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# THE PROCESS OF PENAL LAW REFORM— A LOOK AT THE PROPOSED MICHIGAN REVISED CRIMINAL CODE

JEROLD H. ISRAEL †

THE subject of this symposium, the proposed Michigan Revised Criminal Code (Proposed Code),<sup>1</sup> is the product of a three-year study by a Joint Committee of the State Bar. The study was undertaken pursuant to a 1964 resolution of the State Bar Commissioners calling for a "complete revision of the criminal code to redefine crimes and penalties."<sup>2</sup> The Joint Committee is an extraordinarily large group, being composed of members of both the standing Criminal Jurisprudence Committee and the Special Code Revision Committee.<sup>3</sup> Its membership reflects great diversity in viewpoint and professional interests, including not only prosecutors, defense attorneys and judges, but also corrections officials, police officers and clergymen.<sup>4</sup> The Proposed Code is a product of the total committee and naturally reflects the give-and-take of any group effort of this type. Not every committee member agreed with every section, but they all concluded that the Proposed Code, taken as a whole, would represent a vast improvement over the current law. The objective of this article is to explain, in a general fashion, the basis for that conclusion.

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The author served as reporter for chapters 4, 10, 45-50 and 63 of the Proposed Code. The views expressed here do not necessarily reflect the position of the Joint Committee. In fact, the article will not have been read by the chairman or any other member of the Committee prior to publication. Representations concerning various arguments advanced within the Committee and information advanced to the Committee are based on the personal recollections of the author as well as Committee minutes.

1. Published in September 1967 by West Publishing Company. Copies may be obtained, if still available, from the offices of the State Bar, Lansing, Michigan. Alternative Draft proposals adopted on December 2, 1967, are also available from the State Bar. Throughout this article, the Proposed Code will be cited as Mich. Rev. Crim. Code (Final Draft 1967).

2. Mich. Rev. Crim. Code, Committee Foreword, at III (Final Draft 1967). See also Gilmore, Special Committee for the Revision of the Criminal Code, 45 Mich. S.B.J. 32 (Apr. 1966).

3. The Committee was chaired by Judge Horace W. Gilmore. Vice chairmen were Fred K. Persons and Judge Donald S. Leonard, both former chairmen of the Committee on Criminal Jurisprudence. Total membership exceeded 100 persons, although not all participated in the drafting and discussion sessions.

4. The Committee also included several general practitioners, who rarely handled criminal cases, state legislators, representatives of the attorney general's and governor's legal staffs, the Deans of the four Michigan law schools, criminal law teachers, and psychiatrists. The total membership is listed in the foreword to the final draft.

## I

## THE NEED FOR REVISION

The commissioners' call in 1964 for a complete revision of the criminal law was hardly radical or unprecedented.<sup>5</sup> There are movements in the field of law reform just as there are movements in the fields of art and politics; and revision of the substantive criminal law is clearly "the" law reform movement of the sixties. Over half the states have undertaken revisions of their criminal law in the last several years,<sup>6</sup> and a few had already completed the project, quite successfully, when the bar commissioners issued their resolution.<sup>7</sup> In part, this new emphasis on criminal law revision has been a product of the American Law Institute's Model Penal Code, which provided the first practical working model for code revision in over fifty years.<sup>8</sup> The main impetus, however, has come from a dramatic increase in criminal law litigation, clearly revealing the great degree to which our current law suffers from the infirmities of old age.<sup>9</sup>

On the basis of old age, the Michigan criminal code is probably as ripe for revision as any. Although our present criminal code is listed in the statute books as the Penal Code of 1931,<sup>10</sup> it might more accurately be described as the Penal Code of 1846,<sup>11</sup> supplemented by mostly minor additions in 1931. For in large part, the 1931 revision simply codified, consolidated and repeated the provisions of the initial

5. The commissioners action was later endorsed by the Senate in S. Con. Res. 157, 73d Leg., Reg. Sess., vol. 1, at 118 (1966), adopted by the House in H.R., Reg. Sess., vol. 1, at 151-52 (1966).

6. A Report by the President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 126 (1967); see Robinson, *Revisionists of the States Unite*, 5 *Am. Crim. L.Q.* 178 (1967).

7. Basic revisions had already been completed, for example, in Wisconsin, Minnesota, and Illinois. See Keeton & Reid, *Proposed Revision of the Texas Penal Code*, 45 *Texas L. Rev.* 399, 405 n.24, 407 (1967).

8. See Wechsler, *The American Law Institute: Some Observations on Its Model Penal Code*, 42 *A.B.A.J.* 321 (1956), and also Wechsler, *Foreword to Symposium on the Model Penal Code*, 63 *Colum. L. Rev.* 589 (1963). Actually the Wisconsin Code was completed in 1955 and offered an excellent working model. The ALI project, however, was started somewhat before then, and the first drafts were issued in 1953, although the final draft was not adopted until 1962. On the condition of criminal law reform prior to the ALI venture, see Cohen, *Criminal Law Legislation and Legal Scholarship*, 16 *J. Legal Ed.* 253 (1964). See also Bennett, *Louisiana Criminal Code of 1942*, 20 *U. Kan. City L. Rev.* 208 (1952).

9. It is interesting to note that the original impetus toward substantive criminal law reform in the late 1950's and early 1960's preceded most of the Supreme Court decisions broadening the constitutional rights of indigents. See, e.g., *Douglas v. California*, 372 U.S. 353 (1963); *Gideon v. Wainwright*, 372 U.S. 335 (1963). But see *Griffin v. Illinois*, 351 U.S. 12 (1956).

10. *Mich. Comp. Laws* § 750.1 (1948), *Mich. Stat. Ann.* § 28.191 (1962).

11. *Mich. Rev. Stat.* 1846, ch. 151-61.

code of 1846.<sup>12</sup> Ancient vintage, of course, is not always a detriment in statutory law, but in the case of a detailed criminal code, it often presents numerous difficulties. For one, the provisions usually are written in the language and style of another day. The Michigan provisions, for example, tend to be unnecessarily long and intricate, often using language which, while not quite archaic, is hardly within the common usage of today.<sup>13</sup> More significantly, a code adopted largely in 1846 tends to concentrate, naturally enough, upon the problems of society in 1846. Many of these problems—such as dueling,<sup>14</sup> inciting Indians to break treaties<sup>15</sup> and advertising cures for venereal disease<sup>16</sup>—are hardly the most pressing issues of today. Changes in social, economic and political institutions require the extension of criminal sanctions to new areas and the revision, and sometimes even elimination, of sanctions in old areas.

Actually even a penal code that had been totally revised in 1931 could not be expected to deal adequately with the vast changes in society that have occurred in just the last ten or fifteen years. New developments in the economic structure—the widespread use of credit; the recognition of new security interests in legislation like the Uniform Commercial Code; the use of services and rentals as major commodities on the market; and the creation of new items of value such as trading stamps and credit cards—would alone require significant changes in various provisions dealing with the misappropriation and destruction of property. Similarly, the tremendous expansion in the operations of government, accompanied by various changes in administrative functions, would require substantial alterations in the numerous

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12. Compare Mich. Comp. Laws § 750.11 (1948), Mich. Stat. Ann. § 28.201 (1962), with Mich. Rev. Stat. 1846, ch. 153, § 22; Mich. Comp. Laws § 750.81 (1948), Mich. Stat. Ann. § 28.276 (1962), with Mich. Rev. Stat. 1846, ch. 153, § 29; Mich. Comp. Laws § 750.83 (1948), Mich. Stat. Ann. § 28.278 (1962), with Mich. Rev. Stat. 1846, ch. 153, § 14; Mich. Comp. Laws § 750.117 (1948), Mich. Stat. Ann. § 28.312 (1962), with Mich. Rev. Stat. 1846, ch. 156, § 7; Mich. Comp. Laws § 750.149 (1948), Mich. Stat. Ann. § 28.346 (1962), with Mich. Rev. Stat. 1846, ch. 156, § 20; Mich. Comp. Laws § 750.249 (1948), Mich. Stat. Ann. § 28.446 (1962), with Mich. Rev. Stat. 1846, ch. 155, § 2; Mich. Comp. Laws § 750.316 (1948), Mich. Stat. Ann. § 28.548 (1954), with Mich. Rev. Stat. 1846, ch. 153, § 1; Mich. Comp. Laws § 750.423 (1948), Mich. Stat. Ann. § 28.665 (1954), with Mich. Rev. Stat. 1846, ch. 156, § 2.

13. Consider the terminology in the following: Mich. Comp. Laws § 750.339 (1948), Mich. Stat. Ann. § 28.571 (1954); Mich. Comp. Laws § 750.342 (1948), Mich. Stat. Ann. § 28.574 (1954); Mich. Comp. Laws § 750.379 (1948), Mich. Stat. Ann. § 28.611 (1954), and the intricacy of: Mich. Comp. Laws § 750.118 (1948), Mich. Stat. Ann. § 28.313 (1962); Mich. Comp. Laws § 750.125 (1948), Mich. Stat. Ann. § 28.320 (1962); Mich. Comp. Laws § 750.479 (1948), Mich. Stat. Ann. § 28.747 (1954).

14. Mich. Comp. Laws § 750.171 (1948), Mich. Stat. Ann. § 28.368 (1962).

15. Mich. Comp. Laws § 750.348 (1948), Mich. Stat. Ann. § 28.580 (1954).

16. Mich. Comp. Laws § 750.40 (1948), Mich. Stat. Ann. § 28.229 (1962).

provisions that affect public administration. Only in the area of physical violence and wanton depredations against property has the underlying institutional setting remained comparatively stable, and, even here unfortunately, the development of new devices for inflicting harm make necessary some modification of earlier legislation.

