committed with force or violence. Murder in the second degree is thus confined to a killing with intent to effect death, but without premeditation. In addition, the minimum 15 year imprisonment sentence has been eliminated.<sup>24</sup>

The result of the 1959 legislation and the proposed revision is that whether a defendant is subject to life imprisonment for murder in the first degree or to a term not exceeding 40 years for murder in the second degree turns on whether he had "deliberated" or "premeditated" as well as intended the murder. As inter-

21. See MINN. STAT. § 619.07 (1961).

22. Minn. Sess. Laws 1941, ch. 314, § 1.

23. MINN. STAT. § 619.08 (1961).

24. See §§ 609.185, .19. Present law does not prevent the parole board from granting parole at an earlier time. MINN. STAT. § 243.05 (1961).

preted under the pre-1959 law, these terms had almost no meaning. They meant only that an interval of time was needed sufficient to form the intent.<sup>25</sup> It was believed by the Advisory Committee that content should now be given to these terms. For this purpose, only the term "premeditation" is used, and it is defined as meaning "to consider, plan or prepare for, or determine to commit, the act referred to prior to its commission."<sup>26</sup> It is hoped that this definition will enable the courts to give some substance and meaning to the distinction between first and second degree murder, and that life imprisonment, when it depends upon this distinction, will be reserved for those cases involving the murderer who lies in wait for his victim, or plans, calculates, and prepares to commit the fatal act.

The premise upon which the distinction is based may to some extent be invalid. The person who ponders, hesitates, and doubts, but under the stress of real or supposed circumstances, finally determines to commit the fatal act is a less dangerous individual and less to be condemned than one who without hesitation or inhibitions and without premeditation instantly but intentionally kills his victim. Considerations of this kind were put aside in the revision in favor of the traditional approach in view of the fact that the subject had been given such recent consideration by the legislature.

#### B. MURDER IN THE THIRD DEGREE

Murder in the third degree under the new revision covers the same two categories as the present law.<sup>27</sup> The first applies when the defendant "perpetrates an act eminently dangerous to others and evincing a depraved mind, regardless of human life."<sup>28</sup> This statutory language probably conveys to the jury as well as any expression can the state of mind that the jury is required to find for conviction.<sup>29</sup> The provision, however, has not been without criti-

25. The following instruction was sustained in *State v. Prolow*, 98 Minn. 459, 461, 108 N.W. 873, 874 (1906):

Premeditation may be formed at any time, moment, or instant before the killing. Premeditation means thought of beforehand for any length of time, no matter how short. There need be no appreciable space of time between the intention of killing and the act of killing. They may be as instantaneous as the successive thoughts of the mind.

26. § 609.18.

27. MINN. STAT. § 619.10 (1961).

28. § 609.195.

29. In *State v. Stokely*, 16 Minn. 282, 294 (1871), the defendant stabbed the deceased with a knife with an underhand blow during an attack upon the deceased. The court characterized this as "an act certainly eminently

cism as being misleading in what it appears to require.<sup>30</sup>

Note that the word "eminently" rather than the word "imminently" is used. The two words, of course, have different meanings. "Eminently" means clearly or obviously, while "imminently" refers to the immediacy of the act referred to. "Imminently" appeared in the 1881 revised Penal Code of New York from which Minnesota's present criminal code was taken. The New York Penal Code in turn merely adopted language that had prevailed since the 1829 Revised Statutes of New York in which the phrase was first formulated.<sup>31</sup> Whether the change in Minnesota was by design or through clerical error cannot be known. In any event, it was believed that the word "eminently" stated more accurately the intended meaning.

The second category of murder in the third degree under the proposed revision covers cases where an unintended death is caused in committing or attempting to commit "a felony upon or affecting the person whose death was caused or another."<sup>32</sup> The only substantial change from present law made by this provision consists in the deletion of the words "or otherwise" following the word "another." The provision incorporates what is commonly referred to as the "felony-murder rule" which has been subject to much criticism on the ground that it is highly punitive and objectionable as imposing the consequences of murder upon a

dangerous to life, and which could only be done by a person regardless, at the time, of the life of the deceased . . . [S]uch an act is certainly evidence of the depraved mind contemplated in the statute . . ." See also *State v. Lowe*, 66 Minn. 296, 68 N.W. 1094 (1896). Driving down a street at a high rate of speed and in a drunken condition falls within the meaning of the provision. *State v. Weltz*, 155 Minn. 143, 193 N.W. 42 (1923). *State v. Shepard*, 171 Minn. 414, 418, 214 N.W. 280, 281 (1927), states that "there was evidence from which the jury could find that defendant in a maudlin spirit of recklessness and wanton depravity swerved from side to side of the street in an effort to throw Cittadino from the rumble seat, looking back as he was zigzagging on at a furious speed, and inquiring of his companions whether the 'dago' was still there."

30. The 1953 report of the Judiciary Committee of the Wisconsin Legislative Council stated:

This language is misleading in several respects: (1) An 'act imminently dangerous to others' does not mean dangerous to a large number of people; it is sufficient if it is dangerous only to the person who is killed . . . (2) 'Depraved mind regardless of human life' does not mean what it seems to imply, i.e., that the actor has a mental disorder. The mind does not in any sense have to be diseased . . .

WISCONSIN LEGISLATIVE COUNCIL, 1953 JUDICIARY COMMITTEE REPORT ON THE CRIMINAL CODE 59. The Committee recommended a reworded version of the requirement, but this was rejected and the criticized language restored. WIS. STAT. § 940.02 (1959).

31. See 2 N.Y. Rev. Stat., pt. 4, ch. I, tit. I, § 5 (1829).

32. § 609.195. Sex crimes resulting in death and covered by first degree murder are excluded specifically by the section.

death wholly unintended. It is particularly severe in its application to cases where the death was caused by an accomplice.<sup>33</sup>

Such criticism is particularly warranted when the unintended death constitutes murder in the first degree and capital punishment is imposed. Such is the law in New York.<sup>34</sup> Wisconsin limits liability to cases where the death is "a natural and probable consequence of the commission of or attempt to commit the felony" and adds 15 years imprisonment in excess of the maximum provided by law for the felony. The law proposed in Minnesota is similar. Death resulting from the commission of a property crime is no longer felony-murder; the felony must be upon or affect the person whose death was caused or another.<sup>35</sup> Such a felony inherently involves a risk of death. Sentence is limited to 25 years imprisonment. Under the proposed code, the defendant could be sentenced only for the murder or the felony but not both.<sup>36</sup> It is believed that with these limitations a substantial part of the objections have been met.

The change making death resulting from specified sex felonies first degree murder will affect the eligibility of those convicted of such crimes to parole. Under section 243.05 of the Minnesota Statutes, a convict serving a life sentence for first degree murder is not eligible for parole until he has served 25 years, less allowance for good conduct. Others serving life sentences for mur-

33. See *Commonwealth v. Redline*, 391 Pa. 486, 137 A.2d 472 (1958), in which the court refused to apply the doctrine where the defendant's accomplice had been killed by a policeman apprehending them. See also *People v. Wood*, 8 N.Y.2d 48, 167 N.E.2d 736, 201 N.Y.S.2d 328 (1960), holding that the New York section limits liability to cases where the death results from an act committed either by the defendant or his accomplice in furtherance of the intended crime.

Minnesota cases are not of much assistance on this question. In *State v. McFague*, 158 Minn. 516, 197 N.W. 962 (1924), the deceased was shot and killed by the defendant. The court stated: "If the purpose of the men in the bandit car was to wound only and to make their escape, that is, to commit a felony, they were guilty of murder in the third degree under the statute making an unintentional killing, which results while committing a felony, murder in the third degree." *Id.* at 519, 197 N.W. at 963. In *State v. Jackson*, 198 Minn. 111, 268 N.W. 924 (1936), the deceased was killed by a blow on the head with a blunt instrument inflicted during a robbery. The court could find no evidence of a design to kill in inflicting the blow but held there was ample evidence to sustain a conviction of murder in the third degree. Both cases are obvious instances for the application of the felony-murder doctrine if it is to be applied at all.

34. N.Y. PEN. LAW § 1044.

35. § 609.195(2).

36. § 609.035 provides that "if a person's conduct constitutes more than one offense under the laws of this state he may be punished for only one of such offenses and a conviction or acquittal of any one of them is a bar to prosecution for any other of them."

der other than first degree are eligible for parole at the expiration of 20 years, less good conduct allowance. The effect of the recommendations of the Advisory Committee making sex felony-murders first degree murder is therefore to increase the time required to be served on a life sentence in such cases from 20 years to 25 years. This was not the desire of the Committee, but it was felt that amendment of section 243.05 should be the subject of a separate bill and should not be included in the recommended substantive provisions.

### C. MANSLAUGHTER

The changes made in the manslaughter provisions are somewhat more substantial. Those made with respect to manslaughter in the first degree are sufficiently explained in the notes to the proposed section and need not be repeated here.<sup>37</sup>

As proposed,<sup>38</sup> four classes of cases are covered by manslaughter in the second degree. In the first, death must result from "culpable negligence whereby [the actor] creates an unreasonable risk, and consciously takes chances of causing death or great bodily harm to another." This undertakes to spell out what is probably implicit in the present undefined term "culpable negligence."<sup>39</sup> More than ordinary negligence is required. The defendant must create an unreasonable risk of causing death or great bodily harm to another and he must be conscious that he is taking that chance. This reflects the fact that throughout the proposed criminal code, the Advisory Committee pursued the policy of limiting crimes to cases where there is an element of conscious guilt or consciousness of wrongdoing. With some exceptions, unless accompanied by some other element such as the commission of a crime, it was the policy of the Committee not to impose criminal liability on negligence not accompanied by some mental element of the kind described.

One of those exceptions appears in the second class of cases included within manslaughter in the second degree. It consists of shooting another with a firearm or other dangerous weapon as a result of negligently believing him to be a deer or other animal. This incorporates present law under which it has been held that ordinary negligence is sufficient to impose criminal liability.<sup>40</sup>

A third category of manslaughter in the second degree imposes

37. See § 609.20.

38. See § 609.205.

39. See MINN. STAT. § 619.18(3) (1961).

40. *State v. Hayes*, 244 Minn. 296, 70 N.W.2d 110 (1955). See MINN. STAT. § 619.18(4) (1961).

liability for "setting a spring gun, pit fall, deadfall, snare or other like dangerous weapon or device . . . ."41 Here neither negligence nor intent to cause death is required. This clause essentially applies the misdemeanor-manslaughter doctrine. Under the proposed code, the setting of these devices is itself made a gross misdemeanor.<sup>42</sup> In the proposed section defining manslaughter in the first degree, the misdemeanor-manslaughter doctrine has been limited to death resulting from "committing or attempting to commit a crime with such force and violence that death of or great bodily harm to any person was reasonably foreseeable . . . ."43 Setting these devices would not come within that provision, hence the explicit provision was necessary.

