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Does not deal with sex offenses.

See FN61 - identifies minimum and maximum penalties for crimes & misdemeanors.

NEW BOTTLES FOR OLD WINE: CRIMINAL LAW REVISION IN KANSAS

*Paul E. Wilson**

The Kansas Judicial Council has published recommendations for the extensive revision of the substantive part of the criminal law of Kansas.[1] The proposal is a product of more than four years of study by the Council and its Advisory Committee on Criminal Law Revision.[2] Preparation of proposals to revise the Code of Criminal Procedure has also been undertaken and will be completed during the current year. These recommendations are expected to form the basis for a program of criminal law reform to be presented to and considered by the 1969 session of the Kansas legislature.

I. The Sources and Structure of Kansas Criminal Law

The definition and prohibition of criminal conduct in Kansas is essentially a function of the legislature. The legislature alone has the power to prohibit and provide penalties for conduct that is deemed inimical to the best interests of the state. At the same time, the common law has played an important role in determining the substance of the criminal law of Kansas. While the legislature has the exclusive power to prohibit conduct, the prohibitions are often stated in terms of common law concepts. Thus, reference must often be made to the common law in order to understand the legislative intent. To illustrate, the present laws of Kansas relating to homicide provide that murders committed under certain circumstances shall be murder in the first degree and that all other murders shall be murder in the second degree.[3] Nowhere in the present statutes are the elements of murder enumerated. Reference to the common law concept of murder is necessary to determine the nature of the conduct proscribed by the legislature. But notwithstanding the fact that our criminal jurisprudence is derived from the common law and is interpreted in the light of common law concepts, these concepts become vital and effective limitations upon human conduct only by reason of legislative enactment.

The present substantive criminal law of Kansas is basically the Crimes Act, which was enacted by the first territorial legislature in July, 1855. This legisla-

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[1] *Proposed Kansas Criminal Code*, Kan. Judicial Council Bull. (Special Report, April, 1968) (hereinafter cited as *Proposed Code*).

[2] The Advisory Committee appointed by the Council represents a broad spectrum of experience and interest in the criminal law. Judge Doyle E. White of Arkansas City, a member of the Judicial Council, is Chairman of the Committee. Other appointed members are E. Lael Alkire of Wichita, William M. Ferguson of Wellington, Charles F. Forsyth of Erie, Lee Hornbaker of Junction City, Selby S. Soward of Goodland and George T. Van Bebber of Troy. J. Richard Foth, Assistant Attorney General, is the Attorney General's representative on the Committee and Professor Paul E. Wilson of the University of Kansas School of Law, the author of this comment, serves the Advisory Committee as its Reporter. Others who have served on the Advisory Committee are Howard T. Payne of Olathe, the late A. K. Stavely of Lyndon, and the late Lester M. Goodell of Topeka.

[3] Kan. Stat. Ann. §§ 21-401, -402 (1964).

ture, often identified as the "bogus" legislature, included a majority of members who either then or had formerly resided in the state of Missouri. In a session which lasted only six weeks, this legislature drafted and enacted a complete body of statutes by which the territory was to be governed, consisting essentially of statutes that were then in effect in Missouri. All the laws enacted by the territorial legislature of 1855 were repealed by the territorial legislature of 1859.[4] However, the penal portions of the repealed statutes, with certain exceptions, were reenacted in the same language as they appeared in the earlier draft. These provisions were carried forward in the earliest compilation of Kansas state laws in 1868.[5]

Hence, not only the basic ideas but the specific language of a major part of the existing criminal laws of Kansas is derived from the acts of the territorial legislature of 1855.[6] There have been many amendments both in substance and in form since that date and the body of criminal law has been considerably enlarged. Indeed, it is unlikely that any session of the legislature of Kansas has failed to enact new penal legislation of some kind. Usually, however, such legislation was passed as a response to specific social problems of which the state or some community within the state had become aware, often without regard to its relation to or consistency with the general body of criminal law. Until the present effort, there has been no attempt systematically to review and evaluate the existing criminal law of Kansas and to initiate basic reforms.

The present Crimes Act has served the state for more than a century. It has provided a framework within which the public order has been maintained and the people of the state have enjoyed a high degree of security in their persons and property. While the objectives of the criminal law are essentially unchanged, crime appears in new forms and contexts and the problems of crime control have assumed new aspects as the state moves through the twentieth century. These circumstances compel recognition of an imperative need to provide new tools by which the state can maintain its own integrity and safeguard the security of its people.

Although chapter 21 of the Kansas Statutes Annotated is generally thought to contain the substantive criminal law of the state, its content is not exclusively substantive criminal law. Many of its sections are procedural in nature and others relate to administrative matters. Still other parts of the chapter are regulatory rather than penal. These statutes do not prohibit conduct that is truly criminal, but rather they are designed to assist in maintaining a level of conduct deemed compatible with the public interest in areas of public health, commerce, public morals, and appropriate standards of professional and official conduct. Other sections of chapter 21 have probably outlived their usefulness. Statutes which prohibit public exhibitions of reptile eating,[7] which provide penalties for failure to provide cuspidors or spittoons in railroad smoking cars or compart-

[4] Ch. 89, [1859] Kan. Terr. Laws.
[5] Kan. G.S. 1868, chs. 30, 31.
[6] Chs. 48-54, [1855] Kan. Terr. Laws.
[7] KAN. STAT. ANN. § 21-2426 (1964).

nts,[8] which outlaw walkathons and skatathons,[9] and which make it unlawful m ain unclean soap, candle, oil, glue, or varnish factories[10] probably are a opriate sections of a modern penal code. Whatever significance these ions may have had at the time of their enactment seems to have disappeared. , these sections are representative of scores of prohibitions that remain in the ute book and tend to diminish the stature of the criminal law.