To some extent the changes needed to meet these new developments could be accomplished through piecemeal amendment of the 1931 code, rather than through a completely new revision. The piecemeal amendment process has, of course, been relied upon by the Michigan Legislature for the past thirty-seven years.<sup>17</sup> But this process of "continuous revision" through ad hoc legislation has serious limits.<sup>18</sup> For one, it rarely has completely satisfied the need for new sanctions. Amendments have usually been produced by particular pressures aimed at specific situations and have therefore failed to reflect the breadth of legislative perspective needed to meet a basic change in social or economic structure. For example, the Michigan Legislature has attempted to respond over the years to the developing importance of commercial services by the adoption of a series of provisions dealing with the misappropriation of such services in specific contexts. Special legislation has been adopted to cover the misappropriation of specific services, such as electricity, gas, lodging and the rental of motor vehicles.<sup>19</sup> While such legislation solved the immediate problem before the legislature at the time of each amendment, it hardly met the general gap in the law in dealing with commercial services. The current code still fails to deal adequately with the less frequently occurring situations in which other services are misappropriated, such as where an employee utilizes valuable machinery or the services of other employees for his own benefit.<sup>20</sup> To provide a satisfactory solution to the total problem of misappropriating commercial services, the legislature would have to reconsider the several general provisions that deal with the improper acquisition of property (*e.g.*, larceny,

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17. See, *e.g.*, Mich. Pub. Acts 1967, No. 255, §§ 157m-157u, Mich. Stat. Ann. §§ 28.354(13)-354(20) (Supp. 1968) (added in 1967 to meet deficiencies in general theft and fraud provisions as applied to credit cards).

18. See Remington, Criminal Law Revision Codification vs. Piecemeal Amendment, 33 Neb. L. Rev. 396 (1954).

19. See Mich. Comp. Laws § 750.282 (1948), Mich. Stat. Ann. § 28.493 (1962) (utility services); Mich. Comp. Laws § 750.292 (1948), Mich. Stat. Ann. § 28.503 (1962) (hotel, inn, restaurant or cafe); Mich. Pub. Acts 1966, No. 297, § 362a, Mich. Stat. Ann. § 28.594(1) (Supp. 1968) (rental of motor vehicles). Of course, the general false pretenses provision also includes services, see Mich. Comp. Laws § 750.218 (1948), Mich. Stat. Ann. § 28.415 (1962), but not all cases involving "theft" of services will also involve false pretenses.

20. See Mich. Rev. Crim. Code § 3220, Comment (Final Draft 1967).

embezzlement, fraudulent conversion and false pretenses), placing particular emphasis upon the interrelationship of the total group. This would involve a degree of revision that goes far beyond the past practice of patching and plugging.<sup>21</sup> Moreover, a similar approach would also be necessary in numerous other areas where piecemeal amendments have provided only partial solutions, such as the application of perjury and related provisions to the vastly increased number of application forms, returns and records that must be submitted to the government and the extension of various public mischief provisions to the ingenious use of new devices to harass individuals and disrupt government operations. When all of these areas are totaled it becomes obvious that a complete revision is the only satisfactory solution.

Yet, even if one assumes that piecemeal amendments have filled and could continue to fill the gaps created by new technological, economic and social developments, the heavy burden that the amendment process has placed on the structure, clarity and consistency of our criminal code would, in itself, justify a total revision. Almost every legislative term ten to thirty new provisions imposing significant criminal penalties have been added to the compiled laws.<sup>22</sup> In many

21. See p. 777 *infra*.

22. For 1966, the following public acts added major criminal provisions: Mich. Pub. Acts 1966, No. 68, § 493d, Mich. Stat. Ann. § 28.761(4) (Supp. 1968) (abandonment of refrigerator with locking device intact); Mich. Pub. Acts 1966, No. 69, § 211a, Mich. Stat. Ann. § 28.408(1) (Supp. 1968) (explosive devices); Mich. Pub. Acts 1966, No. 75, §§ 540c-540d, Mich. Stat. Ann. §§ 28.808(3)-808(4) (Supp. 1968) (device to avoid telecommunications service charges); Mich. Pub. Acts 1966, No. 78, § 297e, Mich. Stat. Ann. § 28.508(5) (Supp. 1968) (false representation of food products as kosher); Mich. Pub. Acts 1966, No. 100, § 227a, Mich. Stat. Ann. § 28.424(1) (Supp. 1968) (carrying of pistol by off-duty private policeman); Mich. Pub. Acts 1966, No. 117, § 17, Mich. Stat. Ann. § 18.1087 (Supp. 1968) (fraud in the procurement of narcotic drugs); Mich. Pub. Acts 1966, No. 134, § 12, Mich. Stat. Ann. § 7.456(12) (Supp. 1968) (unlawful use of document stamps in real property transfer); Mich. Pub. Acts 1966, No. 158, §§ 1-2, Mich. Stat. Ann. §§ 28.746(101)-746(102) (Supp. 1968) (public officials, willful non-enforcement of the law); Mich. Pub. Acts 1966, No. 166, § 141, Mich. Stat. Ann. § 28.336 (Supp. 1968) (minor under 17 unaccompanied by parent or guardian allowed to remain in place where liquor is sold); Mich. Pub. Acts 1966, No. 169, §§ 1-6, Mich. Stat. Ann. §§ 14.379(21)-379(26) (Supp. 1968) (violation of Immunization and Tuberculin Testing of Children Act); Mich. Pub. Acts 1966, No. 215, § 6, Mich. Stat. Ann. § 18.1106 (Supp. 1968) (Dangerous Drug Act—LSD, hallucinogens); Mich. Pub. Acts 1966, No. 218, § 15, Mich. Stat. Ann. § 18.170(15) (Supp. 1968) (unauthorized use of title: "professional community planner"); Mich. Pub. Acts 1966, No. 230, §§ 1-20, Mich. Stat. Ann. §§ 14.447(1)-447(20) (Supp. 1968) (violation of Public Swimming Pools Act); Mich. Pub. Acts 1966, No. 234, §§ 1-7, Mich. Stat. Ann. §§ 17.420(1)-420(7) (Supp. 1968) (violation of Emigrant Agent Act); Mich. Pub. Acts 1966, No. 235, § 728d, Mich. Stat. Ann. § 9.2428(4) (Supp. 1968) (falsification of traffic citations); Mich. Pub. Acts 1966, No. 272, § 414a, Mich. Stat. Ann. § 28.646(1) (Supp. 1968) (possession of motor vehicle master key); Mich. Pub. Acts 1966, No. 273, § 24, Mich. Stat. Ann. § 17.137(24) (Supp. 1968) (violation of Boiler Act); Mich. Pub. Acts 1966, No. 296, § 157a, Mich.

instances, these provisions were not included in the penal code, even though they created new crimes of a most serious nature. An offense relating to the unlawful sale of narcotics, for example, would be added to one of the general narcotic drug acts,<sup>23</sup> while provisions prohibiting forgery of such items as warehouse receipts or liquor tax stamps would be included respectively in the Uniform Warehouse Receipts Act or the liquor control acts.<sup>24</sup> Moreover, while these new provisions were being added here and there, little or no effort was made to repeal those earlier provisions that deal solely with problems of the past and no longer serve any useful function, except as a favorite source of material for the humorist. The result is a basic criminal law without any consistent framework, scattered throughout the compiled laws and cluttered with ancient irrelevancies.<sup>25</sup>

This state of disorganization has been further complicated by the duplication and overlap that has resulted from the narrow range of most of the piecemeal amendments. Thus, we have today over fifty Michigan statutes dealing with the offense of perjury, each prohibiting the same basic act (false swearing) in a different context.<sup>26</sup> A similar situation is found in numerous other areas, including trespass, malicious damage to property and abuse of public office.<sup>27</sup> Lines of distinction between the separate offenses in these areas often have no or little relation to the substantive nature of the offense involved. In the trespass area, for example, we have separate provisions prohibiting trespass upon huckleberry and blackberry marshes on the one hand<sup>28</sup> and

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Stat. Ann. § 28.354(1) (Supp. 1968) (conspiracy); Mich. Pub. Acts 1966, No. 297, § 362a, Mich. Stat. Ann. § 28.594(1) (Supp. 1968) (larceny of rented tangible property); Mich. Pub. Acts 1966, No. 299, § 479a, Mich. Stat. Ann. § 28.747(1) (Supp. 1968) (fleeing from or assaulting an arresting police officer); Mich. Pub. Acts 1966, No. 302, § 298a, Mich. Stat. Ann. § 28.509(1) (Supp. 1968) (false advertising of health services as endorsed by or under supervision of physician); Mich. Pub. Acts 1966, No. 319, §§ 539a-539i, Mich. Stat. Ann. §§ 28.807(1)-807(9) (Supp. 1968) (eavesdropping); Mich. Pub. Acts 1966, No. 320, § 7(11)(j), Mich. Stat. Ann. § 7.7(11)(j) (Supp. 1968) (false affidavit to avoid property tax). For additions during the 1967 term, see Department of State Police, Digest of Michigan Laws and Amendments Affecting Law Enforcement (1967).

23. See Mich. Comp. Laws § 335.154 (1948), Mich. Stat. Ann. § 18.1124 (1957).

24. See Mich. Comp. Laws § 444.107 (1948), Mich. Stat. Ann. § 19.527 (1964); Mich. Comp. Laws § 436.46a (1948), Mich. Stat. Ann. § 18.1017(1) (1957).

25. Compare the following articles commenting on similar inconsistencies in other states: Brumbaugh, *A New Criminal Code for Maryland?*, 23 Md. L. Rev. 1 (1963); Keeton & Reid, *supra* note 7; and Kessler, *An Indictment of the Pennsylvania Penal Code*, 29 Pa. B.A.Q. 311 (1958).