The fourth category of manslaughter in the second degree deals with "negligently or intentionally permitting any animal, known by him to have vicious propensities, to go at large, or negligently failing to keep it properly confined, and the victim is not at fault."<sup>44</sup> Here, again, ordinary negligence would be sufficient to impose liability; this is but a continuation of the present law.<sup>45</sup>

There has been some modification in the crime of criminal negligence resulting in death from the operation of a vehicle. The proposed section covers not only automobiles but aircraft and watercraft.<sup>46</sup> The latter now appear in separate sections outside of the criminal code.<sup>47</sup> These sections are identical in requiring that the vehicle, aircraft, or watercraft be operated "in a reckless or grossly negligent manner." The meaning to be ascribed to these words has caused considerable difficulty. In *State v. Bolsinger*, the Minnesota court undertook to clarify this phrase. It was of the opinion that two types of conduct were referred to, one called "reckless," and the other "grossly negligent."

The meaning of the word "reckless," so far as it relates to driving, is found in § 169.13 . . . , which defines "reckless" driving as driving "in such a manner as to indicate either a wilful or wanton disregard for the safety of persons or property." That means conscious and intentional driving which the driver knows, or should know, creates an unreasonable risk of harm to others . . . . By this is not meant that the driver must be personally conscious of his wrongdoing; it is sufficient that he ought to realize the fact.<sup>48</sup>

41. § 609.205(3).

42. § 609.665.

43. § 609.20(2).

44. § 609.205(4).

45. MINN. STAT. § 619.21 (1961).

46. See § 609.21.

47. See MINN. STAT. §§ 169.11 (motor vehicles), 360.75 (aircraft), 361.06 (watercraft).

48. 221 Minn. 154, 157, 21 N.W.2d 480, 484 (1946). The court also relied upon the definition of "reckless" in several Massachusetts cases.

The court characterized gross negligence as "very great negligence or absence of even slight care,"<sup>49</sup> which was more than ordinary negligence, but less than reckless conduct. Gross negligence was also considered to be different in meaning from culpable negligence, the difference being that culpable negligence "involves the idea of recklessness and [gross negligence] does not."<sup>50</sup> These super-fine distinctions, which can at most be merely matters of degree, must produce nightmares for trial judges in formulating their instructions and headaches for juries in trying to understand and apply them.

The problem is probably inherent in the effort to create a separate crime of criminal negligence in the operation of a vehicle resulting in death, and in attempting to provide a standard different from that of culpable negligence required for manslaughter. Bearing these considerations in mind, the Advisory Committee decided merely to eliminate the requirement of "reckless" and to confine criminal negligence in the operation of a vehicle to cases of "gross negligence," leaving further development of the law on the subject to the courts. The omission of the word "reckless" will cause little change in the law since any instance that would qualify as "reckless" would also automatically qualify as "gross negligence." The fact that the defendant was guilty of conduct more severe than required for "gross negligence" would not exonerate him.<sup>51</sup>

Section 619.18 of the Minnesota Statutes makes it manslaughter in the second degree to cause an unintentional death by "a trespass or other invasion of a private right" or "by any act . . .

49. *Id.* at 159, 21 N.W.2d at 485.

50. *Id.* at 163, 21 N.W.2d at 487.

51. Wisconsin uses the term "high degree of negligence" in defining this offense and defines it as "conduct which demonstrates ordinary negligence to a high degree, consisting of an act which the person should realize creates a situation of unreasonable risk and high probability of death or great bodily harm to another." This would appear to fall within the category of the term "reckless" as defined in the *Bolsinger* case. See WIS. STAT. § 940.08 (1961).

The revision in Illinois requires that the defendant's acts "are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly." ILL. REV. STAT. ch. 38, § 9-3 (1961). "Recklessly" is defined as follows: "A person is reckless or acts recklessly, when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, described by the statute defining the offense; and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation." ILL. REV. STAT. ch. 38, § 4-6. This again requires a higher degree of negligence than under the *Bolsinger* case and requires substantially the same conduct as the proposed Minnesota Criminal Code does for manslaughter in the second degree. See § 609.205.

of any person" not constituting some other degree of homicide. Literally applied, these sweeping provisions would impose absolute liability for any unintentional death caused by any tort without regard to fault.<sup>52</sup> These provisions have not been given substantial consideration by the Minnesota Supreme Court, probably because prosecuting authorities have not undertaken to base prosecutions on them. They have been deleted in the proposed revision.

### III. THEFT

#### A. AT COMMON LAW

At common law, the misappropriation of the property of another was covered by three different offenses. The earliest in point of history was larceny, which developed from the concept that the wrong consisted of taking and carrying away property from the possession of another without his consent and with intent to deprive him permanently of it. The wrongful act stressed was that of taking property from the possession of another. This, of course, did not include cases where the defendant had been entrusted with the property by the owner and had subsequently made off with it. The developing economy and the growth of fiduciary relationships in England made necessary legislation to cover these situations. Hence, the crime of embezzlement by designated fiduciaries, such as clerks, attorneys, and brokers, was created by legislation. Similar statutes have been almost universally enacted in this country. Similarly, the common-law crime of larceny did not cover cases where the defendant had obtained money or property of another by means of false representations that induced the owner to give up the property. In response to this need, legislation was enacted creating the crime of obtaining goods by false pretenses.<sup>53</sup> The

52. In *State v. Pankratz*, 238 Minn. 517, 537, 57 N.W.2d 635, 647 (1953), the following trial court definition of "trespass or other invasion of private right" was sustained:

"The term 'trespass or other invasion of a private right, not amounting to a crime' in the foregoing definition means some physical act against the person killed in the nature of a transgression of a duty owed to others, involving some violence, however slight, such violence being no more than the breaking of a blade of grass. A private right means some power or privilege to which one is entitled upon principles of morality, religion, law or the like. It means a natural right peculiar to an individual, one's own right.

The facts in the case, however, indicated a violent assault by the defendant upon the deceased female and could be clearly sustained as a misdemeanor-manslaughter case involving force and violence. There was no discussion of the point by the court.

53. Later common-law courts extended larceny to cases where the possession of goods had been obtained by a misrepresentation and was known as

essence of each of the offenses described was the appropriation of the property of another to one's own use and, except for historical reasons, a single crime based on this premise could have been created.

#### B. MODERN TREATMENT

Modern statutes undertake to amalgamate these offenses. Section 622.01 of the Minnesota Statutes represents such an attempt. The first two subdivisions provide that any person is guilty of larceny who, with intent to deprive the owner of his property:

(1) Shall take from the possession of the true owner, or of any other person, or obtain from such possession by color or aid of fraudulent or false representation or pretense, or of any false token or writing, or secrete, withhold, or appropriate to his own use, or that of any person other than the true owner, any money, personal property, thing in action, evidence of debt, or contract, or article of value of any kind;

(2) Having in his possession, custody, or control as a bailee, servant, attorney, agent, clerk, trustee, or officer of any person, association, or corporation, or as a public officer, or person authorized by agreement or by competent authority to hold or take such possession, custody, or control, any money, property, evidence of debt or contract, article of value of any nature, or thing in action or possession, shall appropriate the same to his own use, or that of any other person than the true owner or person entitled to the benefit thereof. . . .<sup>54</sup>

The poor draftsmanship of the section is evident. For example, "appropriate to his own use, or that of any person other than the true owner . . ." in the first subdivision includes within its compass most of what is provided in the balance of the two subdivisions. Though probably not intended, the provisions appear to extend to temporary use of property where there is no intent to appropriate the property; an act that is generally not treated as larceny. Thus, the section reads in part that one who "with intent to deprive . . . the true owner . . . of the use and benefit there-

larceny by trick. Obtaining property by false pretenses was distinguished on the basis that for this crime, title to the goods must pass to the defendant or, and this was not clear, that title was intended to pass. Larceny by trick applied if only possession was transferred or intended to be transferred.

No attempt is made here to state the exceptions and qualifications developed to the principles described in the text. For a short history of the subject, see HALL, *THEFT, LAW AND SOCIETY* 34-79 (2d ed. 1952).

54. Paragraph (3) of this section seems pure duplication of paragraphs (1) and (2) reproduced in the text. It applies to "storage, forwarding, or commission merchant, carrier, warehouseman, factor, or broker, or as a clerk, agent, or employee" of these persons, and the acts prohibited clearly fall within the prohibitions of the first two paragraphs.

of . . . shall . . . withhold . . . any money . . ." is guilty of larceny. Whatever its meaning, the section manifests an intent to combine under the single label of larceny the former crimes of larceny, obtaining goods by false pretenses, and embezzlement, the last appearing in subdivision two of the section. The policy has been defeated to a considerable degree by the requirement that the information or indictment state one or the other of these crimes and that under a charge of one the others cannot be proved.<sup>55</sup>

The proposed revision undertakes to effectuate the same policy but with comparatively simple provisions. It provides:

Whoever does any of the following commits theft . . . :

(1) Intentionally and without claim of right takes, uses, transfers, conceals or retains possession of moveable property of another without his consent and with intent to deprive the owner permanently of possession of the property . . . .

(3) Obtains for himself or another the possession, custody, or title to property of a third person by intentionally deceiving him with a false representation which is known to be false, made with intent to defraud, and which does defraud the person to whom it is made . . . .<sup>56</sup>

The word "takes" includes all that was recognized as larceny at common law. This was the construction of the word under the present section.<sup>57</sup> The words "uses, transfers, conceals or retains" include what was formerly designated "embezzlement," but it will no longer be necessary to allege or prove any fiduciary relationship.

55. *State v. Henn*, 39 Minn. 464, 465-66, 40 N.W. 564, 565 (1888): [B]ecause the Penal Code has swept away the distinction between larceny at common law and obtaining property by false pretenses or embezzlement, and made them all larceny, it does not follow that the common form of an indictment for larceny would answer in all cases. Under the Code there are several distinct acts or ways by which a person may commit or be guilty of larceny; and in accordance with the spirit, at least, of the bill of rights, which entitles the accused "to be informed of the nature and cause of the accusation" against him, and the statute prescribing the rule by which the sufficiency of indictments shall be determined, viz., that the act or omission charged as the offense shall be clearly and distinctly set forth, we think that the indictment should charge the act constituting the alleged larceny so as to advise the accused in which one of these different ways he is charged with having committed the crime.

See also *State v. Friend*, 47 Minn. 449, 50 N.W. 692 (1891), in which it was held that, under the charge that goods were "taken," the crime of obtaining goods by false pretenses cannot be established. This, however, is a procedural problem falling outside the compass of this discussion. 56. § 609.52(2).

57.

The word "take" has a definite and well-understood signification in connection with the offense of larceny, and implies a trespass;

The third paragraph covers, of course, what has been known as obtaining goods by false pretenses. It further specifies three kinds of acts that constitute false representation within the meaning of the paragraph.<sup>58</sup> Two of these state existing law: the issuance of a check, draft, or order for the payment of money or the delivery of property knowing that the actor has no authority to do so,<sup>59</sup> and secondly, unauthorized use of a credit card, credit plate, and the like.<sup>60</sup> The third kind of act specified by paragraph three clarifies a point which presently is in doubt in Minnesota—that a promise made with intent not to perform qualifies as a misrepresentation for the purposes of the section. Prevailing judicial doctrine is to the contrary.<sup>61</sup> But there are a growing number of cases adopting the position stated in the revision as representing the policy better designed to protect against fraudulent behavior of this kind.<sup>62</sup> Any fears that persons who promise in good faith

and the averment, "did wrongfully and feloniously take, steal, and carry away," involves the possession, and the wrongful taking, of the property from the actual or constructive possession of the owner, general or special, and without his consent.

*State v. Friend*, 47 Minn. 449, 450, 50 N.W. 692, 693 (1891); see 2 BISHOP, CRIMINAL LAW §§ 823-39 (6th ed. 1877).