Many sections that prohibit conduct and provide penalties for violation are nd outside of chapter 21. A search has revealed at least 1500 separate penalty visions outside of the Crimes Act. About sixty of these crimes, scattered ughout the statute book, are of felony grade. In addition, there are dozens, haps hundreds, of other kinds of conduct that are prohibited by administra- regulations. These regulations become penal in nature by virtue of en- ng acts passed by the legislature authorizing administrative bodies to enact ılations which have the force of law and which provide that violation of h regulations shall be punishable by penal sanctions. Notwithstanding their rcement by penalties, most of the conduct prohibited by statutes outside of pter 21 and by administrative regulation is not essentially criminal. The ctive of such enactments is to regulate. The regulations deal with such ters as the control of traffic; the manufacture, sale, and distribution of xicating liquors; the practice of various professions and callings; the produc- , sale, and distribution of food products, drugs, and similar matters. Still, w of these sections do relate to conduct that is truly criminal. While the cess of revision has generally been limited to chapter 21, sections in other pters which prohibit conduct essentially criminal in nature have been recom- nd[d] for transfer to the criminal code.[11]

II. THE OBJECTIVES OF REVISION

At the outset, the Advisory Committee faced questions concerning the scope ts project. A possible approach to revision was to leave the language of the sent chapter 21 substantially unaffected and to focus attention on the dele- of obsolete provisions, to remove ambiguities and inconsistencies, and to assify and rearrange. The Judicial Council advised the Committee that this roach would not accomplish the intended objective and instructed the mmittee to study, evaluate, and rewrite the present law section by section, ng due regard for contemporary problems of maintaining order and pro- ng life and property in Kansas, while at the same time, recognizing the tations imposed by due process of law.

The drafters have taken the view that certain considerations relevant to ie and punishment are matters of state policy which lie outside the technical

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KAN. STAT. ANN. § 21-2417 (1964).
KAN. STAT. ANN. § 21-2458 (1964).
KAN. STAT. ANN. § 21-1211 (1964).
Illustrative is the crime of negligent homicide presently defined in the traffic code at KAN. STAT. ANN. 29 (1964). The proposal would redesignate the offense Vehicular Homicide and locate it in the on crimes against persons at proposed section 21-405.

task of redrafting the criminal code. For example, the Committee and the Council did not consider it appropriate to make any recommendations concerning changes in use of the death penalty. It is their position that capital punishment is a matter of policy which transcends the ordinary considerations relevant to the substantive criminal law. Taken as a whole, the proposed code does not depart widely from present standards. Most conduct that is prohibited by the present law is unlawful under the proposal. Where new crimes have been created, it was in response to recognized social problems for which the present law does not provide a satisfactory solution.

More specifically, the objectives of the proposed revision may be summarized as follows:

Simplification.—The prohibited acts are identified and defined in clear, simple, and understandable terms and in language sufficiently specific that the person who reads the statute can readily understand the conduct that is prohibited. At the same time, it avoids the enumeration of specific acts which might exclude other conduct equally harmful but not thought of at the time the enumeration was made. By defining each crime in forthright, simple terms, the drafters seek to remove sterile technicality from the administration of criminal justice.

Consolidation and Condensation.—The proposal contains 224 sections. These sections contain the substance of some 650 sections of the present code, plus other material not presently found in the statutes. The reduction in bulk has been accomplished by removing invalid provisions and obsolete material, by eliminating duplication and inconsistencies, and by combining sections relating to the same subject.

Modernization.—The proposal seeks to conform Kansas criminal law to the accepted standards and concepts of modern penal legislation as reflected by codes recently enacted in other states and in model and uniform acts prepared by drafting agencies of national stature. The Advisory Committee has benefited by the experience of similar agencies in other states where recent programs of criminal law revision have been undertaken. It has drawn upon the work of recent drafting committees in Illinois, Minnesota, New Mexico, New York, Wisconsin, and other states. The Committee has also considered the work of the American Law Institute which published the Model Penal Code in 1962 after a ten year period of study and preparation. The proposals of other drafting agencies have been adapted to the extent that they, in the Committee's best judgment, might contribute to the improved administration of justice in Kansas.

Reorganization.—An effort is made to confine the provisions of the criminal code to those matters which are properly classified as substantive criminal law. This requires the transfer of administrative, procedural, and regulatory sections from chapter 21, and at the same time the relocation of certain criminal sections of other chapters in chapter 21.

III. THE PROCESS OF DRAFTING

E: ience with other drafting projects has demonstrated the necessity for arch in the preparation of preliminary drafts of proposed revisions and the l for centering this responsibility upon a single individual or group. Accordingly, the Council appointed a professor at the University of Kansas School aw as reporter for the Advisory Committee. He has worked with the Comee on a part-time basis since the inception of the project.

The draft originated with the reporter, who examined each section of the ing law together with relevant judicial opinions. Similar statutes in other s were reviewed, particularly those of states which have recently revised criminal codes. With this material before him, the reporter drafted a ested revision of each section which he supported by comments and mals from cases, statutes, and other authorities. These suggestions were subed to the Advisory Committee which undertook an intensive scrutiny of proposal. Each section was then redrafted by the reporter with the new reflecting the views of the Advisory Committee to which it was again itted. This process was often repeated several times. Indeed, it is a safe nate that few sections in the proposal have undergone fewer than three s, and in some instances, sections have been drafted as many as six times e final approval.

he recommendations of the Advisory Committee were then reported to udicial Council for its study and approval. Again the sections were exl to careful examination. Often more redrafts were required before ici approval was given. Thus, before being considered by the legislature, r mended section has already been approved by the reporter, the Ady Committee, and finally by the Judicial Council. This process necessarily ved compromise and adjustment. No section is the product of the thinking y single individual. Each represents the most feasible basis upon which at a majority of those involved in the process have been able to agree.