26. See Mich. Rev. Crim. Code § 4906, Comment (Final Draft 1967) (listing the various provisions).

27. See Commentaries to Mich. Rev. Crim. Code §§ 2607, 2707, 4806 (Final Draft 1967).

28. Mich. Comp. Laws § 750.549 (1948), Mich. Stat. Ann. § 28.817 (1954).

cranberry marshes on the other.<sup>29</sup> Moreover, these irrelevant distinctions are too frequently accompanied by partially inconsistent definitions of the requisite *actus reus* or *mens rea*, as well as considerable variation in penalty. The various false swearing provisions, for example, sometimes do and sometimes do not state that the false statement must meet a "materiality" requirement.<sup>30</sup> And the maximum punishment provisions for false swearing, even under relatively similar circumstances, may range from six months imprisonment in a county jail to fifteen years in a state prison. Thus, false swearing in a hearing before the insurance commissioner is punishable by fifteen years,<sup>31</sup> false swearing in a hearing before a conservation commissioner by five years<sup>32</sup> and false swearing in a hearing before the race track commissioner by six months.<sup>33</sup> The lack of correlation of penalties is even more striking when one examines the whole range of penal sanctions as they are allocated to somewhat related, but structurally different offenses. For example, while perjury before the fire commissioner is punishable by fifteen years imprisonment,<sup>34</sup> bribery of the same commissioner carries a maximum penalty of only four years.<sup>35</sup>

In sum, the process of piecemeal amendment of the Michigan code over the past thirty years, combined with the absence of a thorough revision for the past 100 years, has produced a penal law that accurately fits Professor Wechsler's often quoted description of American penal law in general:

[O]ur penal codes are fragmentary, old, disorganized and often accidental in their coverage, their growth largely fortuitous in origin, their form a combination of enactment and of common law that only history explains. . . . [Similarly,] [d]iscriminations that distinguish minor crime from major criminality, with large significance for the offender's treatment and his status in society, often reflect a multitude of fine distinctions that have no discernible relation to the ends that law should serve.<sup>36</sup>

29. Mich. Comp. Laws § 750.548 (1948), Mich. Stat. Ann. § 28.816 (1954).

30. Compare Mich. Comp. Laws § 471.26 (1948), Mich. Stat. Ann. § 22.346 (1935) and Mich. Comp. Laws § 117.25 (1948), Mich. Stat. Ann. § 5.2104 (1949), with Mich. Comp. Laws § 455.7 (1948), Mich. Stat. Ann. § 21.667 (1963) and Mich. Comp. Laws § 257.903 (1948), Mich. Stat. Ann. § 9.2603 (1960).

31. Mich. Comp. Laws § 500.248 (1948), Mich. Stat. Ann. § 24.1248 (1957); Mich. Comp. Laws § 750.422 (1948), Mich. Stat. Ann. § 28.664 (1954).

32. Mich. Comp. Laws § 319.11 (1948), Mich. Stat. Ann. § 13.139(11) (1967).

33. Mich. Comp. Laws § 431.36 (1948), as amended, Mich. Stat. Ann. § 18.966(6) (Supp. 1968).

34. Mich. Comp. Laws § 29.7 (1948), Mich. Stat. Ann. § 4.559(7) (1961); Mich. Comp. Laws § 750.423 (1948), Mich. Stat. Ann. § 28.665 (1954).

35. Mich. Comp. Laws § 750.117 (1948), Mich. Stat. Ann. § 28.312 (1962); Mich. Comp. Laws § 750.503 (1948), Mich. Stat. Ann. § 28.771 (1954).

36. Wechsler, *The American Law Institute: Some Observations on Its Model Penal Code*, 42 A.B.A.J. 321, 321-22 (1956).



Admittedly, such defects are not quite as significant in practice as they may appear on paper. The difficulties created by lack of organization and clarity are often overcome by the gradually developed expertise of the lawyer who continuously works with the criminal law. However, not even the most experienced lawyer is likely to be aware of every hidden provision or misleading title.<sup>37</sup> Similarly, inadequacies in coverage are usually offset by an ingenious prosecutor, always able to find some provision somewhere that relates to at least one aspect of the defendant's conduct, or a tolerant judge, willing to strain the language of an existing provision to encompass an act that clearly should be deemed criminal even if the statute might not clearly say so. So too, gross inconsistencies in penalties for similar acts often are neutralized by judicious use of plea bargaining. All of this, of course, comes at a cost—in time, effort and the dignity of the criminal law.<sup>38</sup> The State Bar Commissioners, in proposing a total revision of the code, obviously felt that this was an extravagant expenditure of society's resources. The committee assigned to draft the Proposed Code clearly shared that view. Accordingly, its primary goal in revising the criminal law was to produce a rational, consistent and clearly expressed code that would facilitate and, indeed, encourage a more efficient and more equitable administration of the criminal law.

## II

### THE COMMITTEE'S GOAL

It should be emphasized that the Committee's goal was fairly limited. The Committee did not view its task as one of general social reform; no attempt was made to institute any new penal or correctional philosophies.<sup>39</sup> Its primary aim simply was to eliminate the

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37. As for hidden provisions see, e.g., Mich. Comp. Laws § 750.306 (1948), Mich. Stat. Ann. § 28.538 (1954). The second paragraph of this provision creates a *prima facie* presumption that is totally unnecessary for the provision, but would be helpful under such sections as Mich. Comp. Laws § 750.302 (1948), Mich. Stat. Ann. § 28.534 (1954), and Mich. Comp. Laws § 750.373 (1948), Mich. Stat. Ann. § 28.605 (1954). As for misleading titles see, e.g., Mich. Comp. Laws § 750.213 (1948), Mich. Stat. Ann. § 28.410 (1962).

38. It is no answer that this complexity has become familiar to those experienced in the criminal law. Education in the unnecessary intricacies of the present substantive law takes time and expense which is unwarranted whether borne by the state, the client, or the lawyer himself. Efficiency of administration which would result from a rational, consistent and clearly expressed criminal law ought to result in a saving to both the state and the defendant. Nowhere is adequate legal assistance at minimum cost needed more than in the field of criminal law.

Remington, *supra* note 18, at 401 (footnote omitted).

39. The argument has been advanced that the Proposed Code rejects "retribution" as a proper basis for imposing punishment. Retribution is not an easily definable term. Some views of retribution clearly are not adopted in the Proposed Code, but neither

structural defects of the present law. The Committee sought first to improve code organization through elimination of inconsistent, overlapping and obsolete sections and rearrangement of the remaining basic provisions. It sought to avoid the needless complexity of the present law by restatement of basic offenses in modern language without the excessive duplication and verbosity of current sections. It attempted to plug loopholes in coverage by extension of principles incorporated in present sections, as well as by elimination of technical distinctions that no longer make any functional sense. At the same time, it also sought to eliminate potential maladministration by narrowing vague and overly broad provisions that extended far beyond the basic evil at which they were aimed. Finally—and for most members this was the most crucial task—the Committee sought through various devices to harmonize penalties in accordance with both the severity of the act involved and the treatment of related offenses.

In large part, these reforms relate more to form than substance. Moreover, even where a proposed revision is primarily substantive, it usually reflects only a minor extension or modification of existing policy. In about ten or twelve instances, however, the Committee did feel compelled to propose basic changes in substantive policy. Most of these changes concern the penalty structure, as opposed to the definition of offenses. In several areas, for example, the Proposed Code advocates use of new and quite different lines of demarcation in distinguishing between higher and lower level offenses. One or two substantial innovations are also suggested in the allocation of sentencing authority. The few basic changes in the definition of offenses are found primarily in the general article on sex offenses and the individual provisions on abortion and the justifiable use of force. With the exception of the change in the abortion law, these proposals probably would have considerably more theoretical than practical significance. Also, although they do reflect revisions of basic policy, these reforms are all based on the same fundamental assumptions as underlie our present law. Proposals for new, non-criminal law oriented approaches to the treatment of various problems, such as prostitution and narcotics, were left to be considered by other groups at other times. The changes proposed by the Committee are all based on an evaluation of new developments in scientific knowledge and institutional settings in the light of the traditional functions of the criminal law.

Most of the dozen or so basic policy changes contained in the

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are they adopted in the current code. Insofar as retribution is defined in terms of prohibiting morally culpable conduct, the Proposed Code clearly recognizes this concept, as evidenced by § 105(a) and all of its basic provisions.

Code are discussed at length in the *Wayne Law Review's* student comments. The *Review's* concentration on these proposals is entirely appropriate since they are probably the most intellectually challenging and clearly the most controversial segments of the Proposed Code. They are not, however, the crux of the Committee project.<sup>40</sup> The primary significance of the Proposed Code lies in the improvement of the clarity, organization and correlation of the penal law that stems from viewing the law as a whole. Accordingly, these are the factors upon which this article concentrates. It is the first of two articles on the Proposed Code and will deal primarily with changes in the structure of the Proposed Code and the definitions of substantive crimes. A second article will consider the proposals relating to penalties.

### A. Improving Organization

The Committee's first task in improving the organization of the penal law was to engage in a thorough job of statutory housekeeping. The present penal law consists of approximately 3,500 sections scattered throughout the compiled laws. The Proposed Code provides the same basic coverage with 350 sections located in a single act.<sup>41</sup> This dramatic reduction in the bulk of the criminal law was achieved in several ways. Many provisions dealing with problems of a different era were eliminated as obsolete. Some, like the prohibition against using the name of a former president in advertising liquor, simply are no longer appropriate subjects for the criminal law.<sup>42</sup> Others, like the provisions on dueling and train robberies, would still be covered under various general offenses but are no longer of sufficient concern to justify separate provisions.<sup>43</sup> Still others, like several provisions on

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40. In several areas, alternative proposals have been drafted for legislative consideration should the Committee recommendations be rejected. See note 1 *supra*.

41. Of course, not all of the 3,500 provisions replaced by the Proposed Code would be repealed. At least 1,000 are regulatory provisions that would still be retained, although no longer including separate penalty provisions. See p. 785 *infra*. Similarly, of the approximately 770 provisions in the present penal code, approximately 70 would be transferred to general regulatory provisions, with the remainder being replaced by the Proposed Code. In sum, including provisions within and without the criminal code, approximately 1,500 to 2,000 provisions would be repealed.