58. They are:

(a) The issuance of a check, draft, or order for the payment of money or the delivery of property knowing that he is not entitled to draw upon the drawee therefor or to order the payment or delivery thereof; or

(b) A promise made with intent not to perform. Failure to perform is not evidence of intent not to perform unless corroborated by other substantial evidence; or

(c) The unauthorized use of a credit card, credit plate, charge plate, or other identification device issued by an organization to a person for use in purchasing goods on credit . . . .

§ 609.52(2)(3).

59. See MINN. STAT. § 622.03 (1961).

60. See MINN. STAT. § 622.28 (1961).

61. *Chaplin v. United States*, 157 F.2d 697 (D.C. Cir. 1946). Note also the following statement appearing in *State v. Thaden*, 43 Minn. 325, 326, 45 N.W. 614, 615 (1890):

The mortgaged premises were positively represented to be of great value and double the amount of the note, and the note to be a valuable security, worth its face value, when known to be worthless, and these representations were coupled with a promise to find a purchaser, which doubtless aided the consummation of the fraud, as it was well calculated to do. Where a promise is thus connected with false pretenses, and cooperates with them in the inducement, the case is within the statute if the pretense of false existing or past facts is sufficient. The promise and the pretense may be so connected that it would be difficult to prove one without the other, and equally necessary to an intelligent statement of the facts that both be included in the indictment.

62. See *Chaplin v. United States*, 157 F.2d 697 (D.C. Cir. 1946) (dissenting opinion); H.L. REV. STAT. ch. 38, §§ 15-4, 16-1 (1961); Pearce, *Theft by False Promises*, 101 U. PA. L. REV. 967 (1953).

and later are unable to perform will be convicted as a result of inferring from their failure to perform the existence of a prior wrongful intent should be dissipated by the explicit requirement that this is not evidence of such intent "unless corroborated by other substantial evidence."<sup>63</sup>

### C. SWINDLING

Notwithstanding its uncertain character, the crime of swindling has been retained, with modifications in wording,<sup>64</sup> because it appears to be serving a useful function. References to "three-card monte," "sleight of hand," or "use of cards or instruments of like character" have been deleted as unnecessary.<sup>65</sup> Courts have had difficulty in formulating the crime's precise meaning, for it is basically only a specific instance of the crime of obtaining property by false pretenses.<sup>66</sup> Probably the offense can best be described

63. § 609.52(2)(3)(b). A similar provision appears in ILL. REV. STAT. ch. 38, § 15-4(c) (1961). WIS. STAT. § 943.20(1)(d) (1961), requires that the promise be "a part of a false and fraudulent scheme," a limitation believed by the author to be too restrictive. It had not been recommended by the Wisconsin Committee. 5 WISCONSIN LEGISLATIVE COUNCIL, 1953 JUDICIARY COMMITTEE REPORT ON THE CRIMINAL CODE 112.

64. § 609.52(2)(4).

65. See MINN. STAT. § 614.11 (1961) for the present provisions containing these terms.

66. The Minnesota Supreme Court has held the following transactions to be swindling within the meaning of the statute: inducing the loan of money for a bet with a purported stranger, actually a confederate of the defendant, that the stranger could not open a trick lock, *State v. Wilson*, 72 Minn. 522, 75 N.W. 715 (1898); giving a \$20 bill to a ticket seller, pretending it was a \$1 bill, and securing from the confused ticket seller both the \$20 and the change given in return, *State v. Smith*, 82 Minn. 342, 85 N.W. 12 (1901); inducing investments in a business by misrepresentations as to the glowing prospects of the business, *State v. Yurkiewicz*, 208 Minn. 71, 292 N.W. 782 (1940); securing the cashing of a check by ordering paint to be delivered at a fictitious address, *State v. Cunningham*, 257 Minn. 31, 99 N.W.2d 908 (1959). The Minnesota Supreme Court has said, however, that giving a check without having funds in the bank to meet it is not swindling, notwithstanding that defendant was engaged in this activity on a fairly large scale. *State v. Cunningham*, 257 Minn. 31, 99 N.W.2d 908 (1959).

*State v. Hale*, 134 Mont. 131, 137-38, 328 P.2d 930, 934 (1958), contains a good description of swindling:

The confidence games . . . are those whereby an elaborate scheme is developed to play upon the credibility or sympathy or some other trait of the victim. These confidence games . . . often require detailed and complex plots and time to support and mature their elaborate scheme . . . Those games . . . do not depend upon the active or passive emotions of the victim. Such games are those purported gambling devices so contrived, although masked as legitimate operations, to hilk the victim of his wager by manipulation. The two-card faro-box, brace roulette-wheel and loaded dice are mechanically fixed games in which it is so arranged by the mechanism that you never

as one involving the obtaining of the victim's property by those deceptive means that entail the use of rather elaborate schemes or skillful manipulation to bring about the successful deception. It is the use of elaborate schemes and skillful manipulation that distinguishes it from obtaining goods by false pretenses.

The statement in the Minnesota cases that the crime is an attempt to expand upon the common-law crime of cheats<sup>67</sup> is without historical foundation. At the time the crime of swindling was first enacted,<sup>68</sup> the crime of cheats was already recognized by other sections of the statutes.<sup>69</sup> If the swindling statute was intended to expand the crime of cheats, it would have been addressed to the existing sections. It is also believed unwise to resurrect a long forgotten, ancient common-law crime and to undertake to construct the crime of swindling on that basis. It may be observed that the crime of obtaining goods by false pretenses was originally created partly to overcome the common-law requirement for the crime of cheating—that ordinary prudence could not guard against the taking.<sup>70</sup> It would be unfortunate if this requirement should now be revived in applying the swindling statute. Gullible people need

give the victim any break. Of the same ilk are the old shell game, three-card monte or other sleight of hand or manipulated games which effect the same result, all accompanied by fast work, fast count and, buncombe talk by the operator.

67. See *State v. Cunningham*, 257 Minn. 31, 99 N.W.2d 908 (1959). The statement was first made by Justice Mitchell in *State v. Wilson*, 72 Minn. 522, 75 N.W. 715, (1898), and has been repeated in subsequent cases without further examination.

68. Minn. Sess. Laws 1877, ch. 130, § 1.

69. "Whoever is convicted of any gross fraud or cheat at common law shall be punished by imprisonment in the state prison not more than four years, nor less than one year, or by fine not exceeding one thousand dollars, nor less than fifty dollars." Minn. Gen. Stat., ch. 95, § 45 (1878) (Young, 4th ed. 1883). Section 44 of the same chapter also provides that "Whoever, designedly, by any false pretence, or by any privy or false token, and with intent to defraud, obtains from any other person any money or goods" was subject to the punishment stated. The words emphasized were the basic requirement of common-law cheat.

70. Compare the following appearing in *State v. Cunningham*, 257 Minn. 31, 37-38, 99 N.W.2d 908, 912-13 (1959):

At common law cheating consisted of (1) the fraudulent taking of another's property, (2) by means of a false token, symbol, or device, (3) of such a nature that common prudence could not guard against it. The primary concern of the decisions interpreting § 614.11 has been the effect of the statute in modifying the second element of the common-law offense. . . . [W]hile eliminating the common-law requirement of a false token or symbol, this court has never indicated that § 614.11 was intended to do anything other than codify the third element of the common-law offense; namely, that the trick must be of such a nature that ordinary prudence cannot guard against it.

as much, if not more, protection against swindlers than do others endowed with greater caution.

Under the proposed revision, swindling becomes a form of theft, subject to sentences that depend in considerable part on the amount received.<sup>71</sup> Under the present section, imprisonment up to five years or a fine up to 2,000 dollars may be imposed without regard to the amount received.<sup>72</sup>

#### D. PROPERTY TAKEN FOR TEMPORARY USE

Special problems are presented in cases where the defendant has taken property of another for temporary use only, intending that the property shall later be restored to the owner. An essential element of common-law larceny was intent to deprive the owner permanently of his goods. But confusion is added by section 622.17 of the Minnesota Statutes which states:

[T]he fact that the defendant intended to restore the property stolen shall be no ground of defense, nor shall it be received in mitigation of punishment unless the property shall have been restored before complaint charging the commission of the crime has been made to a magistrate.

The courts have not given this statute its apparent meaning; it means only that once the theft is complete, having been committed with intent to deprive the owner permanently of the goods, a change of heart and a determination to restore the goods to the owner does not constitute a defense to the prior crime.<sup>73</sup>

It may be that the provision was directed principally at embezzlement cases where an employee or other fiduciary appropriates money of his employer or ward intending to return an equivalent amount at some later time. This is generally held not to be a defense even without a statutory provision, for the courts take the position that the defendant has substituted his own personal credit in place of the money that he took and his ability to return the funds may or may not materialize; furthermore, the money that he restores is not the money that he took.<sup>74</sup>

71. § 609.52(2)(3). CAL. PEN. CODE § 332 deals with the crime in this same manner.

72. MINN. STAT. § 614.11 (1961).

73. In *State v. Thornton*, 174 Minn. 323, 329, 219 N.W. 176, 178 (1928), the court stated that the statute "declares that intent to restore shall be no defense. This is in accord with the well-settled rule that intent to restore the property or its actual restoration constitutes no defense to the criminal prosecution." This is an ambiguous statement, but the annotations referred to show that the court had in mind the principle stated in the text. See also *State v. Eggermont*, 206 Minn. 274, 279, 288 N.W. 390, 392 (1939).

74. MODEL PENAL CODE § 206.1(2)(c), comment (Tent. Draft No. 1, 1953).

The proposed revision undertakes to make explicit that an intent to deprive the owner permanently of his goods is the ordinary requirement of theft.<sup>75</sup> A separate provision deals specifically with acts falling within the theft section but accompanied with "intent to exercise temporary control only . . ." In the first of the situations covered, the defendant must exhibit an "indifference to the rights of the owner or the restoration of the property to him."<sup>76</sup> What constitutes such "indifference" is a matter of construction and, in a sense, a question of degree. The revision contemplates such acts as using or abusing the property in a manner that exposes it to risk of damage, or using it so that it is in fact damaged; leaving the property at some location where it may or may not be found, the defendant being unconcerned whether it is recovered or not; leasing, renting, or borrowing the property for a period and continuing to use it beyond the period, the defendant being unconcerned with whether the owner desires either its return or compensation for the added use. Such misuse of another's property is believed to be sufficiently serious to entail the same consequences as any other theft.

Two other instances of temporary control constituting theft under the proposed revision are (1) attempting to subject the property to an adverse claim by pledge, lien, and so forth, and (2) conditioning the return of the property on payment of a reward or other compensation.<sup>77</sup> There are no corresponding explicit provisions in the present criminal code of Minnesota.

Taking a motor vehicle for temporary use without the permission of the owner has been the subject of special statutes known as the "joy riding" statutes. The subject is currently covered in Minnesota by statutes appearing in the traffic code and making the crime a felony.<sup>78</sup> The crime is intended to meet the problem of taking cars on the street, driving them about, and then leaving them for the owner or the police to find. It is committed principally by young people who cannot afford to own a car. The principal

75. The phrase "with intent to deprive the owner permanently of possession of the property" appears in § 609.52(2)(1). See also § 609.52(2)(2), which requires an intent to defraud in obtaining the property by false representation. Other clauses have similar phrases which contemplate permanent deprivation of the property from the owner.