IV. ORGANIZATION AND FORMAT

he proposed code consists of seventeen articles arranged in three distinct Part one is entitled General Provisions and consists of definitions, conand statements of limitations applicable to all crimes; that is, such subjects isdiction, statutes of limitations, effect of former prosecutions, principles of nal responsibility, defenses, justifiable use of force, and other conditions subject one to, or exonerate one from, criminal liability. Part two, which ts of thirteen articles, defines and classifies conduct that is prohibited. hree relates to classifications of crimes and sentencing and provides the ntive framework within which sentences are to be imposed.

has already been noted that many of the present penal statutes of Kansas t actually define the conduct that they prohibit. When conduct which is fied by name only is prohibited and made punishable it is necessary that

reference be made to common law concepts to determine the content of the crime. In an effort to achieve greater clarity, the drafters of the proposed code name the type of conduct proscribed and enumerate the elements of each class of conduct designated as criminal. Thus, assault is defined as "an intentional threat or attempt to do bodily harm to another coupled with apparent ability and resulting in immediate apprehension of bodily harm. No bodily contact is necessary." The definition is followed by the designation of the crime as a "class C misdemeanor."[12] Sentences for all classes of misdemeanors are found in the sentencing article.[13] Present statutes in some instances describe prohibited acts without assigning a convenient name or designation to the criminal act. In such cases it is often difficult for courts, lawyers, and others working with the statutes to identify the prohibited conduct by a descriptive word or phrase. Identification is usually accomplished by reference to the section containing the definition. The drafters of the proposed code have attempted to assign to each class of prohibited conduct a simple name or designation which is convenient to use and at the same time is descriptive of the acts made criminal. In many cases the crime is identified by the name given to it at common law. In other cases, the act is identified by use of a word or phrase which is generally descriptive of the conduct that the law seeks to prohibit. Thus, each section which defines a crime contains (1) the identification or designation of the conduct prohibited, (2) a simple, nontechnical statement of the elements of the crime identified, and (3) a classification of the offense for sentencing purposes. In addition to identifying and defining a crime, the statute may contain a statement of special conditions or defenses that are applicable in prosecutions for the particular offense. This format, in the view of the drafters, contributes to clarity and simplicity.

V. RECOMMENDED CHANGES IN THE SUBSTANTIVE LAW

The proposed code presents several new approaches to problems of criminal justice. While all cannot be commented on here, mention of some of the specific recommendations for change seems appropriate. The particular recommendations that are mentioned hereafter are not necessarily the most significant, but they are thought to relate to matters in which there is an active public interest.

A. *The Test of Insanity as a Defense*

The problem of defining the criteria of criminal responsibility is one of the most difficult and controversial matters in the criminal law. A general lack of understanding of the conditions that produce irresponsibility as well as an apparent lack of sympathy and communication between the courts and law enforcement officers on the one hand and the behavioral scientists on the other have contributed to the difficulty.

[12] *Proposed Code* § 21-408.
[13] *Proposed Code* §§ 21-1502, -1503.

Any system of criminal justice that holds an individual responsible for anti- 30(10)
oc cts done in the exercise of free will must provide standards for excepting
hc acts which are done under circumstances which destroy or impair free
vill. The punishment of an offender whose act is the result of an insane frenzy
s both unjust and futile. It is unjust because the offender had no ability to know
r to conform to the norm. It is futile because it cannot possibly deter similar
cts. The idea of deterrence presupposes a rational individual capable of weigh-
ng values and selecting among them. It follows that some criterion of irre-
ponsibility is essential in a system of penal law predicated on free will.

Kansas has no statutory test of criminal responsibility but follows the tradi-
onal *M'Naghten* rule which has been recognized in numerous judicial deci-
ions.[14] This test fixes criminal responsibility on the accused who knows the
ature and quality of his act and knows that the act is wrong.

Several possibilities confronted the drafters of the proposed code: (1) The
ubject might have been wholly omitted from the statutes, in which case the
f'Naghten rule would stand. (2) The proposed statute might have stated the
f'Naghten rule, thus giving legislative reinforcement to the judicially de-
eloped standard. (3) The draft might have provided a new and different test
f criminal responsibility. Alternatives considered by the Advisory Committee
ere (a) the irresistible impulse test,[15] (b) the *Durham* or product test,[16] (c)
ie American Law Institute Model Penal Code test,[17] and (d) the American
aw Institute test as modified by the *Currens* case.[18]

After a thorough exploration of the problem, the Advisory Committee and
ie Council determined that the *M'Naghten* rule ought to be rejected. Some of
ie objections follow:[19]

t, the word "know" is ambiguous when applied to persons suffering
om a serious mental illness. The fact that the defendant is able to verbalize
ght answers to questions, to respond, for example, that murder or stealing is
rong, or the fact that he exhibits a sense of guilt by concealment or flight, is
ten regarded as conclusive evidence that he knew the nature and wrongful-
ss of his conduct at the time of the crime. One of the most striking facts about
e abnormality suffered by many psychotics is their way of knowing, which is
ntirely different from the ordinary person. In psychiatric terms, their knowl-
lge is usually divorced from all effect, which is to say that it is like the knowl-
ge that children have of propositions they can state but cannot understand;
has no depth and is devoid of comprehension. The present rule makes it very
fficult to put this point before a jury, though it is often the crucial point in-
lved. It seems clear that the knowledge which should be deemed material in

[14] *See* State v. Andrews, 187 Kan. 458, 357 P.2d 739 (1960).
[15] This is the second most popular test, being used in about one-third of the states. *See* compilation in DEL PENAL CODE, App. A (Tent. Draft No. 4, 1955). (Caveat: a few states have shifted away from the sistible impulse test since the enumeration was made.)
[16] Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).
[17] MODEL PENAL CODE § 4.01 (Proposed Official Draft, 1962).
[18] United States v. Currens, 290 F.2d 751 (3d Cir. 1961).
[19] The argument which follows is based on 1963 INTERIM REPORT OF COMMISSION ON REVISION OF PENAL V AND CRIMINAL CODE, NEW YORK LEG. DOC. No. 8 at 16-26.

testing criminal responsibility is more than mere surface intellection; it is an appreciation or an awareness of the act and its legal and moral consequences.

Second, the *M'Naghten* rule improperly confines the inquiry as to responsibility to the *effect* of mental illness or defect upon the accused's cognitive capacity; the finding must be that the accused did not *know* the *nature* or wrongfulness of his act. The limitation is, as Judge Cardozo pointed out, faithful neither to the facts of mental illness nor to the demands of legal, ethical, or social policies.[20] Mental illness may not destroy the minimal awareness required by the *M'Naghten* rule, but it may destroy the defendant's capacity to employ such knowledge in controlling his behavior. This point is related to the impairment of capacity to know. Capacity to know the nature and wrongfulness of conduct may not have been discernibly destroyed, yet the transformations in ability to cope with the external world, caused for instance by a severe psychosis, may have otherwise destroyed the individual's capacity for self-control. In such cases, *M'Naghten* holds the individual responsible. Yet it is the destruction of the capacity for self-control that warrants the special treatment of the irresponsible. Hence, the *M'Naghten* rule raises a distinction which requires a discrimination that is neither logical nor just. The proper test should be one which eliminates the possibility of that discrimination.