42. Mich. Comp. Laws § 750.42 (1948), Mich. Stat. Ann. § 28.231 (1962). See also Mich. Comp. Laws § 750.34 (1948), Mich. Stat. Ann. § 28.223 (1962) (prohibiting *inter alia* advertising the restoration of "Lost manhood"); Mich. Comp. Laws § 750.102 (1948), Mich. Stat. Ann. § 28.297 (1962) (prohibiting blasphemy); Mich. Comp. Laws § 750.348 (1948), Mich. Stat. Ann. § 28.580 (1954) (prohibiting inciting Indians).

43. On dueling see Mich. Comp. Laws § 750.171 (1948), Mich. Stat. Ann. § 28.368 (1962); Mich. Comp. Laws § 750.173 (1948), Mich. Stat. Ann. § 28.370 (1962); Mich. Comp. Laws § 750.319 (1948), Mich. Stat. Ann. § 28.551 (1954). These activities would be proscribed by general provisions on assault, misuse of firearms, homicide, etc. On train robberies see Mich. Comp. Laws §§ 750.514, .516-.517 (1948), Mich.

criminal syndicalism and obscenity, are clearly unconstitutional under federal and state court rulings.<sup>44</sup> In most instances, these sections had been partially replaced by later enactments, but the earlier provisions were never repealed.<sup>45</sup> Still other provisions are no longer necessary in light of recent judicial developments that would be reaffirmed in the Proposed Code.<sup>46</sup> For example, an extremely narrow interpretation of the law of attempts once led the legislature to adopt a series of provisions dealing with specific acts that would today be clearly punishable as attempts.<sup>47</sup> Thus, a provision prohibiting the arrangement of combustible material about a building with intent to set it afire could easily be omitted from the existing code since such activity would now be treated directly as attempted arson.<sup>48</sup>

Although considerable legislative deadwood is eliminated, the most substantial reduction in the present legislative clutter comes from the consolidation of various related provisions. About one-half of the individual sections in the Proposed Code each replace two or more provisions in the present law. In some areas, such as malicious damage to property, a single section replaces as many as thirty or forty of our present provisions.<sup>49</sup> Ordinarily, wherever a series of

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Stat. Ann. §§ 28.782, .784-.785 (1954). These provisions would be replaced by general provisions prohibiting robbery, theft, etc.

44. Compare Mich. Comp. Laws § 750.142 (1948), Mich. Stat. Ann. § 28.337 (1962), with *Winters v. New York*, 333 U.S. 507 (1948), and *Police Comm'r v. Siegel Enterprises, Inc.*, 223 Md. 110, 162 A.2d 727 (1960); Mich. Comp. Laws § 750.143 (1948), Mich. Stat. Ann. § 28.338 (1962), with *Butler v. Michigan*, 352 U.S. 380 (1957); Mich. Comp. Laws § 750.47 (1948), Mich. Stat. Ann. § 28.236 (1962), with *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), and *Harris v. Younger*, 281 F. Supp. 507 (C.D. Cal. 1968); Mich. Comp. Laws § 750.48 (1948), Mich. Stat. Ann. § 28.237 (1962), with *Stromberg v. California*, 283 U.S. 359 (1931). But see *People v. Immonen*, 271 Mich. 384, 261 N.W. 59 (1935).

45. See, e.g., Mich. Comp. Laws § 750.343e (1948), as amended, Mich. Stat. Ann. § 28.575(5) (Supp. 1968), replacing Mich. Comp. Laws § 750.143 (1948), Mich. Stat. Ann. § 28.338 (1962).

46. Similarly, several provisions were omitted because the subsequent adoption of federal legislation rendered them obsolete. This was true, for example, of provisions prohibiting derogatory statements about financial institutions. See Mich. Rev. Crim. Code § 4240, Comment (Final Draft 1967) (note on commercial slander).

47. Compare *People v. Youngs*, 122 Mich. 292, 81 N.W. 114 (1899), with *People v. Coleman*, 350 Mich. 268, 86 N.W.2d 281 (1957). *Coleman* cites with approval the broad view of attempts taken by the California courts. See *People v. Miller*, 2 Cal. 2d 527, 530-32, 42 P.2d 308, 309-10 (1935).

48. Mich. Comp. Laws § 750.77 (1948), Mich. Stat. Ann. § 28.272 (1962). See also Mich. Comp. Laws § 750.205 (1948), Mich. Stat. Ann. § 28.402 (1962).

49. See Mich. Rev. Crim. Code §§ 2705-07, Comments (Final Draft 1967), listing the various statutes replaced by those sections and §§ 2711-12. The malicious destruction statutes are extremely limited, even to the point of prohibiting destruction of specific property in a particular location. See, e.g., Mich. Comp. Laws § 317.283 (1948), Mich. Stat. Ann. § 13.1113 (1967) (prohibiting destruction of submarine vegetation on reserves in Wayne and Monroe counties).

current provisions all prohibit the same basic act and differ only as to the individual subject injured by the act, they are replaced in the Proposed Code by a general prohibition applicable to the total class of subjects. Thus, a general provision prohibiting intentional false alteration of public records replaces a series of individual provisions prohibiting the alteration of specific records, such as birth records, school records, retirement system records, etc.<sup>50</sup> Of course, in some cases the difference in affected subject matter so altered the seriousness of the crime that the several separate provisions could not appropriately be consolidated into one or two general sections.<sup>51</sup> Normally, however, the differences had so little relation to the statutory function that numerous provisions were easily consolidated in a single section. Certainly, there was no functional difference between the five provisions prohibiting falsification on applications under the separate state retirement systems for legislators, state employees, probate judges, other judges and school employees.<sup>52</sup> Nor could any need be found for retaining separate provisions prohibiting the act of tampering with the property of water power companies in the Lower Peninsula, water companies in the Upper Peninsula, electric or gas power companies and telephone companies.<sup>53</sup> These and similar provisions were easily replaced by general sections prohibiting respectively, false statements in governmental applications for pecuniary benefits<sup>54</sup> and tampering with the property of utilities.<sup>55</sup> Various other sections of the Proposed Code, particularly those found in Titles B, C and D (dealing with offenses against property) perform a similar function.

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50. See Mich. Rev. Crim. Code § 4555, Comment (Final Draft 1967). Michigan does have a current provision prohibiting destruction of all public records, Mich. Comp. Laws § 750.491 (1948), as amended, Mich. Stat. Ann. § 28.759 (Supp. 1968), but that provision does not include false alteration.

51. See, e.g., Mich. Rev. Crim. Code § 4515, Comment (Final Draft 1967) (failure to file a required report).

52. See Mich. Comp. Laws § 38.1058 (1948), Mich. Stat. Ann. § 2.169(58) (1961) (legislators); Mich. Comp. Laws § 38.42 (1948), Mich. Stat. Ann. § 3.981(42) (1961) (employees); Mich. Comp. Laws § 38.351 (1948), Mich. Stat. Ann. § 15.893(91) (1968) (school employees); Mich. Comp. Laws § 38.929 (1948), Mich. Stat. Ann. § 27.3178 (1962) (probate judges); Mich. Comp. Laws § 38.828 (1948), Mich. Stat. Ann. § 27.125 (28) (1962) (other judges).

53. See Mich. Comp. Laws § 486.112 (1948), Mich. Stat. Ann. § 22.1642 (1937) (water power companies); Mich. Comp. Laws § 486.212 (1948), Mich. Stat. Ann. § 22.1662 (1937) (Upper Peninsula power companies); Mich. Comp. Laws § 750.282 (1948), Mich. Stat. Ann. § 28.493 (1962) (water, steam, gas and electric power); Mich. Comp. Laws § 484.6 (1948), Mich. Stat. Ann. § 22.1415 (1937) (telephone companies). Insofar as these provisions prohibit malicious destruction or theft of services, they are replaced by Mich. Rev. Crim. Code §§ 2705-07, 3220 (Final Draft 1967).

54. See Mich. Rev. Crim. Code § 4940, Comment (Final Draft 1967). See also *id.* § 4910 (false swearing).

55. *Id.* § 2711.

Although consolidation was a very effective means of reducing legislative clutter, the Committee did not carry this technique to its logical extreme. For example, while many current offenses that basically punish only attempts or solicitations to commit a particular crime were absorbed into the general attempt and criminal solicitation provisions,<sup>56</sup> others in the same category were retained as separate provisions because they dealt with crimes so frequently prosecuted that a separate statute was administratively convenient. Thus, the Proposed Code contains several forgery provisions although most probably encompass no more than an attempted theft by false pretenses.<sup>57</sup> Similarly, where statutes dealt with separate but closely related types of conduct—as opposed to statutes barring exactly the same conduct as applied to different subjects—no attempt was made to consolidate if the provisions were generally recognized as separate offenses serving even slightly different functions. The one exception in this regard was in the consolidated theft provision discussed at length in a later Comment in this symposium.<sup>58</sup> There, the various provisions combined in a single section (larceny, embezzlement, fraudulent conversion and false pretenses) served essentially the same function. The technical distinctions that separated these offenses—such as the distinction between taking title without consent and taking a possessory interest with consent and subsequently converting—had no relationship to the essential criminality of the act involved. Moreover, as noted in the Comment on theft offenses, these distinctions create serious procedural pitfalls which could result in appellate reversals of otherwise proper convictions.<sup>59</sup> Consolidation in this case accordingly was based as much on the need to facilitate effective use of the theft provisions (while affording the defendant adequate notice) as on the need to eliminate duplication and overlap. Even so, the theft provision also eliminated a great deal of duplication by combining *inter alia* a lengthy series of separate statutes barring embezzlement by such diverse parties as bank tellers, railroad conductors, insurance agents, etc.<sup>60</sup>

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56. See, e.g., Mich. Comp. Laws § 750.425 (1948), Mich. Stat. Ann. § 28.667 (1964) (attempting to incite or procuring one to commit perjury). Other provisions that were included within the general concept of accessorial liability, Mich. Rev. Crim. Code § 415 (Final Draft 1967), were also omitted. See, e.g., Mich. Comp. Laws § 750.424 (1948), Mich. Stat. Ann. § 28.666 (1956) (subornation of perjury).