76. § 609.52(2)(5)(a).

77. § 609.52(2)(5)(a), (b). This section undoubtedly represents present law. See MODEL PENAL CODE § 206.1(2)(c), comment (Tent. Draft No. 1, 1953).

78. MINN. STAT. § 168.48 (1961) applies to taking and removal from a "warehouse, garage, or building of any kind." Section 168.49 makes it an offense to "drive, operate or use a motor vehicle without the permission of the owner," making § 168.48 unnecessary.

statute, however, is drawn in extremely broad terms.<sup>79</sup> The crime is committed when the defendant either "drives" or "operates" or "uses" the car without the owner's permission. Under these provisions, anyone renting a motor vehicle and continuing to use it beyond the term of the rental agreement becomes a felon even though he intends to return it and to pay for its use since he is using it without the permission of the owner. An employee driving his employer's car or truck in the course of his employment violates the statute by deviating from his assigned route to stop at his home or visit a friend. Literally applied, it would include a case where a thief lent a car to the defendant who drove the car without knowledge of the theft.

These relatively innocuous acts, though properly a basis for civil claims, do not exhibit a criminal disposition and should not be made criminal offenses. The proposed revision limits this offense to cases where the defendant "intentionally takes and drives a motor vehicle without the consent of the owner or his authorized agent," and changes the permissible sentence from up to five years imprisonment or a fine of up to 500 dollars to up to three years imprisonment or a fine of up to 3,000 dollars, or both.<sup>80</sup> Under this provision, it is not enough that the defendant drive, operate, or use the car; he must also have *taken* it without the permission of the owner. The word "intentionally" requires that he know that he is taking it without the owner's permission.<sup>81</sup> These limitations will avoid the absurd possibilities of the present law.

#### E. SENTENCES FOR THEFT

The present statutes on larceny divide the crime into three degrees: first, second, and petty. The difference depends on a rather complex variety of factors such as whether the taking was from the person at night, or from a building, shop, or motor vehicle, or whether the property taken was of more than a stated value. This approach has been abandoned in the revision pursuant to the general policy of eliminating degrees of crime. A single subdivision of the theft section has been substituted stating the several permissible sentences, which depend largely on the value of the property taken.<sup>82</sup> In four instances, the sentence may be up to five

79. MINN. STAT. § 168.49 (1961).

80. § 609.55(2). The term "motor vehicle" is broadly defined to include "any self-propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on land, rails, water, or in the air." § 609.55(1).

81. See § 609.02(9)(3), defining the term.

82. § 609.52(3).

years imprisonment or a fine of not more than 5,000 dollars without regard to value because the property taken is of a particular kind, such as that taken from a corpse, grave, or coffin, or because it is a public record, consists of public funds, or is taken from the scene of a disaster. Other factors that now control the degree within which the larceny falls have been discarded. The proposed code thus follows the Wisconsin example where a similar revision has operated successfully for many years.<sup>83</sup> The wrong with which the crime of theft is concerned is the wrongful appropriation of personal property. Therefore, the amount or value of the property taken should be the controlling consideration. Where and under what conditions it is taken should have only a limited significance.

This change will require some modification of the form of the verdict. Instead of finding the defendant guilty or not guilty of a particular degree of larceny, the jury will find the defendant guilty or not guilty of theft. For this purpose, they need not consider the value or the nature of the property since the elements of the crime do not involve this question. But if the verdict is guilty, the jury must also find as a separate issue the value of the property or its nature, if that is the material question in the particular case. The instruction will define value as it is defined in the proposed section.<sup>84</sup> If the verdict is guilty, a typical form will be in substance:

We, the jury, find the defendant guilty of theft and find the value of the property taken by him to have been \$———.<sup>85</sup>

This finding of value must be by the jury under proper instructions; it cannot be made by the court.<sup>86</sup> The jury need not be told, however, that the sentence may vary depending on the value of the property taken. That is no more of their concern under the proposed section than it is presently.<sup>87</sup>

#### IV. SEX OFFENSES

The sex crimes deal with some of the most personal and in-

83. WIS. STAT. § 943.20(3) (1959).

84. § 609.52(1)(3).

85. See *McEntee v. State*, 24 Wis. 43, 44 (1869), where a particular verdict is set out and discussed.

86. *Heyroth v. State*, 275 Wis. 104, 109, 81 N.W.2d 56, 59 (1957), and cases cited.

87. *State v. Gensmer*, 235 Minn. 72, 79, 51 N.W.2d 680, 685 (1951): "It is proper in a criminal case to admonish the jury that the punishment is a subject with which they have nothing to do, that the responsibility of punishment rests exclusively with the court."

timate aspects of an individual's life. It might be expected therefore that the state, dedicated in a democracy to the freedom of the individual and respect for his dignity and privacy, should invade this field with the greatest caution and only to the extent necessary to protect other individuals and the public. This has not been the case. Our present statutes were enacted in the 19th century when the subject of sex was not considered fit for public discussion and the provisions of the criminal law reflected more of an emotional reaction to certain kinds of sexual behavior than a considered judgment as to the harm they involved to others or to the public. As one author has stated, since having a desire for sexual expression is universal, it should not be a crime,<sup>88</sup> but its assertion in socially harmful ways should be prohibited. To use an analogy, theft does not punish the desire to have property, but only the socially harmful means of obtaining that property. This approach is reflected in the proposed revision.

#### A. RAPE

The crime of rape has been divided into two categories, but the content of the two reflects generally the present law.<sup>89</sup> The distinction between the two proposed categories turns on the presence or absence of consent. Aggravated rape is confined to those cases where the act is perpetrated by force or threat of force or where the victim is incapable of giving consent, as by reason of mental illness or unconsciousness.<sup>90</sup> A provision not in the present law has been added extending this serious offense to law enforcement officers and officers and employees of penal or other public institutions who take advantage of persons in their custody. A similar provision has been the law in New York since 1892<sup>91</sup> and is recommended by the American Law Institute. The other category, designated as rape, applies to cases where consent to the act was obtained through trickery or fraud or otherwise misleading the victim, or where consent was obtained by the use of drugs or intoxicants that caused her to give the consent, but which were taken without her knowledge or consent.<sup>92</sup>

It was felt that in these cases the violation of the person of a woman was not of the same magnitude as in the cases provided for under the heading "aggravated rape" and should not, therefore, carry the same severity of sentence.

88. Sherwin, *Sex Crime—A Failure of the Law*, 12 BAR BULL. OF N.Y. COUNTY 116 (1954).

89. See MINN. STAT. § 617.01 (1961).

90. § 609.29.

91. N.Y. PEN. LAW § 2010(5).

92. § 609.295.

#### B. DEVIATE SEXUAL BEHAVIOR

Deviate sexual behavior is dealt with in the present code in two sections. The present section on sodomy punishes three forms of such behavior, one of which is more properly called bestiality.<sup>93</sup> Other forms of deviate behavior must be brought under the section on indecent assault,<sup>94</sup> to which consent of the victim or the fact that the victim is a public prostitute is a defense unless he or she is a child under 16 years of age. The present section on sodomy also makes no distinction between cases where consent is present and those in which it is absent. It even applies to acts between consenting spouses.

In the proposed revision, a distinction is drawn between cases where consent is present and where it is absent, following the lines drawn in the provisions on rape. Possible sentence is increased from the present 20 year imprisonment provision to 30 years in those cases where force or threat of force is used or the victim was unconscious or otherwise incapable of giving consent at the time of the act.<sup>95</sup> The possible sentence for acts to which there is consent, but in which the consent was obtained by trickery or fraud or by the use of a drug or intoxicant, is reduced from 20 to 10 years.<sup>96</sup> When committed by adults who freely consent, the crime is reduced to a gross misdemeanor.<sup>97</sup>

#### C. OFFENSES AGAINST CHILDREN

Sexual relations, normal and abnormal, with children are presently covered by several sections in the criminal code. Sexual relations with a female child in a normal manner fall within the carnal knowledge statute<sup>98</sup> and the severity of punishment, up to life imprisonment, depends upon the age of the child. Sodomious relations with a female child fall within this section also, by judicial construction.<sup>99</sup> Sodomious relations with a male child are

93. MINN. STAT. § 617.14 (1961).

94. MINN. STAT. § 617.08 (1961).

95. § 609.30(2).

96. § 609.30(3).

97. § 609.30(5). In this respect, the example of N.Y. PEN. LAW § 690, making the offense a misdemeanor, and the recommendation of the American Law Institute to the same effect were not followed.

Bestiality is made a misdemeanor unless committed in the presence of another, in which case it becomes a gross misdemeanor. "This, it is believed, meets more directly the purpose of the criminal law in penalizing these reprehensible acts." § 609.305, comment.

98. MINN. STAT. § 617.02 (1961).

99. "The use of the words *carnally know* in both the sodomy and carnal knowledge statutes shows that the legislature regarded both crimes as involving different kinds of carnal knowledge." *State v. Schwartz*, 215 Minn. 476, 478, 10 N.W.2d 370, 371 (1943).

not included in the carnal knowledge section; hence its severe sentences do not apply. Such cases must be brought either under the sodomy section,<sup>100</sup> which carries a maximum sentence of 20 years regardless of whether a child is involved (compared with life imprisonment under the carnal knowledge section if the child is under ten years of age), or under the indecent assault section,<sup>101</sup> which carries a maximum sentence of only seven years or a fine of 1,000 dollars, or both. The testimony of a boy 16 years or more of age must be corroborated to secure conviction; that of a girl under the age of 18 years need not be.<sup>102</sup>

In the proposed revision, there is an explicit provision creating the crime of sodomy with a child, whether male or female.<sup>103</sup> Another provision covers normal sexual relations with a female child.<sup>104</sup> It modifies present law in two respects. Life imprisonment has been reduced to 30 years maximum imprisonment if the child is under the age of ten years to eliminate the invitation to murder otherwise existing. The offense has been reduced to a gross misdemeanor in cases where the girl's age ranges from 16 to 18 years and she is not a prostitute. This will meet the rather widespread criticism of the harshness of the present law in this type of case.

#### D. INDECENT LIBERTIES

Under present law, the taking of "indecent liberties" with another without the victim's consent constitutes a felony.<sup>105</sup> The term "indecent liberties" is not defined, but undoubtedly contemplates acts intended by the actor to arouse or gratify his own or the victim's sexual desire. This can include relatively innocuous acts as well as those of serious nature. The section draws no distinction between cases where the "liberties" are taken with a child

100. MINN. STAT. § 617.14 (1961).

101. MINN. STAT. § 617.08 (1961) prohibits taking "any indecent liberties with or on the person of any male under the age of 16 years, without regard to whether he . . . shall consent to the same or not, or who shall persuade or induce any male . . . under the age of 16 years to perform any indecent act upon his . . . own body or the body of another."

102. *State v. Schwartz*, 215 Minn. 476, 10 N.W.2d 370 (1943), distinguishing *State v. Penetti*, 203 Minn. 150, 280 N.W. 181 (1938), on this ground.

103. § 609.30(4). Sentences permitted range from a maximum of five years, if the child is over the age of 14 years, to the maximum of 30 years, if the child is under the age of ten years. Life imprisonment, authorized under present statutes for the latter category, was believed to be undesirable as inviting murder of the child for which no greater penalty could be imposed.