Still another difficulty is the degree to which a defendant's capacity to know must be impaired before the law holds him responsible for his criminal act. On its face, the *M'Naghten* rule calls for an impairment that is total; the accused *must not know*. This requirement of an absolute incapacity to know poses what some have thought to be the greatest problem in the just administration of the test. Even in the most extreme psychoses, there is often some residual capacity to know and to control; and, because of an examination after the event, the psychiatric expert can seldom testify on oath that at the time of the alleged crime the accused was totally bereft of knowledge or control. The witness is faced with a dilemma that sound legal policy ought not impose. In other situations where the facts of life do not allow an absolute appraisal, the law has been content to tolerate distinctions of degree. It would appear that such recognition is required here. People of relative sanity, to whom the threats of penal law often exert some deterrent force and who are in the range of influence of programs for correction differ from the seriously deranged because they possess an appreciable or substantial capacity to know and control their acts.

The Committee and Council have determined that the American Law Institute's Model Penal Code test provides the best opportunity for reconciling the traditional concept of moral and legal accountability with contemporary scientific approaches to mental illness and deficiency. The language of the proposal is taken from the New York adaptation of the ALI test. The Committee proposes the following:

> (1) A person is not criminally responsible for conduct if at the time of such conduct as a result of mental illness or defect he lacks substantial capacity:

[20] B. CARDOZO, LAW AND LITERATURE AND OTHER ESSAYS 108 (1930).

(a) To know or understand the wrongfulnesses of his conduct; or
AS (b) To conform his conduct into requirements of law.
) ised in this section, the terms "mental illness or defect" do not include an normality manifested only by repeated criminal or otherwise anti-social conduct.[21]

'he changes that the proposal would effect may be summarized as follows:
1) With respect to the question which now is material under *M'Naghten,* nquiry would be not merely whether the accused lacked knowledge of the re and wrongfulness of his behavior but also whether he was lacking in city to appreciate its wrongfulness. By adding the requirement of appreciato the knowledge, the courts might exercise some discretion in recognizing distinction between mere verbalization and a deeper comprehension. her, since the person who lacks capacity to know or to appreciate the re or quality of his acts is necessarily incapable of an appreciation of the ıgfulness of those acts, it is probably unnecessary to deal with the former ibility explicitly in stating the rule.
2) Instead of asking whether the defendant *did or did not know,* the .iry should be addressed to his *capacity* to know or to appreciate. Any testi-ıy by the psychiatric expert regarding the accused's mental state at a time ıe past, will necessarily involve his evaluation based upon an analysis of the ised's present powers or capacity. The law gains in clarity by making this icit.
3) The inquiry is not confined to the impairment of capacity to know ɔ appreciate the wrongfulness of the defendant's conduct. It extends also is capacity to conform his conduct to the requirements of the law. Both in ing with capacity to know or to appreciate and with capacity to conform, c ion is not whether the accused wholly lacked the requisite capacity whether he lacked substantial capacity, that is, the degree of capacity that esents a fair appraisal of the range of competence that excludes the diag-.s of severe mental illness or defect. The scope of that range is essentially a ɔlem for the scientist, to be reflected by the testimony of the expert witness, weighed and evaluated by the court and jury in light of common sense.
The purpose of paragraph (2) of the proposal is to exclude from the concept mental illness or defect"—and thus from a standard of irresponsibility—the alled psychopathic or sociopathic personality. These terms are used by some hiatrists to categorize persons who are insensitive to moral and social norms, videnced by their persistent and repeated criminal conduct. Those psychia-s who regard such persons as victims of illness do so either upon the theory their capacity to abide by the law is an element of mental health, con-ling that where it is absent, the patient is ill; or upon the theory that physical rder of this kind underlies all maladjustment, even though the present state nowledge may not serve to explain the nature of the mental disorder except erms of its result. This view is not generally accepted; and, therefore, this e of disorder is excluded from the concept.

[21] *Proposed Code* § 21-208.

B. *Other Conditions Limiting Criminal Capacity*

A number of other factors bear upon criminal responsibility. These concepts are found in the common law but are not embodied in the present criminal statutes. Hence, the inclusion of these concepts in the code is new, although to a considerable extent the content is embodied presently in the law. Intoxication is a defense only when it is the result of some involuntary circumstance.[22] However, involuntary intoxication is a defense only when it produces a disability comparable to that required by the defense of mental illness. The mere fact that the accused may have misjudged his capacity for liquor does not make the resulting intoxication involuntary. Although voluntary intoxication is not a defense to a crime, evidence thereof may be admitted as relevant to some particular intent or state of mind when such intent or state of mind is a necessary element of the crime charged. Compulsion is also recognized as a defense under certain circumstances. The person who acts on compulsion or threat of imminent death or great bodily harm may defend upon that ground except in cases involving intentional homicide. The proposal would not sanction one's taking the life of an innocent person in order to protect his own life.[23]

While Kansas has long recognized the defense of entrapment,[24] it has seldom been asserted effectively. By codification, the drafters have sought to clarify the status of the defense and to make it more usable. The defense is based upon the theory that improper law enforcement methods should be penalized and that depriving the officer who uses such methods of the fruits of his labor is a proper way of penalizing him. The defense is available only when the person doing the entrapping is a public officer. The defendant may raise the defense by showing that he was induced or solicited to commit a crime for the purpose of obtaining evidence with which to prosecute him. It will then be up to the state to prove that the methods of investigation used were proper within the standards established by the section.

Some criminal activity is particularly difficult to detect unless law enforcement officers are permitted to take initiative in the form of a solicitation. Under safeguards provided, an officer is permitted to initiate the transaction where the crime is of a type which is likely to occur and recur in the course of the de-

[22] *Proposed Code* § 21-209:
(1) The fact that a person charged with a crime was in an intoxicated condition at the time the alleged crime was committed is a defense only if such condition was involuntarily produced and rendered such person substantially incapable of knowing or understanding the wrongfulness of his conduct or of conforming his conduct to the requirements of law.
(2) An act committed while in a state of voluntary intoxication is not less criminal by reason thereof, but when a particular intent or other state of mind is a necessary element to constitute a particular crime, the fact of intoxication may be taken into consideration in determining such intent or state of mind.