57. See Mich. Rev. Crim. Code §§ 4001-07, Comments (Final Draft 1967).

58. See Comment, The Michigan Revised Criminal Code and Offenses Involving Theft, 14 Wayne L. Rev. p. 969 *infra*.

59. See *id.* at 984-85. These difficulties remain despite Mich. Comp. Laws § 767.44 (1948), Mich. Stat. Ann. § 28.984 (1954), and Mich. Comp. Laws § 767.60 (1948), Mich. Stat. Ann. § 28.1000 (1954).

60. See Mich. Rev. Crim. Code §§ 3205-08, Comments at 228-29 (Final Draft 1967)

Aside from reducing the bulk of the criminal law, the Committee also sought to facilitate efficient utilization of that law by placing all of the basic criminal provisions within the criminal code. In part, this was assisted by consolidation since most of the sections eliminated as merely duplicative of general provisions were located outside the current code. Other important provisions, however, had to be moved from various sections of the compiled laws into the Proposed Code. These included provisions dealing with such subjects as defrauding judgment creditors and illegal sale of narcotics.<sup>61</sup> The only offenses left out of the Proposed Code were those relating to election laws, liquor regulation, fish and game laws, and business regulation.<sup>62</sup> Even in these areas, however, where it was possible to include a general penalty provision supporting the various regulations, this was done. For example, a special section was added making it a misdemeanor to engage in an occupation for which a license is required without obtaining a license, or to intentionally engage in a licensed occupation contrary to any valid regulation.<sup>63</sup> These are essentially "piggyback" or "tie-in" provisions since their operation depends upon the basic regulatory statutes that determine when a license is required and what conduct is contrary to permissible practice in the occupation.<sup>64</sup> Their location in the criminal code insures that penalties for the several hundred occupational licensing regulations will be treated with some sense of consistency as they relate both to each other and to other offenses. At the same time, proper cross-reference to the criminal code in the basic regulatory statute will afford adequate notice of potential penalties for violation of the regulations. In sum, although there may be some provisions that have unintentionally been overlooked, the Proposed Code would reestablish the criminal code as the general source of the penal law.

The Proposed Code also improves the organization of the criminal code through a more efficient arrangement of the various offenses within the code. The present penal code follows an alphabetical list-

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(listing the various statutes). The theft section also consolidates a series of provisions dealing with larceny of specific property, e.g., livestock, trees, railroad passenger tickets, etc. See *id.* at 227.

61. See *id.* §§ 4135, 6005-07 (Final Draft 1967), replacing Mich. Comp. Laws § 600.6085 (1948), Mich. Stat. Ann. § 27A.6085 (1962) and Mich. Comp. Laws § 335.152 (1948), Mich. Stat. Ann. § 18.1122 (1957).

62. Current criminal code provisions regulating general business practices would be moved out of the code. See, e.g., Mich. Comp. Laws § 750.354 (1948), Mich. Stat. Ann. § 28.586 (1954) (insurance with a particular company); Mich. Comp. Laws § 750.355 (1948), Mich. Stat. Ann. § 28.587 (1954) (water closets); Mich. Comp. Laws § 750.428 (1948), Mich. Stat. Ann. § 28.683 (1954) (fee-splitting by physicians).

63. Mich. Rev. Crim. Code §§ 4230-35 (Final Draft 1967).

64. See *id.*, Comments.

ing of offenses that has been somewhat less than satisfactory. Even for the experienced prosecutor who realizes that deviate sexual behavior might fall under "C" for Crimes Against Nature or "I" for Indecency and Immorality, there remain idiosyncracies that are not readily fathomed by either logic or imagination. Setting fire to a public hotel is not found under "A" for Arson or "M" Malicious Mischief, but under "P" for Public Safety.<sup>65</sup> A fictitious report of a crime to the police falls under "M" for Miscellaneous if given to the police directly, but "R" for Radio Broadcast if communicated to a police broadcasting station.<sup>66</sup> The dumping of garbage in a river falls under "B" for Breaking and Entering.<sup>67</sup>

The Committee felt that these anomalies were almost inherent in the alphabetical system. Moreover, that system simply could not provide the lawyer with a sufficient sense of the interrelationship of various offenses to assist him in finding all the sections relevant to a particular problem. The Proposed Code therefore discards the alphabetical listing in favor of a schematic arrangement classifying crimes according to their basic thrust and relationship to each other. This type of topical arrangement has been adopted in all of the modern penal codes and was essentially the arrangement adopted in the original Michigan code. The present alphabetical listing was basically the product of the 1931 compilers, not the original legislature.<sup>68</sup> As utilized in the Proposed Code, all offenses are divided into nine major categories: offenses involving danger to the person (*e.g.*, homicide, assault); offenses involving damage to or intrusion upon property (*e.g.*, trespass, burglary, arson); theft and related crimes (*e.g.*, robbery); forgery and fraudulent practices (*e.g.*, false advertising); offenses

65. See Mich. Comp. Laws § 750.496 (1948), Mich. Stat. Ann. § 28.764(1) (1954).

66. See Mich. Comp. Laws § 750.411a (1948), Mich. Stat. Ann. § 28.643(1) (1954); Mich. Comp. Laws § 750.509 (1948), Mich. Stat. Ann. § 28.777 (1954). Similarly, furnishing obscene books to children falls under "C" for Children, Mich. Comp. Laws § 750.142 (1948), Mich. Stat. Ann. § 28.337 (1962), but using obscene language in front of children comes under "I" for Indecency and Immorality, Mich. Comp. Laws § 750.337 (1948), Mich. Stat. Ann. § 28.569 (1954). Also, throwing a stone at a train comes under "M" for Malicious Mischief, while uncoupling railroad cars comes under "R" for Railroads. See Mich. Comp. Laws § 750.394 (1948), Mich. Stat. Ann. § 28.626 (1954); Mich. Comp. Laws § 750.512 (1948), Mich. Stat. Ann. § 28.780 (1954).

67. See Mich. Comp. Laws § 750.110b (1948), as amended, Mich. Stat. Ann. § 28.304(2) (Supp. 1968). Similarly, selling explosives to a minor is placed within the homicide chapter rather than the chapters on explosives or children. See Mich. Comp. Laws § 750.327a (1948), as amended, Mich. Stat. Ann. § 28.559(1) (Supp. 1968).

68. The criminal code was arranged on a topical basis until 1931. See Mich. Comp. Laws tit. 28 (1929). Several of the basic divisions of the Proposed Code are similar to those used in the 1929 compilation. Compare, *e.g.*, respectively Mich. Comp. Laws tit. 28, chs. 276, 280, 284 (1929), with Mich. Rev. Crim. Code tit. F, A, D (Final Draft 1967).



against public administration (e.g., bribery, perjury); offenses against public order (e.g., riot); offenses against public health and morals (e.g., narcotics, obscenity); and offenses against the family (e.g., bigamy). Of course, any organization will have its defects, and the topical arrangement is no exception. One could quarrel at length as to whether sex offenses should be classified as offenses involving danger to the person (e.g., forcible rape) or offenses against morals (e.g., statutory rape). However, any difficulties of this sort can be handled by cross-indexing, and experience in other states indicates the topical arrangement clearly is more efficient, particularly after amendments are added, than the present system.

### *B. Making the Code Comprehensible and Complete*

*Improving the language and structure of individual provisions.* Clarity and simplicity of expression are important attributes of any law, but they are especially important in our criminal law. For the criminal law often represents to the public the basic standard for judging all law. Of course, the layman can hardly expect the criminal code to be so clear and complete that he never has need for a lawyer, but he can anticipate that a careful reading of the code will at least make evident the main thrust of each crime. Unfortunately, the language and structure of many current provisions are so complex as to confuse not only the layman, but many inexperienced lawyers as well<sup>69</sup>—a particularly disturbing consequence today when so much of the burden of criminal defense work rests with younger, court-appointed attorneys. The Proposed Code seeks to remedy this difficulty in several ways.

First, the Proposed Code seeks to follow Justice Traynor's famous mandate to "rewrite the criminal law in New English."<sup>70</sup> Wherever possible everyday language is used in describing each offense.<sup>71</sup> When

69. See, e.g., Mich. Comp. Laws § 750.479 (1948), Mich. Stat. Ann. § 28.747 (1954) (resisting officer in discharge of duty); Mich. Comp. Laws § 750.131 (1948), as amended, Mich. Stat. Ann. § 28.326 (Supp. 1968) (drawing checks without sufficient funds); Mich. Comp. Laws § 750.136 (1948), Mich. Stat. Ann. § 28.331 (1962) (cruelty to children).

70. Traynor, *A Time to Build Up*, 35 Cal. S.B.J. 219, 224 (1960).

71. Compare, e.g., Mich. Rev. Crim. Code §§ 2310-25 (Final Draft 1967), with Mich. Comp. Laws § 750.158 (1948), Mich. Stat. Ann. § 28.355 (1962); Mich. Comp. Laws § 750.338 (1948), Mich. Stat. Ann. § 28.570 (1954); Mich. Comp. Laws § 750.339 (1948), Mich. Stat. Ann. § 28.571 (1954); Mich. Comp. Laws § 750.520 (1948), Mich. Stat. Ann. § 28.788 (1954). Throughout the sex offense area terms like "abominable and detestable crime against nature," "gross indecency," "debauch" and "carnally know" were replaced with more common terminology such as "sexual intercourse," "sodomy," etc. Similar simplification of language, although involving quite different terms, was employed in other areas.

technical terms like "materially false statement" and "deviate sexual intercourse" are used, they are always defined at length, substantially in lay language.<sup>72</sup> In cases where judicial gloss has long made legal terminology inconsistent with ordinary understanding, the Proposed Code substitutes new, more accurate terminology.<sup>73</sup> Thus "malice aforethought," which clearly does not require true malice,<sup>74</sup> is replaced by a requirement of intent.