104. § 609.31.

105. MINN. STAT. § 617.08 (1961).

and those directed at nonconsenting adults. It is a charge easily made and open to abuse.<sup>106</sup>

In the proposed revision, this offense has been divided into three separate crimes. One deals with indecent liberties taken with children under the age of 16 years.<sup>107</sup> If the child is under the age of 14 years, imprisonment may be up to five years; if over that age, the offense becomes a gross misdemeanor. It was believed that younger children should be the subject of special solicitude in the creation of this crime. Indecent liberties with adults is dealt with under the heading of "assault." It is a misdemeanor<sup>108</sup> unless accompanied with force or threat of force, in which case it becomes the gross misdemeanor of aggravated assault.<sup>109</sup>

#### E. PROSTITUTION AND FORNICATION

While fornication is limited as an offense to cases where it is done "openly,"<sup>110</sup> the recommendations on prostitution make the proposed law more stringent, particularly as it applies to commercialized vice, and special concern is shown for preventing children from being brought into association with this evil.<sup>111</sup> Under present law, engaging in prostitution is only a misdemeanor—the crime of fornication.<sup>112</sup> Under the proposed revision, it will become a gross misdemeanor.<sup>113</sup> The proposed revision clarifies the Minnesota law on the subject and brings within the compass of a single section what now appears in duplicating, overlapping, and in some measure, inconsistent provisions of the present code.

#### F. ABORTION

Several changes are made in the crime of abortion. Under present law, it is sufficient to constitute the crime to "(1) prescribe, sup-

106. See *State v. Rolfe*, 151 Minn. 261, 186 N.W. 574 (1922).

107. § 609.315.

108. § 609.22(3).

109. § 609.225(3). If a dangerous weapon should be used or great bodily harm inflicted in committing the crime, it would become a more serious violation of the aggravated assault section and sentences of five or ten years imprisonment or fines of up to \$5,000 or \$10,000 respectively or both are authorized.

110. § 609.32 will bring the state into line with the laws of most other states which require that the act be done "openly and notoriously." MODEL PENAL CODE § 207.1, comment (Tent. Draft No. 4, 1955). "Openly and notoriously" is a more stringent requirement than the word "openly" alone. It is common knowledge that the present law is widely disregarded with prosecutions seldom resulting. Such flagrant disregard of one criminal law creates disrespect for all laws.

111. § 609.335.

112. MINN. STAT. § 617.16 (1961).

113. § 609.335(4)(1). This follows ILL. REV. STAT. ch. 38, §§ 11-14 (1961) and WIS. STAT. § 944.30(1) (1959).

ply, or administer to a woman, whether pregnant or not, or advise or cause her to take, any medicine, drug, or substance; or (2) use, or cause to be used, any instrument or other means" with the intention of producing a miscarriage.<sup>114</sup> Another section punishes a pregnant woman who uses or submits to the use of these means.<sup>115</sup> It is also an offense to "manufacture, give, or sell any instrument, drug, or medicine, or any other substance, with intent that the same may be unlawfully used in producing the miscarriage of a woman."<sup>116</sup> The punishment imposed for the offense is greater than for the crime of abortion itself—seven years imprisonment as opposed to four for abortion.<sup>117</sup> There is also a prohibition against selling, advertising, or giving information as to where means of committing an abortion can be obtained, but this is only a gross misdemeanor.<sup>118</sup> The death of a mother or an unborn quick child resulting from an illegal abortion is manslaughter in the first degree.<sup>119</sup>

The present crime of abortion is directed at the means that are employed rather than at the destruction of the embryo or fetus itself. Under the proposed section, the crime will consist of the destruction of the embryo or fetus.<sup>120</sup> When means are employed for this purpose, but no destruction results, the crime becomes an attempt to commit an abortion. The distinction between a fetus that has "quickened" and one that has not is retained, and a more severe sentence is authorized for the former.<sup>121</sup> The sentences for submitting to an abortion and for manufacturing and distributing means to commit an illegal abortion have been very substantially reduced. Prosecutions for the former are almost nonexistent for the simple reason that convictions against the woman are almost impossible to obtain. The reduction for the latter offense is in keeping with the general philosophy of criminal law that acts anticipatory to an offense that may never materialize should not carry a greater or even the same sentence as the offense itself.<sup>122</sup>

Another proposed change is in extending the instances in which

114. MINN. STAT. § 617.18 (1961).

115. MINN. STAT. § 617.19 (1961).

116. MINN. STAT. § 617.20 (1961).

117. MINN. STAT. § 617.20 (1961) simply makes the offense a felony punishable by "imprisonment in the state prison or county jail for not more than seven years, or by a fine of not more than \$1,000, or by both." MINN. STAT. § 610.16 (1961).

118. MINN. STAT. § 617.25 (1961).

119. MINN. STAT. § 619.16 (1961).

120. § 609.345.

121. § 609.345(2), (3).

122. See §§ 609.17 (attempts), .175 (conspiracy).

an abortion is legally permitted. At the present time, legal abortions are permitted only in cases where it is "necessary to preserve her [the mother's] life, or that of the child with which she is pregnant."<sup>123</sup> The statutes elsewhere in the United States are generally to the same effect.<sup>124</sup> Not many cases have construed the phrase "preserve her life"; the tendency in the cases that deal with the subject is to construe it in its broad sense. Imminent death unless an abortion is performed is the obvious case, but the phrase includes more than that and contemplates cases where permitting the pregnancy to continue would lead to such mental or physical deterioration or impairment that the life she is entitled to lead would not be preserved. It also encompasses cases where the mother's life would be shortened.

The leading case is *Rex v. Bourne*.<sup>125</sup> The facts stated in the case included the following:

[T]he girl, who was then under the age of fifteen, had been raped with great violence in circumstances which would have been most terrifying to any woman, let alone a child of fourteen, by a man who was in due course convicted of the crime. In consequence of the rape the girl became pregnant. Her case was brought to the attention of the defendant, who, after examination of the girl, performed the operation with the consent of her parents.

... In his opinion the continuance of the pregnancy would probably cause serious injury to the girl, injury so serious as to justify the removal of the pregnancy at a time when the operation could be performed without any risk to the girl and under favourable conditions.

The evidence of the defendant was supported and confirmed by Lord Horder, and also by Dr. J. R. Rees, a specialist in medical psychology. Dr. Rees expressed the view that, if the girl gave birth

123. MINN. STAT. § 617.18 (1961); accord, MINN. STAT. §§ 617.9, 619.19 (1961).

124. The state of the law is well summarized in Comment, 23 SO. CAL. L. REV. 523-24 (1950):

Only two statutes in the United States fail to indicate any exception to the prohibitions [to abortion]. The others vary greatly but some classification can be made. A great majority of statutes provide for legality when necessary to preserve life; some seem to require an actual necessity to save the life of the mother, or, upon medical advice, to be necessary for that purpose. Others include preservation of the life of the fetus, with similar variations as in the single exception with regard to the mother's life. A good-faith attempt to preserve the life of the mother or child is permitted in two statutes. Three statutes prohibit only the 'unlawful' abortion, and one, if done, 'maliciously and without justification.' More liberality is found in the wording of four others. Two States allow an abortion when necessary 'to prevent serious and permanent bodily injury' to the mother. The District of Columbia allows it when necessary to preserve the 'health' of the mother, and in Maryland, when necessary to preserve the 'safety' of the mother. Only a few States limit the legal abortion to one performed by a licensed physician or surgeon.

125. [1939] 1 K.B. 687.

to a child, the consequence was likely to be that she would become a mental wreck.<sup>126</sup>

The trial judge in his instructions to the jury emphasized that this was unlike the ordinary illegal abortion cases coming before the court since the operation had been performed by a physician motivated by the highest professional motives. He referred to the provision in the English Statutes that excepted cases "done in good faith for the purpose only of preserving the life of the mother"<sup>127</sup> and stated:

It is not contended that those words mean merely for the purpose of saving the mother from instant death. There are cases, we are told, where it is reasonably certain that a pregnant woman will not be able to deliver the child which is in her womb and survive. In such a case where the doctor anticipates, basing his opinion upon the experience of the profession, that the child cannot be delivered without the death of the mother, it is obvious that the sooner the operation is performed the better. The law does not require the doctor to wait until the unfortunate woman is in peril of immediate death. In such a case he is not only entitled, but it is his duty to perform the operation with a view to saving her life.

Here let me diverge for one moment to touch upon a matter that has been mentioned to you, the various views which are held with regard to this operation. Apparently there is a great difference of opinion even in the medical profession itself. Some there may be, for all I know, who hold the view that the fact that a woman desires the operation to be performed is a sufficient justification for it. Well, that is not the law: the desire of a woman to be relieved of her pregnancy is no justification at all for performing the operation. On the other hand there are people who, from what are said to be religious reasons, object to the operation being performed under any circumstances. That is not the law either. On the contrary, a person who holds such an opinion ought not to be an obstetrical surgeon, for if a case arose where the life of the woman could be saved by performing the operation and the doctor refused to perform it because of his religious opinions and the woman died, he would be in grave peril of being brought before this Court on a charge of manslaughter by negligence. . . .<sup>128</sup>

As I have said, I think those words ought to be construed in a reasonable sense, and, if the doctor is of opinion, on reasonable grounds and with adequate knowledge, that the probable consequence of the continuance of the pregnancy will be to make the woman a physical or mental wreck, the jury are quite entitled to take the view that the doctor who, under those circumstances and in that hon-

126. *Id.* at 688-89.

127. Infant Life (Preservation) Act, 1929, 19 & 20 Geo. 5, c. 34.

128. The judge by this statement undoubtedly did not intend to imply that a doctor would not be complying with his legal duty by recommending to his patient that the operation be performed by another physician of equal competence willing to do so.

est belief, operates, is operating for the purpose of preserving the life of the mother.

These general considerations have to be applied to the particular facts of this case; the verdict of the jury must depend on the facts of the case proved before them. The girl in this case was under the age of fifteen, for she has attained that age within the last ten days. It is no doubt very undesirable that a young girl should be delivered of a child. Parliament has recently raised the age of marriage for a girl from twelve to sixteen, presumably on the view that a girl under the age of sixteen ought not to marry and have a child. The medical evidence given here confirms that view; the pelvic bones are not set until a girl is eighteen, and it is an observation that appeals to one's common sense that it must be injurious to a girl that she should go through the state of pregnancy and finally of labour when she is of tender years. Then, too, you must consider the evidence about the effect of rape, especially on a child, as this girl was. Here you have the evidence of Dr. Rees, a gentleman of eminence in the profession, that from his experience the mental effect produced by pregnancy brought about by the terrible rape which Dr. Gorsky described to you, must be most prejudicial. You are the judges of the facts and it is for you to say what weight should be given to the testimony of the witnesses; but no doubt you will think it is only common sense that a girl who for nine months has to carry in her body the reminder of the dreadful scene and then go through the pangs of childbirth must suffer great mental anguish, unless indeed she be feeble-minded or belongs to the class described as "the prostitute class," a Dolores "marked cross from the womb and perverse." You will remember that the defendant said that if he had found that this girl was feeble-minded or had what he called a "prostitute mind" he would not have performed the operation, because in such a case the pregnancy would not have affected her mind. But in the case of a normal, decent girl brought up in a normal, decent way you may well think that Dr. Rees was not overstating the effect of the continuance of the pregnancy when he said that it would be likely to make her a mental wreck, with all the disastrous consequences that would follow from that.<sup>129</sup>

The defendant was acquitted by the jury.