[23] *Proposed Code* § 21-210:
(1) A person is not guilty of a crime other than murder or voluntary manslaughter by reason of conduct which he performs under the compulsion or threat of the imminent infliction of death or great bodily harm, if he reasonably believes that death or great bodily harm will be inflicted upon him or upon his spouse, parent, child, brother or sister if he does not perform such conduct.
(2) The defense provided by this section is not available to one who willfully or wantonly places himself in a situation in which it is probable that he will be subjected to compulsion or threat.

[24] State v. Leopold, 172 Kan. 371, 240 P.2d 138 (1952).

nt's business or activity. For example, if the defendant is in the business li toxicating liquors or if his activity is selling narcotics, it is permis- fo. law enforcement officer to solicit a sale. Willingness to sell to the l who pretends to be an ordinary patron is the basis for an inference that ıspect would make similar sales to other persons. In such a case, the idea mmitting the specific offense did not originate with the accused or a ıspirator; but since such crimes are difficult to detect and since the person ed intended to participate in unlawful conduct prior to police solicita- t seems proper to abandon the requirement that the idea of committing ime must originate with the accused in this kind of case.[25]

›nspiracy

present, Kansas has no general conspiracy statute; however, in a few ıces conspiracies to commit specific acts are made unlawful. For instance, iracies to engage in certain kinds of subversive activity,[26] to create an un- l assembly,[27] to kidnap,[28] to obstruct railroad business,[29] and to circulate umors concerning banks and other financial institutions[30] are made un- l. On the other hand, conspiracies to commit murder, robbery, rape, arson, em, and most other crimes are not punishable in Kansas; thus, for those s, there is no criminal liability until a completed crime or attempt is ly perpetrated. There is no ready rationale which justifies imposing ıal liability for conspiracies to commit traffic violations,[31] while those onspire to commit murder go unpunished. Therefore, the proposed code les a broad conspiracy prohibition drawn substantially in the terms of the l ıte.[32]

: le forty American jurisdictions now have statutes which prohibit con- ies varying widely in scope. One area of disagreement relates to whether of an overt act to carry out the conspiracy is necessary. At common law, agreement to commit a crime was sufficient basis for criminal liability, ıe federal act[33] and a majority of the American state statutes require some act implementing the criminal intent. The proposed section includes such ıirement.

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›posed Code § 21-211:
. person is not guilty of a crime if his criminal conduct was induced or solicited by a public r or his agent for the purposes of obtaining evidence to prosecute such person, unless:
a) The public officer or his agent merely afforded an opportunity or facility for committing rime in futherance of a criminal purpose originated by such person or a co-conspirator; or
b) The crime was of a type which is likely to occur and recur in the course of such person's ıess and the public officer or his agent in doing the inducing or soliciting did not mislead such n into believing his conduct to be lawful.
N. STAT. ANN. §§ 21-305 to -308 (1964).
N. STAT. ANN. §§ 21-1001, -1002 (1964).
N. STAT. ANN. § 21-402 (1964).
N. STAT. ANN. § 21-1903 (1964).
N. STAT. ANN. § 21-2452 (1964).
N. STAT. ANN. § 8-5,126 (1964).
›posed Code § 21-302.
U.S.C. § 371 (1964).

D. *Manslaughter*

One of the most troublesome areas of present Kansas criminal law is found in the statutes defining manslaughter. At least ten sections of the present statutes[34] define four degrees of manslaughter. Most of the definitions are not sufficiently general in character to be useful. Indeed, most are not definitions but are enumerations of circumstances under which a nonmalicious killing is manslaughter. The complexity is enhanced by reference to and incorporation of certain killings which would be murder or manslaughter at common law. The result is that distinctions between the several degrees of manslaughter, between manslaughter and negligent homicide, and between manslaughter and excusable and justifiable homicide are matters which confuse lawyers, judges, and jurors. The want of a rational basis for distinction renders the distinctions meaningless in practice. Conviction of a lesser degree of manslaughter or of negligent homicide often reflects no more than the persuasiveness of defense counsel or the benign disposition of the jury.

The drafters of the proposed code were aware that certain nonmalicious killings are more reprehensible than others and that some classification for the purpose of fixing penalty is a necessary response to prevailing attitudes. In their search for a rationale, the drafters of the proposed code found merit in the classification used in the federal statute[35] which follows a dichotomy found in the common law. The proposal is that there be two grades of manslaughter—voluntary and involuntary.[36] Voluntary manslaughter is the intentional killing of a human being without malice in a sudden quarrel or in the heat of passion. Involuntary manslaughter is the unintentional killing of a human being without malice while committing an unlawful act not amounting to felony or while committing a lawful act in an unlawful or wanton manner. The statute further provides that "an unlawful act" is any act prohibited by a statute of the United States, or the State of Kansas, or an ordinance of any city within the state which was enacted for the protection of life or safety. This seems to reflect the rule that has been adopted by the Supreme Court of Kansas.[37] The proposed classifications of manslaughter apparently include all acts which would be manslaughter under the present law of Kansas except assisting in self-murder, prohibited by Kan. Stat. Ann. § 21-408, and killing an unborn quick child, prohibited in Kan. Stat. Ann. § 21-409. The proposed code creates the separate crime of assisting suicide[38] and seeks to cover the substance of section 21-409 in the statute on criminal abortion.[39] The proposal would also place the crime of negligent homicide by a vehicle, now part of the traffic code,[40] in the criminal code. The offense has been renamed "vehicular homicide" and the statute

[34] KAN. STAT. ANN. §§ 21-407, 21-410 to -415, 21-418 to -420.
[35] 18 U.S.C. § 1112 (1964).
[36] *Proposed Code* §§ 21-403, -404.
[37] State v. Yowell, 184 Kan. 352, 336 P.2d 841 (1959).
[38] *Proposed Code* § 21-406.
[39] *Proposed Code* § 21-407.
[40] KAN. STAT. ANN. § 8-529(a) (1964).