Some lawyers have expressed concern that the employment of "new" terms or specific definitions for old terms will only result in increased litigation. This hardly seems likely if the courts recognize that the new definitions are designed merely to restate the current law in a more comprehensible fashion. Surely, the substitution of a term like "sexual intercourse" for "carnal knowledge" should not give rise to serious litigation, particularly since the new definition includes an explicit statement of the "slight penetration" rule.<sup>75</sup> On the contrary, experience in other jurisdictions indicates that the increased clarity of such definitions cuts down on litigation by reducing the areas for reasonable disputes over statutory interpretation.<sup>76</sup>

The Proposed Code also attempts to increase comprehensibility by eliminating the excessive verbiage so often found in the present provisions. The current provisions are often repetitive, constantly referring back to the actor or his subject each time a separate act is mentioned. Thus, a provision typically will provide that "any person who shall do one act to specified property or any person who shall

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72. See Mich. Rev. Crim. Code §§ 2301(b), 4901(2) (Final Draft 1967).

73. Also, where a legal term has acquired a common lay meaning, inconsistent with its technical meaning, that term was either not used or was redefined in terms of its lay meaning. Thus, the striking of another individual, an "assault" by common usage, is termed an "assault" rather than a "battery." An attempt to strike another is considered simply an "attempted assault" or possibly "menacing" when the actor intends to place another in fear of imminent injury. See Mich. Rev. Crim. Code §§ 2101-10 (Final Draft 1967). An alternative approach might be to drop the term "assault" entirely and use only "battery." The main objective was to eliminate any confusion between an assault and an assault and battery. Compare Mich. Comp. Laws § 750.81 (1948), Mich. Stat. Ann. § 28.276 (1962), with Mich. Comp. Laws § 750.81a (1948), Mich. Stat. Ann. § 28.276(1) (1962).

74. See, e.g., *People v. Hansen*, 368 Mich. 344, 350-51, 118 N.W.2d 422, 425-26 (1962); *People v. Borgetto*, 99 Mich. 336, 339-40, 58 N.W. 328, 329-30 (1894).

75. Mich. Rev. Crim. Code §§ 2301(a), 2310-12 (Final Draft 1967).

76. Eight years after their code was enacted, the Louisiana draftsmen said that the administration of criminal law in Louisiana had greatly improved and that the new laws had not produced the confusion and uncertainty that had been predicted. One of the leaders of the Wisconsin revision, in assessing the effect of the new code after seven years' experience, was able to state that it did not create confusion and that the number of appellate reversals for error in interpretation of the substantive criminal law had even been reduced. Keeton & Reid, Proposed Revision of the Texas Penal Code, 45 Texas L. Rev. 399, 407 (1967). Reports from Illinois indicate a similarly enthusiastic response.

do another to aforesaid property or any person who shall do still another act to such property shall be guilty of a specific offense."<sup>77</sup> The Proposed Code eliminates repeated references to the actor and the property. It simply provides that a person commits a particular offense if he performs any one of three listed acts to specified property.<sup>78</sup> The use of subsections in describing the acts further facilitates comprehension by immediately indicating that each is a separate basis for liability.

The Proposed Code also discards the traditional practice of individually listing each of the different subjects (*i.e.*, type of actor or property) protected or regulated by the particular offense.<sup>79</sup> Following the pattern of recent legislative enactments,<sup>80</sup> those lengthy enumerations are replaced with a more inclusive general description of subjects, often supplemented by a further definition in a special section on definitions.<sup>81</sup> For example, the present larceny provision prohibits stealing any:

money, goods or chattels, or any bank note, bank bill, bond, promissory note, due bill, bill of exchange or other bill, draft, order or certificate, or any book of accounts for or concerning money or goods due or to become due, or to be delivered, or any deed or writing containing a conveyance of land, or any other valuable contract in force, or any receipt, release, or defeasance . . . .<sup>82</sup>

The Proposed Code, on the other hand, simply prohibits the stealing of "property." That term is then further defined in a separate definitional section as "any money, personal property, real property, thing in action, evidence of debt or contract, or article of value of any kind."<sup>83</sup> This arrangement has several advantages. The use of a sepa-

77. See, e.g., Mich. Comp. Laws § 750.125 (1948), Mich. Stat. Ann. § 28.320 (1962); Mich. Comp. Laws § 750.131 (1948), Mich. Stat. Ann. § 28.326 (1962); Mich. Comp. Laws § 750.491 (1948), Mich. Stat. Ann. § 28.759 (1954).

78. See, e.g., Mich. Rev. Crim. Code §§ 4201, 4555 (Final Draft 1967). The Proposed Code also tends to be more straightforward in its statement of the basic offense even where there is no need to describe a series of different acts. Compare respectively Mich. Comp. Laws § 750.118 (1948), Mich. Stat. Ann. § 28.313 (1962); Mich. Comp. Laws § 750.149 (1948), Mich. Stat. Ann. § 28.346 (1962); Mich. Comp. Laws § 750.215 (1948), Mich. Stat. Ann. § 28.412 (1962), with Mich. Rev. Crim. Code §§ 4705(1)(b), 4530, 4550 (Final Draft 1967).

79. See, e.g., Mich. Comp. Laws § 750.115 (1948), Mich. Stat. Ann. § 28.310 (1962); Mich. Comp. Laws § 750.351 (1948), Mich. Stat. Ann. § 28.583 (1954); Mich. Comp. Laws § 750.479 (1948), Mich. Stat. Ann. § 28.747 (1954).

80. See Mich. Pub. Acts 1966, No. 319, §§ 539a-539i, Mich. Stat. Ann. §§ 28.807(1)-.807(9) (Supp. 1968).

81. Compare the current sections cited note 79 *supra*, with Mich. Rev. Crim. Code §§ 2605, 4205(b), 4506 (Final Draft 1967).

82. See Mich. Pub. Acts 1957, No. 69, § 356, Mich. Stat. Ann. § 28.588 (Supp. 1968).

83. Mich. Rev. Crim. Code § 3201(i) (Final Draft 1967).

rate definition makes it possible to provide a much shorter and more readable description of the total offense; the basic elements of theft are set out directly and simply, without a long break for a detailed description of all the objects that might constitute property. The separate definitional section also promotes a uniform interpretation of the term "property" throughout the several related provisions that use that term.<sup>84</sup> Finally, the use of a more generalized description of property as including "any article of value" provides insurance against any unintended gaps in the enumeration of specific types of protected property.<sup>85</sup>

The Proposed Code employs a similar drafting technique to reduce unneeded (and potentially pernicious) separate listings in describing the basic acts constituting an offense. For example, the current provision on rendering false fire alarms makes it a crime to knowingly and willfully:

raise a false alarm of fire at any gathering or in any public place, . . . ring any bell or operate any mechanical apparatus, electrical apparatus or combination thereof, for the purpose of creating a false alarm of fire; raise a false alarm of fire orally, by telephone or in person.<sup>86</sup>

Whether or not this listing covers every means of making a false alarm may be disputed, but it is quite clear that both potential litigation and unnecessary verbiage could be eliminated by a simple description of the activity this provision seeks to reach. The Proposed Code attempts to do this by simply defining the basic act as intentionally "caus[ing] a false alarm . . . to be transmitted."<sup>87</sup> This clearly encompasses the individual who conveys an alarm either personally or through another, and, at the same time, makes the provision considerably less complex. Of course, such drafting shortcuts could not be used in every instance, since many prohibited activities are naturally complex and difficult to describe.<sup>88</sup> Yet, the Proposed Code does

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84. See *id.* §§ 3205-08 (theft); *id.* § 3215 (appropriation of lost property); *id.* §§ 3225-27 (theft by failure to make required disposition of property); *id.* §§ 3245-47 (extortion); *id.* §§ 3250-53 (receiving stolen property).

85. See the illustration cited in Remington, *Criminal Law Revision Codification vs. Piecemeal Amendment*, 33 *Neb. L. Rev.* 396, 399 (1954).

86. See *Mich. Pub. Acts* 1965, No. 77, *Mich. Stat. Ann.* § 28.437 (Supp. 1968).

87. *Mich. Rev. Crim. Code* § 4535 (Final Draft 1967).

88. See *Mich. Rev. Crim. Code* §§ 4001(d)-(g) (Final Draft 1967) (defining the elements of forgery). Also, when a single current section dealt with separate harmful activities, the Proposed Code often divided the offense into two sections in order to make it easier to use and understand. See, e.g., *Mich. Comp. Laws* § 750.33 (1948), *Mich. Stat. Ann.* § 28.222 (1962); divided into *Mich. Rev. Crim. Code* §§ 4110, 4115 (Final Draft 1967).

manage to eliminate totally unnecessary detail and complexity in a substantial number of provisions.<sup>89</sup>

*Eliminating Ambiguity.* Another target of the Proposed Code is the unnecessary ambiguity in the current descriptions of many offenses. A primary source of that ambiguity lies in the current law's rather haphazard approach to the definition of mens rea. Despite the importance of mens rea in the criminal law, many current provisions, particularly those outside the criminal code, make no mention of this factor.<sup>90</sup> In some cases, this is a purposeful omission designed to create a strict liability offense, but, in many others, it is simply a product of legislative oversight.<sup>91</sup> The difficulty lies in the fact that one cannot always be sure in which category a specific provision should fall. Take, for example, a provision making it a misdemeanor for any officer to accept fees in excess of that authorized by law.<sup>92</sup> It seems

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89. Fairly typical is Mich. Comp. Laws § 750.214 (1948), Mich. Stat. Ann. § 28.141 (1962) which currently provides:

Any person who shall wilfully and corruptly demand and receive from another for performing any service, or any official duty, for which the fee or compensation is established by law, any greater fee or compensation than is allowed or provided for the same, and any public officer, for whom a salary is provided by law in full compensation for all services required to be performed by him, or by his clerks or deputies, who shall wilfully and corruptly demand and receive from any person any sum of money as a fee or compensation for any services required by law to be performed by him in his said office, or by his clerks or deputies, shall be guilty of a misdemeanor . . . .