A recent California case looks in the same direction.<sup>130</sup> In this case, a prominent physician, charged with abortion, claimed he had merely removed the remains of the placenta after a dead embryo had been lost. The court held that the state had not established beyond a reasonable doubt that this defense was false and not made in good faith. The significance of the case lies in the comments of the court.

Surely, the abortion statute . . . does not mean . . . that the peril to life be imminent. It ought to be enough that the dangerous con-

129. [1939] 1 K.B. at 692-95.

130. *People v. Ballard*, 167 Cal. App. 2d 803, 335 P.2d 204 (Dist. Ct. App. 1959).

dition "be potentially present, even though its full development might be delayed to a greater or less extent. Nor was it essential that the doctor should believe that the death of the patient would be otherwise certain in order to justify him in affording present relief."<sup>131</sup>

In *State v. Powers* (1929), 155 Wash. 63, 67 [283 P. 439, 440] the court satisfied itself with an interpretation of "necessity to save life" by stating, "If the appellant in performing the operation did something which was recognized and approved by those reasonably skilled in his profession practicing in the same community . . . then it cannot be said that the operation was not necessary to preserve the life of the patient."

It is evident that the condition which she had, could have developed to a fatal stage before Mrs. Gresham became fully aware of it, or conversely, it might not have developed to the fatal stage. The condition nevertheless would be deemed dangerous to life.<sup>132</sup>

The only case dealing with the point in Minnesota lends support to the position of the proposed code.<sup>133</sup> Part of the trial court's instruction read:

[W]hat is meant by that term ["preserve her life"] was the immediate preservation of her life, not a future, indefinite danger arising at some distant time through childbirth. The question is and then was, not whether Louise Halvorson was in such a condition of health when she called upon Doctor Hatch by reason of being pregnant, that if permitted to go her full period, she would or might die in giving birth to the child with which she was then pregnant, and that, therefore, at the time of her call, it was necessary to produce her miscarriage, but was it necessary to produce her miscarriage, to perform the operation then and there and when he did, to immediately preserve her life?

The comment of the Supreme Court was brief:

This charge, in the abstract, was not correct. The statute excepts from its operation cases where a miscarriage is necessary to preserve life. The statute does not say that in order to bring a case within the exception, the danger of death must be immediate, and it should not be so construed.<sup>134</sup>

131. Here the court cited *State v. Dunklebarger*, 206 Iowa 971, 221 N.W. 592 (1928); *Commonwealth v. Wheeler*, 315 Mass. 394, 53 N.E.2d 4 (1944); *Rex v. Bourne*, [1939] 1 K.B. 687; *Comment*, 23 So. CAL. L. REV. 523 (1950).

132. 167 Cal. App. 2d at 814-16, 335 P.2d at 212-13. The case is discussed in *Leavy & Kummer, Criminal Abortion: Human Hardship and Unyielding Laws*, 35 So. CAL. L. REV. 123, 130 (1962).

133. *State v. Hatch*, 138 Minn. 317, 164 N.W. 1017 (1917).

134. *Id.* at 319, 164 N.W. at 1017. The court further stated:

It does not follow, however, that this language of the charge was reversible error. We think it was not. The claim of the defense on the trial was, not that the miscarriage was produced because of any expected danger of death at childbirth, or at any remote time, but because of a danger that was immediate: This theory of the case

There are no other Minnesota cases on the question, and none have been found elsewhere that state the law differently than described above.

The proposed revision is not a very substantial extension of present principles. It provides, under conditions that assure against use in cases not intended,<sup>135</sup> that a therapeutic abortion is justified if any of the following conditions exist:

(a) The pregnancy resulted from sexual intercourse in violation of sections 609.29 [aggravated rape], 609.295 [rape], or 609.365 [incest] and a complaint has been filed with the appropriate prosecuting authorities charging such violation; or

(b) The abortion is necessary, and two additional licensed physicians so advise, to save the life of the mother, or to avoid grave impairment of the physical or mental condition of the mother or to prevent the birth of a child with grave physical or mental defect.<sup>136</sup>

In view of the rather extensive public notice that these provisions have received, some further amplification may be warranted to explain the reasons of the Advisory Committee in recommending these provisions. They represent essentially the recommendations of the American Law Institute. These recommendations, together with extensive and complete documentation of existing law here and elsewhere and of the facts and reasons for the recommendations, were submitted to the Institute at its meeting in 1959. Over 300 judges, lawyers, and law school professors and deans from all parts of the country attended. The recommendations received the overwhelming vote of the members of the Institute. Among those attending were the leaders of the American bar,<sup>137</sup>

is manifest throughout the record. The evidence of defendant himself makes it clear that the danger to life, on which he relied, was an immediate danger. This being the claim and theory of the defense, an instruction that the danger must be immediate in order to constitute a defense could not prejudice the defendant.

*Id.* at 319, 164 N.W. at 1017-18.

135. It must be performed by a licensed physician and, except in an emergency, in a licensed hospital. § 609.345(6)(1), (2).

136. § 609.345(6)(3).

137. Fifteen of them had been or later became president of the American Bar Association, including the present incumbent; five, president of the National Conference of Commissioners on Uniform State Laws; and four, president of the American Judicature Society. Others present included the late Judge Learned Hand; Honorable Charles E. Clark, former dean of Yale Law School, former reporter to the Committee on Federal Rules of Civil Procedure, and Judge of the Court of Appeals of the Second Circuit; the late Honorable Herbert F. Goodrich, Judge of the Third Circuit Court of Appeals and Executive Director of the American Law Institute; Honorable Harvey M. Johnson of the Eighth Circuit; Honorable Alfred P. Murrah, Chief Judge, and Honorable Orrie L. Phillips from the Tenth Circuit Court; Honorable Albert R. Maris, now retired Judge of the Court of Appeals of the Third Circuit and chairman of the Committee on Rules

none of whom raised an objection to the adoption of the recommendations submitted; the proceedings indicate that the vote in support of them was overwhelming.

Nevertheless, the incorporation of these recommendations in the Proposed Revision of the Minnesota Criminal Code has received criticism from those who consider them in conflict with the teachings of their religion.<sup>138</sup> The central thesis of this criticism is that the embryo is a human being from the moment of conception. From this position all else follows: it becomes murder deliberately to put an end to the embryo; the reasons stated in the proposed section cannot justify it; human beings are not killed because they are the product of a rape or incest or because the mother may be driven to insanity or reduced to physical incompetence. This view condemns even the clear case under present law—performing an abortion to prevent the imminent and immediate death of the mother—since one innocent life cannot be taken to save another. The American Law Institute specifically rejected this view at its 1959 meeting.<sup>139</sup>

of Practice and Procedure of the Judicial Conference of the United States; Honorable Sterry R. Waterman of the Second Circuit Court of Appeals and currently president of the American Judicature Society; Dean Eugene V. Rostow of Yale Law School; Professor Livingston Hall, representing the Harvard Law School; Albert J. Harno, former dean of University of Illinois Law School, former president of the National Conference of Commissioners on Uniform State Laws and of the American Judicature Society, and currently Administrative Director of the Illinois Judicial System; Honorable Laurance M. Hyde, Chief Justice of the Supreme Court of Missouri; Dean William B. Prosser of the University of California Law School at Berkeley; the late Emory Brownell, former Executive Director of the National Legal Aid Association; the late Karl N. Llewellyn; Glenn R. Winters, Executive Director of the American Judicature Society; James V. Bennett, Director of the U.S. Bureau of Prisons since 1937; and a number of deans of law schools not already mentioned, including the deans of the two law schools of this state. Among the nationally prominent private practitioners present at the meeting were Harrison Tweed of New York, then president of the American Law Institute and former president of the National Legal Aid Association; Norris Darrel of New York City, currently president of the American Law Institute; William A. Schnader of Philadelphia, former president of the National Conference of Commissioners on Uniform State Laws and of the National Association of Attorneys General and prominently identified with the Uniform Commercial Code; and Albert E. Jenner, Jr., of Chicago, past president of the American Judicature Society and of the American College of Trial Lawyers. See 36 ALI PROCEEDINGS 1-26 (1959) (registration list).

138. See Doherty, *Unborn's Life: A Right*, Catholic Bull., Oct. 26, 1962, p. 6. For a more extended discussion of this position see Quay, *Justifiable Abortion—Medical and Legal Foundations*, 49 GEO. L.J. 173 (1960).

139. See the following arguments made in support of a motion to delete the provisions justifying therapeutic abortions from the Model Penal Code: MR. QUAY: We stand in horror of totalitarianism as we see it in different parts of the world. We reject the claim of any state that

As Glanville Williams has pointed out, this approach is based essentially on a religious interpretation and characterization of the biological phenomenon of conception and development of the embryo and fetus.<sup>140</sup> Being so, it is not susceptible to either demonstrative proof or disproof. Those holding such views are certainly entitled to adhere to them, to live their lives accordingly, and to be free from criticism or condemnation for doing so. This is only in keeping with American tradition and constitutional principle of freedom of religious thought and practice. The American

it has in its predisposition the lives of all of the people, or of any single one of its people.

We were shocked by the slaughter of the Kulacks [sic], we were shocked by the slaughter in the name of science at Dachau. We still maintain the right of every individual as a human being to retain his life as long as he is guiltless of any offense that would justify taking it.

That is equally true for the child, and the child still in the womb, in the case of a newly born child such as those in the days of my youth were so commonly exposed by their mothers in China, in the case of a child or in the case of an adult.

If the state wants to take the life of a human being at one stage, it can take the life of that individual at any other stage. I can see no difference, and I say the state does not have the authority and it cannot give it to any two medical men or men licensed to practice medicine.

After all, we [protect] minors, even those who have reached the end of their teens who can speak for themselves and at least assert their rights. Whether they defend them or not, we protect them. We [require] guardianship to protect their rights even though we are dealing only with property, not with their lives. But in this unborn child, guilty of no offense, it has no part in that. That child has done no wrong. It has simply followed the law of human nature, growing in the womb, inoffensive, doing no harm to anyone, simply waiting there patiently for the time when it will be ready to meet the mother's love and venture on a full life among fellow men.

Instead, it will never meet that love, but will have that life snuffed out before it has had a chance even to whimper a protest.

FATHER TEMPOLI [St. John's University School of Law]: I have no illusion that I will be able to change the opinion of anyone in the room on such a basic thing, but I think it would be weighing on my conscience if I did not draw the attention of the American Law Institute to the fact that we have evidence as to what happened in Germany, and I think that we ought to be very much concerned by the fact that the only difference that we make between the killing of the healthy father of a family, and one who is a newborn child or quickening or recognizable, is either a feeling of sympathy with a fellow human being or a decent opinion of a responsible group. If we would rely upon either as the fundamental difference, the only basis of our philosophy, then we soon go much farther than we intend to. 36 ALI PROCEEDINGS 261-64 (1959). The motion to delete the provisions for therapeutic abortion was defeated.

140. WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 225 (1957).

Law Institute recommendations are consistent with this position; they are permissive only. No woman need submit to an abortion for any reason if her faith does not permit her to do so.