ıerates with some particularity the vehicles whose operation may be in-
d hin the definition of the crime.[41]

iminal Abortion

he present law of Kansas authorizes therapeutic abortions only when sary "to preserve the life" of the mother.[42] Following the suggestion made e American Law Institute's Model Penal Code, the proposed code broadens ircumstances under which abortions may be performed. The recom- ed section[43] authorizes a licensed physician to terminate a pregnancy he believes that there is substantial risk that a continuance of the preg- would gravely impair the physical or mental health of the mother, that ild would be born with grave physical or mental defects, or when the ancy resulted from rape, incest, or other felonious intercourse. How- n the absence of an emergency which requires the abortion be performed diately in order to preserve the life of the mother, the abortion can be med only after three physicians have certified in writing their belief that stifying circumstances are present. The abortion can be lawfully per- d only in a licensed hospital or in such other place as may be designated v. The proposal is similar to legislation that has previously been before ansas legislature[44] and generally resembles statutes recently enacted in ıdo and North Carolina.

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l larceny at common law was felonious and, like most other common law es. was punishable by death. It was defined as the unlawful taking and n way of the personal property of another with intent to steal. An ial element of the crime was a trespassory taking. The courts, probably ated by a desire to avoid imposition of the extreme penalty required upon tion, narrowly limited the scope of the crime. This resulted in a large f theft outside the purview of larceny. To fill the gaps in the law other s of theft, such as embezzlement, false pretenses, and receiving stolen ty, were created and made punishable by a less severe penalty. All of rimes, like larceny, include the common element of obtaining the prop- f another by dishonest means. Thus, the distinctions among the several s are technical and historical and serve no present socially useful purpose. same time, these distinctions have made the law of theft unduly complex

posed Code § 21-405:
) Vehicular homicide is the killing of a human being by the operation of an automobile, ne, motor boat or other motor vehicle in a manner which creates an unreasonable risk of to the person or property of another and which constitutes a substantial deviation from the rd of care which a reasonable person would observe under the same circumstances.
) This section shall be applicable only when the death of the injured person ensues within ear as the proximate result of the operation of a vehicle in the manner described in subsection this section.
) Vehicular homicide is a Class A misdemeanor.
. STAT. ANN. § 21-437 (1964).
posed Code § 21-407.
. S.B. 343 (1963).

and have created unnecessary problems in pleading and proof. Therefore, the drafters of the proposal have consolidated the crimes, which are defined in some thirty sections of the present statutes, into the single, generic crime of theft, defined in fewer than one hundred words.[45] It is intended that the proposed crime of theft shall include all of the crimes presently identified as larceny, embezzlement, false pretenses, extortion, and receiving stolen property. Another suggested change would raise the line of demarcation between misdemeanor and felony theft from the present fifty dollars to one hundred dollars. This is done in recognition of current trends in the economy and with an awareness of the substantial penalties that may be imposed upon conviction of misdemeanor theft—up to one year in jail or a fine up to $2500 or both.

The proposed theft statute is augmented by special provisions prohibiting theft of lost or mislaid property. The statute makes unlawful the failure to take reasonable steps to restore such property to the owner by a finder, who has obtained control of such property, who knows or learns the identity of the owner thereof, and who intends to deprive the owner permanently of the possession, use, or benefit of the property.[46] Further, a general prohibition against theft of services is contained in another section.[47] This crime is defined as obtaining services from another by deception, threat, coercion, stealth, mechanical tampering, or the use of a false token or device. The term "services" includes but is not limited to labor, professional services, public utility or transportation service, entertainment, and supplying of equipment for use.

G. *Burglary*

Like larceny, the crime of burglary, at common law and under present Kansas statutes, has highly technical aspects. It consists of breaking and entering certain structures with intent to commit a felony or larceny therein. Three degrees of burglary are defined in the present statutes,[48] the gravity of the offense being determined by whether there was a human being in the structure at the time of the burglary, the kind of structure unlawfully entered, and whether the crime was committed during the daytime or the nighttime. One element of burglary is the unlawful breaking, but as the law has developed, the use of any force, however slight, to remove a barrier to entry is sufficient to constitute a breaking. Thus, pushing open an unlocked door or opening a partially opened window is sufficient to constitute the breaking required for burglary. The requirement of breaking in the present law seems to be an

[45] *Proposed Code* § 21-701:
Theft is any of the following acts done with intent to deprive the owner permanently of the possession, use or benefit of his property:
(a) Obtaining or exerting unauthorized control over property; or
(b) Obtaining by deception control over property; or
(c) Obtaining by threat control over property; or
(d) Obtaining control over stolen property knowing the property to have been stolen by another.
Theft of property of the value of $100 or more is a Class D felony. Theft of property of the value of less than $100 is a Class A misdemeanor.

[46] *Proposed Code* § 21-702.

[47] *Proposed Code* § 21-703.

[48] *See* KAN. STAT. ANN. §§ 21-513 to -525 (1964).

torical anomaly which now serves no useful purpose. Therefore, the pro-
ec de eliminates the breaking requirement. As proposed, burglary con-
s knowing entry without authority and with intent to commit a felony
heft.[49] Two degrees of burglary are proposed—simple burglary and aggra-
ed burglary. The distinction in degree is determined by whether there was a
nan being in the place in which the burglary was committed. Because of the
ater hazard to human safety, burglary in a place occupied by some human
ng is subjected to a more severe penalty. The proposal makes it clear that
awful entries into vehicles as well as fixed structures subjects the accused to
alty for burglary where the other elements are proven.

Eavesdropping

The protection of the citizen's right to privacy is a legitimate objective of
criminal law. Nearly forty years ago Justice Holmes described wire tapping
law enforcement officers as a "dirty business" in which government should
e no part.[50] The striking technological advances in devices for electronic
ction and recording of sound have greatly jeopardized the individual's right
e left alone. Today any telephone can be quickly transformed into a micro-
ne which transmits every sound in the room, even though the receiver is on
hook. Tiny microphones can be secreted behind pictures and at other in-
spicuous locations. Highly directive devices, known as parabollic micro-
nes, are capable of eavesdropping on a conversation in an office on the op-
te side of a 100 foot wide street even when the street is filled with traffic.
se considerations are adequate evidence to support the proposal that a new
ne eavesdropping should be created in Kansas. Actually, the proposal is
an novation; eavesdropping was a crime at common law.