Mich. Rev. Crim. Code § 4710 (Final Draft 1967) provides:

(1) A public servant commits the crime of soliciting unlawful compensation if he requests a pecuniary benefit for the performance of an official action knowing that he was required to perform that action without compensation or at a level of compensation lower than that requested.

. . . .

(3) Solicitation of unlawful compensation is a Class B misdemeanor.

Also, compare respectively Mich. Comp. Laws § 750.465 (1948), Mich. Stat. Ann. § 28.720 (1954); Mich. Comp. Laws § 750.33 (1948), Mich. Stat. Ann. § 28.222 (1962); Mich. Comp. Laws § 750.214 (1948), Mich. Stat. Ann. § 28.411 (1962), with Mich. Rev. Crim. Code §§ 4220, 4110-15, 4710 (Final Draft 1967).

90. For example, Mich. Comp. Laws § 800.283 (1948), Mich. Stat. Ann. § 28.1623 (1954) makes it a crime to introduce into any prison an implement which may be used to injure or convict. No mention is made as to whether the actor must intend to introduce the item or must even appreciate its capacities for misuse. In the criminal code itself, Mich. Comp. Laws § 750.483 (1948), Mich. Stat. Ann. § 28.751 (1954) makes it an offense to neglect or refuse to assist a police official, but does not state whether the individual must know or recognize the person requiring assistance is a police officer. Compare Mich. Pub. Acts 1966, No. 299, § 479a, Mich. Stat. Ann. § 28.747(1) (Supp. 1968). Other provisions refer to the mental element at one point and not at another. Mich. Comp. Laws § 750.479 (1948), Mich. Stat. Ann. § 28.747 (1954) originally prohibits "knowingly and willfully" obstructing an officer serving a warrant, but later simply makes a reference to any person "who resists" an officer executing a local ordinance.

91. See *People v. Damm*, 183 Mich. 554, 149 N.W. 1002 (1914); *People v. Rice*, 161 Mich. 657, 126 N.W. 981 (1910).

92. See, e.g., Mich. Pub. Acts 1961, No. 236 (RJA), § 2513, Mich. Stat. Ann.

likely that this law is aimed only at those officers who realize they are accepting illegal consideration. On the other hand, the absence of any reference to a requisite mental element might indicate a legislative intent to place upon the officer an absolute duty to determine proper fees and accept no higher amount.<sup>93</sup> Similar provisions in other areas often do specify that the officer act "willfully" or "corruptly."<sup>94</sup> Yet others do not—whether by reason or inadvertence again is unclear.<sup>95</sup>

The absence of any reference to mens rea still creates problems of interpretation even where the statute involved clearly is not intended to impose strict liability. Consider, for example, a provision prohibiting obstruction of a state agricultural agent in the performance of his duty.<sup>96</sup> The basic nature of this offense indicates that some mens rea is required, but at exactly what level is uncertain. Must the actor intend to obstruct the agent or is reckless disregard sufficient on this point? Must he have knowledge that the person obstructed was indeed a state official, or is recklessness in this regard also sufficient? Of course, analogous statutes or common logic may provide satisfactory answers,<sup>97</sup> but the legislature's oversight in failing to specify the requisite mens rea leaves the issue sufficiently open to foster otherwise needless litigation.

Unfortunately, the difficulties involved in defining mens rea have hardly been reduced by most legislative attempts to specifically describe the required mental element. The terms most frequently used in the current code to describe mens rea are "willfully" and "maliciously."<sup>98</sup> Apparently, neither has a "set" definition. What each term

§ 27A.2513 (1962); Mich. Comp. Laws § 408.279 (1948), Mich. Stat. Ann. § 17.99 (1960); Mich. Comp. Laws § 701.18a (1948), Mich. Stat. Ann. § 27.3178(18a) (1962).

93. Compare Mich. Rev. Crim. Code § 3225(3) (Final Draft 1967).

94. See, e.g., Mich. Pub. Acts 1961, No. 236 (RJA), § 7611, Mich. Stat. Ann. § 27A.7611 (1962); Mich. Comp. Laws § 750.214 (1948), Mich. Stat. Ann. § 28.411 (1962).

95. See Mich. Pub. Acts 1961, No. 236 (RJA), § 2513, Mich. Stat. Ann. § 27A.2513 (1962); Mich. Comp. Laws § 408.279 (1948), Mich. Stat. Ann. § 17.99 (1960); Mich. Comp. Laws § 701.18a (1948), Mich. Stat. Ann. § 27.3178(18a) (1962). The legislature has been inconsistent in its use of mens rea terminology even in areas where strict liability is often employed. Compare Mich. Comp. Laws § 750.23 (1948), Mich. Stat. Ann. § 28.213 (1962), with Mich. Comp. Laws § 750.24 (1948), Mich. Stat. Ann. § 28.214 (1962).

96. Mich. Comp. Laws § 286.7 (1948), Mich. Stat. Ann. § 12.137 (1967); also Mich. Comp. Laws § 287.149 (1948), Mich. Stat. Ann. § 12.449 (1956).

97. Similar statutes dealing with other officials require that the defendant have acted "knowingly" or "willfully." See Mich. Comp. Laws § 300.17 (1948), Mich. Stat. Ann. § 13.1227 (1967); Mich. Comp. Laws § 409.26 (1948), Mich. Stat. Ann. § 17.726 (1960); Mich. Comp. Laws § 750.241 (1948), Mich. Stat. Ann. § 28.438 (1962).

98. See, e.g., the various provisions in the following chapters of the current penal code: Chapter X (arson); LXX (public offices and officers); LXXXV (trespass).

requires seems to depend primarily on the specific statutory context in which it arises, with very few guidelines for separating one context from another.<sup>99</sup> In fact, judicial interpretation of both terms lends further support to Justice Jackson's famous comment about the "variety, disparity and confusion of [judicial] definitions of the requisite but elusive mental element."<sup>100</sup> Taken literally, the term "willfully," might suggest only that the individual acted consciously and voluntarily.<sup>101</sup> The Michigan decisions, however, indicate that "willfully" means considerably more. At least one opinion states that the actor must have intended to cause the harm that resulted from his act.<sup>102</sup> Yet, another seems to suggest that it is sufficient that he acted in reckless disregard of potential harm.<sup>103</sup> Similarly, the term "maliciously" literally should require that the actor had an evil or wicked intent;<sup>104</sup> and, indeed, one opinion does state that it requires a "spirit desiring harm or misfortune to another . . ."<sup>105</sup> Again, however, another opinion seems to take a contrary view, suggesting that malice might only require that the actor intended to do the act that proved harmful.<sup>106</sup> Moreover, as applied in the homicide area, the requirement of malice has been further reduced to encompass even a reckless disregard of a "strong likelihood that . . . harm will result."<sup>107</sup>

The legislature's use of the terms "willfully" and "maliciously" is even more confusing (and far less logical), especially where the two terms have been used in combination. Closely related provisions in the current code will sometimes use the terms conjunctively, sometimes alternatively, or sometimes as substitutes for each other, without suggesting any rational patterns for the variation.<sup>108</sup> For example,

99. *Highway Comm'rs v. Ely*, 54 Mich. 173, 19 N.W. 940 (1884). See *United States v. Murdock*, 290 U.S. 389 (1933); *Remington & Helstad, The Mental Element in Crime—A Legislative Problem*, 1952 Wis. L. Rev. 644, 666.

100. *Morissette v. United States*, 342 U.S. 246, 252 (1952).

101. See Cal. Pen. Code § 7; *W. Clark & W. Marshall, Law of Crimes* § 5.07 (7th ed. M. Barnes 1967).

102. *People v. Lee*, 231 Mich. 607, 611-12, 204 N.W. 742, 744 (1925); accord, *Highway Comm'rs v. Ely*, 54 Mich. 173, 178-80, 19 N.W. 940, 943-44 (1884).

103. *People v. Orr*, 243 Mich. 300, 308, 220 N.W. 777, 779 (1928).

104. *W. Clark & W. Marshall*, supra note 101, § 5.05.

105. See *People v. Vanderpool*, 2 Mich. N.P. 264, 267 (Cir. Ct. 1870); accord, *People v. Petheran*, 64 Mich. 252, 265-66, 31 N.W. 188, 194 (1887).

106. *People v. Tessmer*, 171 Mich. 522, 528, 137 N.W. 214, 216 (1912). See also *People v. Comstock*, 115 Mich. 305, 312, 73 N.W. 245, 248 (1897).

107. See *People v. Hansen*, 368 Mich. 344, 350, 118 N.W.2d 422, 425 (1962).

108. See Mich. Comp. Laws § 750.72 (1948), Mich. Stat. Ann. § 28.267 (1962); Mich. Comp. Laws § 750.74 (1948), Mich. Stat. Ann. § 28.269 (1962); Mich. Comp. Laws § 750.75 (1948), Mich. Stat. Ann. § 28.270 (1962) (all relating to arson). See also Mich. Comp. Laws § 750.108 (1948), Mich. Stat. Ann. § 28.303 (1962) (making it a crime to "willfully remove any ship, boat, or vessel from their fastenings . . . or

in the chapter on malicious destruction, the section on destroying bridges prohibits "willfully *and* maliciously" breaking,<sup>109</sup> that on boundary markers prohibits "willfully *or* maliciously" breaking,<sup>110</sup> that on fences simply prohibits "maliciously" breaking,<sup>111</sup> and that on public utility equipment prohibits "willfully" breaking.<sup>112</sup> The section on trees further complicates matters by prohibiting destruction caused "willfully and maliciously, or wantonly and without cause."<sup>113</sup> Moreover, "willfully" and "maliciously" are not the only terms treated in this seemingly inconsistent manner. The legislature apparently has had similar difficulties in determining the relationship between the terms "knowingly" and "willfully." Section 220 of the present code speaks of acting "knowingly *and* willfully" in filing a false report,<sup>114</sup> but section 199 speaks of acting "knowingly *or* willfully" in aiding an escapee.<sup>115</sup> At the same time, one judicial decision suggests that the term "knowingly" may often be superfluous since the term "willful" sometimes requires, by itself, that the actor have knowledge of all material facts.<sup>116</sup> Similar difficulties have also arisen from the occasional substitution of the term "intentionally" for "willfully" in a few current provisions.<sup>117</sup>

The Proposed Code, following the lead of revisions in other states,<sup>118</sup> seeks to eliminate these difficulties by employing four uni-

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. . . maliciously loose any ship, boat, or vessel . . . and suffer the same to float away . . .").