It is quite a different matter to insist that laws based on these views be applicable to everyone, including persons not sharing them.<sup>141</sup> Protestantism and the Jewish religion are not opposed to therapeutic abortions.<sup>142</sup>

The common law did not accept the proposition that human

141. A distinguished lawyer and civic leader of the Twin Cities put it thus in a letter to the author:

Surely proposed Section 609.345, Subd. 6, on therapeutic abortion will stir up much emotional argument. I notice that the present laws which it will supersede can have the effect of compelling a woman to give birth to a monster, or the child of an idiot who has raped her. This is plain cruelty. It seems disgraceful to legislate it. Thus the proposed section, allowing the mercy of a carefully regulated abortion, comes as a ray of light in a dark attic chamber. I suppose much of the opposition to it will be based on religious dogma. As we all know, such dogma has made some bad law. One example is "The Capitall Lawes of New-England" of 1641. (See Harvard Law School Bulletin for February, 1956.) These laws provided a single penalty, death, not only for murder and most sexual irregularities but also for blaspheming or "worshipping any other God, but the Lord God" or simply being a witch. Those who wrote these laws doubtless believed they were simply expressing what was the eternal and immutable law of God. The laws themselves actually cited the passages in the Old Testament on which they were based. What the authors failed to see, and what many well meaning people today forget, is that religious dogma is for all who freely accept it but not something to be imposed by law on those who do not accept it.

142. See Leavy & Kummer, *Criminal Abortion: Human Hardship and Unyielding Laws*, 35 SO. CAL. L. REV. 123, 133 (1962):

Indications are that most contemporary Jewish Talmudic scholars do not consider the present law too liberal, and by and large would not strongly oppose a cautious broadening of the legal exception to the abortion statute.

Protestantism, for the most part, though adhering to the restrictive attitude of Christianity, is not opposed to the present exceptions to the prohibitory law, and most Protestant authorities hold that termination of pregnancy is not a problem for the church but should be handled by the individual patient, her doctor and her clergyman, with primary consideration being given the mother.

The Rev. Dr. Israel Margolies, Rabbi of Beth Am, the People's Temple, in commenting on legalizing abortion to prevent the birth of deformed babies, stated to his congregation:

The truly civilized mind would be hard put to devise a greater sin than to condemn a helpless infant to the twilight world of living death, or to sentence two innocent parents to a life term of caring for, yes, and loving, a creature who is a grotesque mockery of God's image.

Is it not time that we matured sufficiently as a people to assert once and for all that the sexual purposes of human beings and their reproductive consequences are not the business of the state, but rather free decisions to be made by husband and wife?

N.Y. Times, Nov. 18, 1962, § 1, p. 76, col. 3.

life begins from the moment of conception for the purposes of the law. An abortion was not treated as homicide for that reason.<sup>143</sup> Neither does it appear to have been any other crime to commit an abortion unless the child had quickened.<sup>144</sup> Essentially the same position is taken in our present statutes as indicated by the relatively light sentence authorized for abortion as compared to those for homicide. The maximum imprisonment authorized is four years compared with life imprisonment for first degree murder and 15 years for the lowest degree of homicide, manslaughter in the second degree. Judged by the sentences permitted, abortion is less serious than stealing 150 dollars worth of property,<sup>145</sup> transporting a prostitute,<sup>146</sup> keeping a disorderly house,<sup>147</sup> committing perjury,<sup>148</sup> abandoning a child or pregnant wife,<sup>149</sup> and much less serious than committing bribery,<sup>150</sup> selling narcotics,<sup>151</sup> or maiming another.<sup>152</sup> To proceed on the

143. *State v. Prude*, 76 Miss. 543 (1898). The indictment charged that the defendant "did feloniously kill and slay an unborn quick child of said Emma Prude." The court stated:

This is not a good indictment at common law, for by the common law, "an infant in the mother's womb, not being *in rerum natura*, is not considered as a person who can be killed within the description of murder, and, therefore, if a woman, being quick or great with child, take any potion to cause an abortion, or if another give her any such potion, or if a person strike her, whereby the child within her is killed, it is not murder or manslaughter.

*Id.* at 544-45.

144. *State v. Steadman*, 214 S.C. 1, 51 S.E.2d 91 (1948). See also Davies, *The Law of Abortion and Necessity*, 2 MODERN L. REV. 126 (1938). In *Steadman*, the court said:

At common law, an abortion produced with the woman's consent, was not a crime unless the woman was "quick with child," that is, when the embryo had advanced to that degree of maturity where the child had a separate and independent existence, and the woman has herself felt the child alive and quick within her . . . .

"Life begins, in contemplation of law, as soon as an infant is able to stir in the mother's womb." 1 Bl. Com. 129. As stated in *State v. Cooper*, 22 N.J.L. 52, 51 Am. Dec. 248: "It is not material whether, speaking with physiological accuracy, life may be said to commence at the moment of quickening, or at the moment of conception, or at some intervening period. In contemplation of law, life commences at the moment of quickening, at that moment when the embryo gives the first physical proof of life, no matter when it first received it."

214 S.C. at 7, 51 S.E.2d at 93.

145. See MINN. STAT. § 622.06 (1961).

146. See MINN. STAT. § 617.325 (1961).

147. See MINN. STAT. § 617.30 (1961).

148. See MINN. STAT. § 613.39 (1961).

149. See MINN. STAT. § 617.55 (1961).

150. See MINN. STAT. § 613.02 (1961).

151. See MINN. STAT. § 618.21 (1961).

152. See MINN. STAT. § 619.30 (1961).

premise that an abortion involves the taking of human life would introduce a wholly new concept into our criminal law.

Without this concept, the reasons for permitting therapeutic abortions as recommended by the American Law Institute are most compelling. It only makes good sense to permit a physician, by a relatively simple operation, to save a woman from mental breakdown or grave physical impairment; this is probably the present law. It makes equally good sense to prevent the birth of a mentally or physically deformed child. Not only is this an act of mercy to the child that would have been born, but to the mother as well. The recent thalidomide incident demonstrates the shock, dismay, and depression created in the mother on realizing the condition of the child to which she has given birth. Some of the mothers who were victims of this unfortunate incident attempted suicide and others became insane.<sup>153</sup> It debases the dignity of women and the whole concept of motherhood to compel a woman by law to bear the child of a rapist or of her own father.<sup>154</sup>

There are, therefore, strong reasons to support the position of the Advisory Committee in recommending the provision on therapeutic abortion. It is not a large departure from what appears to be the present law, it has the support of the leaders of the bench and bar of the country, and humanitarian reasons support it.

This does not, however, warrant optimism that the provision

153. Where this is medically indicated as a prospect, the present law as stated earlier in the text probably permits an abortion.

154. Many reputable doctors and hospitals faced with these pathetic situations have proceeded with the abortion in the face of laws prohibiting it. See Packer & Gampell, *Therapeutic Abortion: A Problem in Law and Medicine*, 11 STAN. L. REV. 417 (1959). This takes no account of the other and undoubtedly much larger number of such cases in which the abortion was performed by a layman, often times under the most unsanitary conditions. This led the grand jury of Los Angeles County, California, to adopt a resolution in 1960 urging liberalization of the abortion laws of California along the lines recommended by the American Law Institute. The resolution of the jury is set out in Leavy & Kummer, *Criminal Abortion: Human Hardship and Unyielding Laws*, 35 SO. CAL. L. REV. 123, 139 (1962).

Estimates of illegal abortions run from 300,000 to 2,000,000 a year. Few of these would come under the provisions of the proposed change. There was no intent on the part of the Advisory Committee to legalize abortions except in those exceptional cases indicated by the recommendation.

Several letters from members of the bar support the position taken by the Committee. Two criticized the proposed section as not being sufficiently broad in allowing therapeutic abortions. Many others supported the revision generally without specific mention of the section on abortion. Four members of the bar criticized the section on the ground that it permitted the taking of human life. Since these communications were written for the consideration of the Committee only, names cannot be given.

will find its way into the law of this state. At the final meeting on January 4, 1963, the Committee decided to retain the recommendations as they appear in the proposed code. But political realities are such that strong and organized opposition is likely to prevail. The nature of the subject is such that proponents of the measure are not likely to be vocal or to organize for the purpose, and those who would benefit by the proposal are future prospective mothers who cannot be known and cannot organize.

## V. SENTENCING

Since the provisions relating to sentencing are quite fully explained in the comments appearing in the report of the Advisory Committee, only a few supplementary remarks are warranted here.

### A. OBJECTIVES

The proposed revision attempts to eliminate the confusion and uncertainty now existing among the several sections of the present code dealing with sentencing that are scattered over several chapters. The provisions as originally adopted in the nineteenth century were fairly simple, and the objective was the limited one of permitting the judge to impose such sentence as the crime warranted. The sentence of the court constituted little more than a reaction of the judge to the crime and to the defendant in the course of the trial. Sentence was to a penal institution and the court was not concerned with what happened to the defendant once the sentence had been imposed.

Since that time, this relatively simple structure has been changed by new enactments that had a different objective—the rehabilitation of the convicted defendant. Hence, from time to time such provisions have been enacted as the sentence to a reformatory for the younger age group (16 to 30 years of age), the indeterminate sentence, the parole of inmates, and the power conferred on the court to suspend execution of a sentence of imprisonment and place the defendant on probation. All these were superimposed on earlier provisions without much effort directed at reconciliation.

The proposed code co-ordinates the duties of the court in imposing sentence with those of the Department of Corrections in carrying out the execution of the sentence so that both will be directing their efforts toward common ends. Another objective is the differentiation of those convicted persons who need no more than a short term of imprisonment (or none at all) to insure both their rehabilitation and the protection of the public, and those hardened, professional, or unbalanced criminals who require long incarceration.

tion for these purposes. By these means and by the procedures described below, the Committee believed that the objectives and purposes of the criminal law will be achieved more effectively.

#### B. PRESENTENCE INVESTIGATION AND DIAGNOSTIC REPORT

The post-conviction procedure provided is a relatively simple one and builds on principles with which judges and lawyers are already familiar. If the defendant has been convicted of a felony not requiring a life sentence of imprisonment and no stay is asked for purposes of appeal,<sup>155</sup> the judge will order a presentence investigation and defer sentence until the report thereon is returned.<sup>156</sup> The requirement is not only for the protection of the defendant, but also for public assurance that the judge acts upon the fullest information. Pending the investigation, the defendant, if he is not on bail, may be committed to the Department of Corrections until the judge is ready to impose sentence.<sup>157</sup> The purpose is to avoid confining the defendant in a jail or other inadequate local facility pending the investigation. The period of confinement, if any and wherever occurring, is credited toward whatever sentence the judge imposes unless the judge orders otherwise in fixing a term less than the maximum.<sup>158</sup> The judge may also request a diagnostic study by the Department of Corrections if he desires this type of information about the defendant. In the event that the crime committed was one that carries a maximum sentence of more than ten years, the defendant must be referred to the Department of Corrections for such a diagnostic study. Most of the crimes carrying such a sentence under the proposed code involve serious offenses and usually are crimes of violence. Hence it is considered essential that the judge obtain the fullest information about the character of the defendant and receive the recommendations of the Department before sentence is imposed. This helps to identify the hardened or dangerous criminal who might not otherwise be revealed by the presentence report.<sup>159</sup> The diagnostic study will not be available, however, until facilities are provided by law to the Department.<sup>160</sup>

The reports given to the court as a result of the presentence

The Criminal Law Committee of the Minnesota State Bar Association recently rejected a motion to delete the proposed section from the proposed code and submit it as a separate bill.