The proposed section prohibits uninvited entry into a private place in order
sten or observe unless it is authorized by law.[51] It is anticipated that proced-
sections will be proposed which will authorize eavesdropping by law en-
ement officers under conditions properly controlled by a magistrate. Aside
n eavesdropping authorized by law, the proposal prohibits the use of any
ning or recording device in any place to intercept or record sounds emanat-
from a private place unless consented to by the person entitled to privacy
ein. The section does not, however, prohibit visual observation of an un-
ecting person, even though telescopic devices are used, if no unauthorized
r is made upon private premises in which the person observed is entitled to
cy. Hence, *A* may observe *B* without *B's* consent from any place open to
ublic or from the private premises of any person other than *B*. Also, *A* may
ograph *B* from such place so long as no device is used to aid hearing. The
on does prohibit the use of any hearing or recording device to intercept or
d sounds emanating from a private place regardless of the location of the

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[49] *Proposed Code* §§ 21-713, -714.
[50] Olmstead v. United States, 277 U.S. 438 (dissenting opinion).
[51] *Proposed Code* § 21-1001.

device, if the person entitled to privacy has not consented. The term "private place" is defined in the section as a place where one may reasonably expect to be safe from uninvited intrusion or surveillance, but it does not include a place to which the public has lawful access. The phrase, "person entitled to privacy therein" is not defined. Such a person probably can only be identified within the factual framework of each case. Generally, a person is entitled to privacy in a private place when he reasonably and without negligence believes that he is safe from uninvited intrusion or surveillance. The following examples may be illustrative of persons who in the absence of special circumstances are entitled to privacy: (1) any member of the household while in the home; (2) an invited guest in a private home; (3) a client or patient in the consultation room or private office of a professional man; (4) a business invitee while in a private office; (5) a person in consultation with a public official in the private office of such official; (6) a properly registered guest in a hotel room and the invitees of such guest.

The presence of intruding parties or the consent of the owner or occupant of the premises to the surveillance does not deprive the unsuspecting person of his status as a person entitled to privacy. To illustrate, *A* invites *B* to his hotel room to discuss a matter of business. *C*, with *A's* consent, hides in the closet of *A's* room and listens to and records the statements of *B*. *C's* conduct is unlawful. To the extent that *B* reasonably believed himself to be free from uninvited intrusion, he was entitled to privacy in *A's* room.

Eavesdropping is made a class A misdemeanor, punishable by up to one year in jail and a fine of up to $2500. In addition, any evidence obtained by eavesdropping is inadmissible in any civil or criminal trial, any administrative or legislative inquiry or proceeding, and any preliminary hearing or grand jury investigation.[52]

I. *Denial of Civil Rights*

The present law of Kansas proscribes discrimination on account of race, color, ancestry, national origin, or religion in the public schools, including colleges and universities, in hotels and restaurants, in places of public entertainment and amusement for which municipal licenses are required, in public transportation facilities, and in public employment.[53] Other antidiscrimination laws are not penal in character.[54] They simply authorize the Commission on Civil Rights to investigate and make findings in connection with certain unlawful discriminatory or employment practices and to enforce its orders through civil proceedings.

The new proposal would make it a misdemeanor to discriminate because of race, color, ancestry, national origin, or religion (1) in the enjoyment or use

[52] The rule requiring exclusion of evidence obtained by eavesdropping may be inappropriately located in the criminal code. If such a rule is adopted, perhaps it should be placed in KAN. STAT. ANN. ch. 60, art. IV.

[53] KAN. STAT. ANN. §§ 21-2424, -2461 (1964).

[54] KAN. STAT. ANN. §§ 44-1001 to -1013 (Supp. 1967).

all publicly owned or supported facilities or services, (2) in public accommodations and public recreational facilities, (3) in establishments rendering personal and professional services, (4) in public transportation facilities and (5) in transactions.[55] The facilities and services covered by the proposal are so basic to the concept of equality that discrimination in connection therewith seems a legitimate subject of criminal sanctions.

Other Recommended Changes

The foregoing are representative of sections in which significant amendments are proposed, with the objective being a more useful body of substantive criminal law. The enumeration could be extended. To illustrate, an effort is made to provide more effective tools for the control of unlawful assemblies, affrays, and incitements to riot.[56] The laws relating to the possession and use of weapons are amplified and strengthened.[57] The prohibitions against obscenity are redrafted consistent with the most recent standards found in Supreme Court decisions.[58] The entire body of law relating to gambling is reorganized and updated in an effort to present a more realistic approach than that reflected in the present gambling laws.[59] Special attention has been directed toward the establishment of new standards of business practices consistent with the realities of the business world and the protection of the public interest.[60]

VI. PENALTIES AND SENTENCING

In an effort to produce a more rational system of penalties, the proposal departs from the existing statutory pattern which prescribes the penalty for each enumerated crime in or near the section which defines or prohibits the conduct. Since statutes defining particular crimes have been enacted or amended at different times and under different conditions, the penalty often reflects the temper of the legislature which enacted it rather than the gravity of the crime to which it is affixed. The proposal seeks to set up simple classifications of crimes for the purpose of fixing penalties, to assign crimes of like gravity to the same class, and to provide uniform penalty limitations applicable to all crimes within the same class.[61] At the same time, it seeks to enlarge the discretion of the court