155. See § 609.115(9).

156. § 609.115(1).

157. *Ibid.*

158. § 609.145(2).

159. § 609.115(2)(2).

160. § 609.115(2)(3).

investigation and diagnostic study are open to the defendant's attorney and to the prosecuting attorney for inspection, except that confidential sources of information are not to be disclosed unless the court expressly so orders.<sup>161</sup> If the defendant has no attorney, the court may either appoint one for him for the purpose or permit the defendant himself to see the reports. Such appointment should be made whenever the judge considers it undesirable or harmful to permit the defendant to inspect the reports.

Such disclosure of the investigation and diagnostic reports will undoubtedly receive the general approval of the legal profession. It conforms to the conceptions of fairness that permeate the judicial system in insisting that state action against an individual should be preceded by notice of the grounds of the proposed action and an opportunity to be heard.<sup>162</sup> It is also an application of the fundamental premise that our system accepts as axiomatic that the truth is best ascertained when assertions are subjected to the scrutiny and criticism of those affected. This does not imply fraud, dishonesty, chicanery, or incompetence; it recognizes a characteristic of human nature. We are more careful and more accurate about what we do and say if we know it will be examined, criticized, and possibly refuted by those against whom it is directed.<sup>163</sup> A judge should be adequately and correctly informed in performing such a vital function as the imposition of a sentence. Disclosure of the reports help to assure this.

Some concern has been shown among those engaged in correctional services that the effectiveness of the investigation and report will be adversely affected if disclosure to the defendant or his counsel is compelled.<sup>164</sup> It is feared that those who have the needed information will not give it if confidentiality cannot be assured, and that the report will be so cast as to render it less useful to the judge. These are largely hypothetical fears not confirmed by experience in California, where disclosure is required,<sup>165</sup>

161. § 609.115(5).

162. The notion that a convict has no rights except to a sentence that stays within the statutory maximum is primarily a survival of the old common-law punitive concept that a convict is an outcast of society to be executed or banished, treated as civilly dead, and deprived of all civil rights.

163. See *State v. Killian*, 91 Ariz. 140, 144, 370 P.2d 287, 290 (1962).

164. See Barnett & Gronewold, *Confidentiality of the Presentence Report*, *Federal Probation*, March 1962, p. 26; Sharp, *The Confidential Nature of Presentence Reports*, 5 *CATHOLIC U.L. REV.* 127 (1955).

165. CAL. PEN. CODE § 1203. Communications received from California confirm the statement in the text. Some other states also require disclosure. ALA. CODE tit. 42, § 23 (1958); OHIO REV. CODE § 2947.06 (Anderson 1953); VA. CODE § 53-278.1 (1958).

or in those courts that, by way of discretion, uniformly make the report accessible to counsel. What is more likely is a higher and more professional level of investigation and report, and a greater mutual respect and cooperative effort between counsel and probation officer than is possible when the report is treated as a confidential document known only to the officer and the judge.

If either the prosecution or the defendant desires to be heard on any matter contained in the reports, the proposed revision provides that the court may conduct a summary hearing in chambers immediately or defer the matter to a later time if it so desires.<sup>166</sup> Following the hearing, the judge is free to impose such sentence as the law permits. There is no requirement that he make findings. Evidence at the summary hearing need not conform to the usual rules of evidence. Nothing in the nature of an adversary proceeding is contemplated.

#### C. FORM OF SENTENCE

A sentence of imprisonment for a felony for more than one year must be made to the Commissioner of Corrections who determines where the defendant will be confined.<sup>167</sup> The present law permits transfer between the state prison and the reformatory;<sup>168</sup> the proposed provision permits transfer to any facility within the jurisdiction of the Department of Corrections.<sup>169</sup> Sentence for a felony may be for less than a year, and if it is, the crime is considered a misdemeanor or gross misdemeanor depending on the sentence imposed.<sup>170</sup>

The judge may place the defendant on probation on terms determined by him without imposing a sentence of any kind.<sup>171</sup> This procedure is new to Minnesota although it is not uncommon in other states. It gives the judge a more substantial basis upon which to act should the defendant's probation be revoked and sentence then imposed. The court may still continue the present practice of imposing sentence but deferring execution while the defendant is on probation.

It will be noted that confidential sources of information need not be disclosed unless ordered by the court, § 609.115(5). Also, disclosure is made to the defendant's attorney, and if he has none, the court is to appoint one for the purpose unless the court concludes that it would not be detrimental to make the disclosure to the defendant. *Ibid.* It then becomes the responsibility of the attorney whether or not he will advise his client of the contents of the report.

166. § 609.115(5).

167. § 609.105.

168. MINN. STAT. § 243.77 (1961).

169. § 609.105(2).

170. § 609.13.

171. § 609.135(1).

If probation is revoked under the proposed provisions, the defendant must be advised in writing as to the reasons for the revocation and given an opportunity at a summary hearing to take issue with the charge that he violated the terms of his probation.<sup>172</sup> If he has complied with those terms, he is entitled to remain on probation. The reverse is true of the present law.<sup>173</sup> The arbitrary power to terminate the liberty of even a convicted person on probation was deemed undesirable. A number of other states have similar provisions and their number is increasing.

#### D. PAROLE

As under present law, the Adult Corrections Commission may parole a defendant committed to imprisonment at any time unless the sentence is for life imprisonment for murder.<sup>174</sup> The Commission, however, must grant parole within five years to those convicted of a crime carrying a maximum permissible sentence of not more than ten years. The Commission need not grant parole, however, if it determines, with or without a hearing, that parole would not be conducive to the defendant's rehabilitation or would not be in the public interest.<sup>175</sup> The purpose of this provision is to emphasize the desirability of early release for those who are not dangerous criminals and to promote a greater degree of uniformity in the parole of such inmates. The requirement is not extended to those who have been convicted of a crime carrying a maximum possible sentence of more than ten years. In these cases, as already seen, a diagnostic study will have been made prior to sentence and the dangerous offenders identified at that time. The Commission, therefore, should not be encouraged by a directive contained in the law to pursue a policy of early release in these cases. As earlier stated, the policy is to differentiate between the dangerous and the casual criminal.

#### E. HABITUAL OFFENDERS

The proposed revision departs substantially from present sections that deal with habitual offenders. The present law undertakes, by a procedure analogous to that of a criminal prosecution, to identify the chronic offender and authorize increased sentences of imprisonment depending upon the number of prior convictions.<sup>176</sup> Their objective is sound, but the manner in which they

172. § 609.14(2).

173. See MINN. STAT. § 610.39 (1961).

174. See text accompanying notes 21-25 *supra*.

175. § 609.12(2).

176. The principal statutes are MINN. STAT. §§ 610.28, .32 (1961).

operate has been subject to criticism. They apply mechanically, depending upon the existence of a single fact—a prior conviction. Not all persons with prior convictions are chronic offenders, and to treat them as such results in unnecessarily severe and unfair sentences in many instances. Also, the present provisions have been applied very unevenly. In some counties, they are regularly invoked, while in others they are not; thus, whether an offender is to receive the longer sentence authorized depends in part on the county in which he happens to commit the offense.

The revision emphasizes the necessity of identifying the defendant as a dangerous criminal not only on the basis of the prior conviction, but on all of the information obtainable about his character and disposition.<sup>177</sup> A prior conviction is still required, for this gives some assurance against improper application of the law. Prior conduct will have been established by a plea of guilty or by a jury trial in which established procedural protections have been afforded. The prior conviction must be for a felony committed within ten years prior to the crime for which sentence is being imposed. Misdemeanors and gross misdemeanors have not been included, for acts of this character are not believed of sufficient gravity to warrant the application of the proposed law.<sup>178</sup>

The procedure provided in the revision is relatively simple. Instead of an information charging prior convictions, the proceeding is initiated by written notice to the defendant given either by the prosecuting attorney or by order of the court.<sup>179</sup> In addition to the presentence investigation, there must be a diagnostic study and report made by the Department of Corrections. If the defendant requests, a summary hearing is held. Trial by jury is no longer provided. The court itself must make the findings that the defendant was previously convicted of a felony and that he is "disposed to the commission of criminal acts of violence and that an extended term of imprisonment is required for his rehabilitation or for the public safety."<sup>180</sup> This procedure is constitutionally permissible since it assures that the defendant is given both notice of the grounds on which the sentence is proposed to be increased and an opportunity to be heard. A criminal trial is not required.<sup>181</sup>

177. §§ 609.115, .116.

178. For the present provisions concerning misdemeanors involving moral turpitude, see MINN. STAT. § 617.75 (1961). There are also special sections applicable to particular crimes. *E.g.*, MINN. STAT. §§ 617.22, 621.37 (1961).

179. § 609.16.

180. § 609.16(4).

181. *Levell v. Simpson*, 142 Kan. 892, 52 P.2d 372 (1936); *State v.*

If the required facts are found, the court is authorized to increase the sentence by the maximum sentence authorized by law for the crime committed multiplied by the number of prior convictions. However, the sentence may not exceed 40 years.<sup>182</sup>

F. REVISIONS CONCERNING MISDEMEANORS AND GROSS MISDEMEANORS

Very little change is introduced by the proposed revision with respect to sentences for misdemeanors or gross misdemeanors. The Advisory Committee at one time approved giving the trial court power to commit a defendant convicted of a gross misdemeanor to a state penal institution. However, after hearing from the representatives of these institutions and the Department of Corrections about the difficulties this would create for them since their facilities are geared to longer-term confinements, it was concluded that this measure was not feasible, much as it might be desired by the trial judges of the state. Committing individuals to county jails and other local facilities in their prevailing condition is indeed an undesirable alternative to permitting them to remain at large. But the remedy must lie in measures not within the purview of the revision—for example, regional workhouses or workfarms under the supervision of the Department of Corrections.

The Advisory Committee was also aware of the inadequacy of the fine of 100 dollars now provided as the maximum fine for a misdemeanor, but felt no change could be recommended in the criminal code. Any increase in the permissible fine would have to be accompanied by a corresponding increase in the jurisdiction of municipal courts and justices of the peace.<sup>183</sup> Otherwise, these crimes could only be prosecuted in the district court. A change in the jurisdiction of these courts presents problems of lower court reorganization that clearly were not within the compass of the Advisory Committee's responsibilities. Any improvement in this area must await independent legislative consideration. The inability, resulting from the present situation, to make any improvements with regard to sentences for misdemeanors emphasizes the need for such consideration.

Guidry, 169 La. 215, 124 So. 832 (1929); *State v. Morton*, 338 S.W.2d 858 (Mo. 1960). See *Oyler v. Boles*, 368 U.S. 448 (1961); *Chandler v. Freitag*, 348 U.S. 3 (1954). *Contra*, *State v. Furth*, 5 Wash. 2d 1, 104 P.2d 925 (1940).

182. § 609.155(1).

183. Justices of the peace "have power to hold a court . . . to hear, try, and determine all charges for offenses arising within their respective counties where the punishment prescribed by law does not exceed a fine of \$100.00 or imprisonment for three months." MINN. STAT. § 633.02 (1961). Similar jurisdiction is conferred on municipal courts under the general municipal court act. MINN. STAT. § 488.04(5)(a)(1) (1961).