[55] *Proposed Code* § 21-1003.
[56] *Proposed Code* §§ 21-1101 to -1105.
[57] *Proposed Code* §§ 21-1201 to -1206.
[58] *Proposed Code* § 21-1301.
[59] *Proposed Code* §§ 21-1302 to -1308.
[60] *Proposed Code* art. XIV.
[61] *Proposed Code* art. XV. *Classification of Crimes and Penalties.*
21-1501. *Classification of Felonies and Terms of Imprisonment.* For the purpose of sentencing, the following classes of felonies and terms of imprisonment authorized for each class are established:
(a) Class A, the sentence for which shall be death or imprisonment for life. If there is a jury trial the jury shall determine which punishment shall be inflicted. If there is a plea of guilty or if the jury trial is waived the court shall determine which punishment shall be inflicted and in so doing shall hear evidence;
(b) Class B, the sentence for which shall be an indeterminate term of imprisonment, the minimum of which shall be fixed by the court at not less than five years nor more than fifteen years and the maximum of which shall be life;
(c) Class C, the sentence for which shall be an indeterminate term of imprisonment, the minimum of which shall be fixed by the court at not less than one year nor more than five years

in fixing penalty limitations. Except in a few instances, Kansas courts presently have no discretion in fixing terms of imprisonment for felonies. The minimum and maximum limits of the indeterminate sentence are established by statute, and the court must impose the sentence specified in the statute. Even where the habitual criminal penalty is to be imposed, the present system denies the court discretion to determine the effect of evidence of prior conviction. The court is authorized to impose the increased penalty only when evidence of prior convictions is formally produced by the county attorney, and when such evidence is introduced, the court must impose the penalty required by the act.[62]

For most felonies the proposed code sets up a system of indeterminate penalties with variable minimums. The maximum limit is fixed in the statute, but the minimum limit will be fixed by the court within a range prescribed by the statute. Thus, in the case of class B felonies, the statutory maximum is life imprisonment and the minimum may be fixed by the court at any term not less than five nor more than fifteen years. The court has discretion to vary the minimum penalty in accordance with the circumstances of the offense, the personality of the defendant, and his previous criminal record. Other relevant

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and the maximum of which shall be twenty years;

(d) Class D, the sentence for which shall be an indeterminate term of imprisonment, the minimum of which shall be fixed by the court at not less than one year nor more than three years and the maximum of which shall be ten years;

(e) Class E, the sentence for which shall be an indeterminate term of imprisonment, the minimum of which shall be one year and the maximum of which shall be five years.

(f) Unclassified felonies, which shall include all crimes declared to be felonies without specification as to class, the sentence for which shall be in accordance with the sentence specified in the statute that defines the crime; if no sentence is provided in such law, the offender shall be sentenced as for a Class E felony.

21-1502. *Classification of Misdemeanors and Terms of Confinement.* (1) For the purpose of sentencing, the following classes of misdemeanors and the punishment and the terms of confinement authorized for each class are established:

(a) Class A, the sentence for which shall be a definite term of confinement in the county jail which shall be fixed by the court and shall not exceed one year;

(b) Class B, the sentence for which shall be a definite term of confinement in the county jail which shall be fixed by the court and shall not exceed six months;

(c) Class C, the sentence for which shall be a definite term of confinement in the county jail which shall be fixed by the court and shall not exceed one month;

(d) Unclassified misdemeanors, which shall include all crimes declared to be misdemeanors without specification as to class, the sentence for which shall be in accordance with the sentence specified in the statute that defines the crime; if no penalty is provided in such law, the sentence shall be a definite term of confinement in the county jail fixed by the court which shall not exceed one year.

(2) Upon conviction of a misdemeanor, a person may be punished by a fine, as provided in K.S.A. 21-1503, instead of or in addition to confinement, as provided in this section.

21-1503. *Fines.* A person who has been convicted of a felony may, in addition to or instead of the imprisonment authorized by law, be sentenced to pay a fine which shall be fixed by the court as follows:

(a) For a Class B or C felony, a sum not exceeding $10,000;

(b) For a Class D or E felony; a sum not exceeding $5,000;

(2) A person who has been convicted of a misdemeanor may, in addition to or instead of the confinement authorized by law, be sentenced to pay a fine which shall be fixed by the court as follows:

(a) For a Class A misdemeanor, a sum not exceeding $2,500;

(b) For a Class B misdemeanor, a sum not exceeding $1,000;

(c) For a Class C misdemeanor, a sum not exceeding $500;

(d) For an unclassified misdemeanor, any sum authorized by the statute that defines the crime; if no penalty is provided in such law, the fine shall not exceed $2,500;

(3) As an alternative to any of the above, the fine imposed may be fixed at any greater sum not exceeding double the pecuniary gain derived from the crime by the offender.

[62] KAN. STAT. ANN. § 21-107(a) (1964).

criteria are set out in the proposal.[63] The proposal also contemplates increased u[illegible]f fines in felony cases.[64] In view of the increased discretion given to the co[illegible]t to fix minimum penalties, the continuation of the present habitual criminal law is not recommended. The view has been taken that the fixing of sentence is a judicial function over which the court should have ultimate control, within the limits fixed by the legislature. Under the proposal, evidence of prior convictions is relevant to the sentence imposed, but the court, not the prosecutor, is empowered to determine the effect to be given it. In addition, the court's power to impose the increased penalty is not conditioned upon the single fact of previous felony conviction.

The proposal to omit from the code the present habitual criminal law is likely to arouse concern. Prosecuting attorneys will feel that it unduly restricts the plea-bargaining process, a process which is recognized as a necessary technique in the expeditious administration of criminal justice. The prosecuting attorney will be deprived of his power to promise the accused that in return for a plea of guilty the increased penalty will not be imposed. The most that he can offer is a recommendation to the court for a low minimum. The drafters recognize that if the proposal is implemented, the prosecuting attorney may be deprived of some of his power to induce guilty pleas. On the other hand, it is believed that vesting the court with the power to determine the effect to be given prior criminal records is consistent with the better policy in the administration of criminal justice. Moreover, to the extent that the habitual criminal law may be used to induce the accused to forego his constitutional right to jury trial, it may be an unconstitutional limitation on the right to jury trial.[65]

VII. CONCLUSION

The present proposed revision of the substantive criminal law of Kansas represents the product of some four years of thought and work by a number of experts in the field. Still, its drafters are aware that in many instances other views may have merit and may present better solutions to the matters at hand. It is hoped that the published proposal may be recognized as a serious effort to suggest wholesome reforms in the criminal law of Kansas. In that spirit it is now open to scrutiny and evaluation by the bench, the bar, and the public with the hope that scrutiny and evaluation may produce constructive criticism which will result in improvement. It is finally desired that the proposal will be considered as a whole, and that no critic will condemn the entire proposal because of his disagreement with a particular feature.

[3] *Proposed Code* § 21-1607.
[4] *Proposed Code* § 21-1608.
[5] *See* United States v. Jackson, 88 S. Ct. 1209 (1968).