109. Mich. Comp. Laws § 750.379 (1948), Mich. Stat. Ann. § 28.611 (1954).

110. Mich. Comp. Laws § 750.383 (1948), Mich. Stat. Ann. § 28.615 (1954).

111. Mich. Comp. Laws § 750.381 (1948), Mich. Stat. Ann. § 28.613 (1954).

112. Mich. Comp. Laws § 750.383a (1948), Mich. Stat. Ann. § 28.615(1) (1954).

113. Mich. Comp. Laws § 750.382 (1948), Mich. Stat. Ann. § 28.614 (1954).

Cf. Mich. Pub. Acts 1965, No. 38, Mich. Stat. Ann. § 28.556 (Supp. 1968).

114. Mich. Comp. Laws § 750.220 (1948), Mich. Stat. Ann. § 28.417 (1962).

See also Mich. Comp. Laws § 750.411a (1948), Mich. Stat. Ann. § 28.643(1) (1954).

115. Mich. Comp. Laws § 750.199 (1948), Mich. Stat. Ann. § 28.396 (1962).

116. See *People v. Jewell*, 138 Mich. 620, 101 N.W. 835 (1904), holding that a statute similar to Mich. Pub. Acts 1964, No. 147, § 491, Mich. Stat. Ann. § 28.759 (Supp. 1968), prohibiting willful destruction of records, was not applicable where the actor clearly intended to destroy the record but did not know he lacked legal authority to do so.

117. Compare Mich. Comp. Laws § 750.413 (1948), Mich. Stat. Ann. § 28.645 (1954) (prohibiting "willfully and without authority" taking possession of another's car), with Mich. Comp. Laws § 750.416 (1948), Mich. Stat. Ann. § 28.648 (1954) (prohibiting "intentionally and without authority" starting another's car). See also Mich. Comp. Laws § 750.279 (1948), Mich. Stat. Ann. § 28.490 (1962).

The term "corruptly" is also used as a substitute for "willfully." See Mich. Comp. Laws § 750.332 (1948), Mich. Stat. Ann. § 28.564 (1954). It is also employed in conjunction with "willfully." See Mich. Comp. Laws § 750.191 (1948), Mich. Stat. Ann. § 28.388 (1962); Mich. Comp. Laws § 750.214 (1948), Mich. Stat. Ann. § 28.411 (1962).

118. See, e.g., Ill. Rev. Stat. ch. 38, §§ 4-4 to 4-7 (1964); N.Y. Pen. Law § 15.05. See also Remington & Helstad, *supra* note 99.



form levels of mens rea that are used throughout. The terms used to describe these levels are "intentionally," "knowingly," "recklessly" and "negligently." Each is carefully defined, with a special effort made to distinguish properly the concept of criminal negligence from ordinary civil negligence.<sup>119</sup> Actually, these terms are all recognized in current law and should not create any confusion.<sup>120</sup> The Proposed Code includes at least one of these terms in the definition of every offense requiring mens rea, except those few in which the description of the proscribed act necessarily encompasses a specific mental element.<sup>121</sup> As a result, a mens rea requirement is clearly evidenced in all sections that are not based upon strict liability.<sup>122</sup> This should eliminate any confusion as to whether a particular offense falls in that limited category.<sup>123</sup>

The Proposed Code also should eliminate difficulties in determining the applicability of mens rea requirements to different elements of a crime. When a provision refers to a single level of mens rea, that level will apply to all material elements of the crime.<sup>124</sup> Thus, if a provision states that the defendant must have acted "intentionally" in causing specific harm to a particular subject, this would require both an actual intent to cause the harm and knowledge of the identity of the subject if that factor is also a material element of the offense. Where intent applies to one element and recklessness to the other, both terms are used.<sup>125</sup>

The careful use of these standard terms throughout the Proposed Code should be of particular help to the judge in charging a jury. Of course, the proposed definitions of the basic levels of mens rea are too broad and general to aid the jury in themselves, but the uniform pattern of their use should give the courts considerable assistance in interpreting a particular provision and developing a specific charge

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119. Mich. Rev. Crim. Code § 305 (Final Draft 1967).

120. See *People v. Hansen*, 368 Mich. 344, 118 N.W.2d 422 (1962); *People v. Orr*, 243 Mich. 300, 220 N.W. 777 (1928); *People v. Tantenella*, 212 Mich. 614, 180 N.W. 474 (1920).

121. See, e.g., Mich. Rev. Crim. Code §§ 4605-07 (Final Draft 1967) (escape). Of course, in the few cases where the standard levels are not appropriate, other terms are used. Thus, the provision on receiving property describes the requisite mens rea as "knowing" that the property was stolen or "believing that in all likelihood it has been stolen." Id. § 3250. See also id. § 4040.

122. See Mich. Rev. Crim. Code §§ 310, 315(2) (Final Draft 1967).

123. See, e.g., id. §§ 2725(1)(a), 3225 (imposing a form of strict liability).

124. Id. § 315(1), specifically provides that "[w]hen one and only one of these terms [of mens rea] appears in a statute defining an offense, it is presumed to apply to every element of the offense unless a legislative intent to limit its application clearly appears."

125. See, e.g., id. § 2807.

tying that provision to the facts of the particular case.<sup>126</sup> Hopefully, this should lead both to greater jury understanding of the judge's charge and to fewer legal disputes as to the meaning of *mens rea*.

The Proposed Code is also designed to eliminate several other common sources of ambiguity in the current penal law. Thus, unlike the current code, it contains a complete description of the basic activity constituting each offense. Current provisions sometimes state that a particular crime shall be punished as a felony or misdemeanor, but never provide a description of the offense.<sup>127</sup> This is true, for example, of the provision on assault and assault and battery.<sup>128</sup> Ordinarily, the lack of a precise definition in this provision causes little concern because the terms "assault" and "battery" are so common as to be almost self-defining. On occasion, however, potential assault cases do not fit within the common view of the term. A bartender who slips a "mickey" into the drink of a customer has not engaged in a direct and forceful touching.<sup>129</sup> Nevertheless, his action should as clearly qualify as a battery as a shooting or striking.<sup>130</sup> The Proposed Code, by insisting on a complete definition, eliminates any doubt on this matter. Section 2102 specifically states that a person commits the crime of assault in the second degree if:

[f]or a purpose other than lawful medical or therapeutic treatment, he intentionally causes stupor . . . or other physical or mental impairment . . . to another person by administering to him, without his consent, a drug, substance or preparation capable of producing the intended harm.<sup>131</sup>

Most of the current problems of interpretation, however, stem

126. Used in this fashion, the Proposed Code definitions should not present the obstacles envisaged in Kuh, *A Prosecutor Considers the Model Penal Code*, 63 Colum. L. Rev. 608, 621-23 (1963). Also, Mr. Kuh's complaint was leveled against the Model Penal Code definitions of culpability which are considerably more complex than those adopted in the Proposed Code. The Model Penal Code attempts to draw a distinction between the person who has the conscious objective to produce a particular result and one who is aware his conduct necessarily will cause that result, but does not desire it. See Model Penal Code § 2.02, Comment (3) (Tent. Draft No. 4, 1955). The Proposed Code does not draw this distinction, using the term "intentionally" to describe both situations. This is in accord with the usual view of intent, i.e., a person "intends" those physical consequences that he knows will necessarily flow from his actions, even though he may not desire them. See G. Williams, *Criminal Law* § 18 (2d ed. 1961).

127. See, e.g., Mich. Comp. Laws § 750.158 (1948), Mich. Stat. Ann. § 28.355 (1962); Mich. Comp. Laws § 750.321 (1948), Mich. Stat. Ann. § 28.553 (1954).

128. Mich. Comp. Laws § 750.31 (1948), Mich. Stat. Ann. § 28.276 (1962).

129. For a discussion of the Michigan law on assault and battery see Tinkler v. Richter, 295 Mich. 396, 295 N.W. 201 (1940); *People v. Carlson*, 160 Mich. 426, 125 N.W. 361 (1910).

130. *Carr v. State*, 135 Ind. 1, 34 N.E. 533 (1893); *R. Perkins*, *Criminal Law* 81-82 (1957).

131. Mich. Rev. Crim. Code § 2102(1)(e) (Final Draft 1967).

from ambiguities in sections, unlike assault, in which the legislature has attempted to describe specifically the particular offense. Section 479 of the current code is typical.<sup>132</sup> It is an extremely lengthy and detailed provision prohibiting interference with officers in the performance of specific duties. However, the proscribed conduct is merely described as "obstruct[ing], resist[ing] or oppos[ing]" any officer. Although the use of force is mentioned at one point, the section as a whole does not clearly indicate whether affirmative physical force is needed to obstruct, resist, or oppose an officer. Would an individual violate this provision, for example, if he vigorously criticized and verbally attacked an officer who was attempting to serve process on another? Does a person resist arrest if, when placed under arrest and ordered to walk to a police vehicle, he "goes limp" and forces the police to carry him? Courts in other states have held that similar activities constitute violations of obstruction or resistance provisions.<sup>133</sup> The historical background of section 479 as well as some early judicial interpretations suggest that the section probably was not designed to encompass such activity.<sup>134</sup> Nevertheless, the statutory language would not bar a contrary ruling, and at least one local police authority has argued that even an attempt by a person to flee from an arrest constitutes resistance in violation of section 479.<sup>135</sup> The Proposed Code clearly settles the issue by requiring "physical interference" under the general obstruction provision and the use of "physical force" against the officer under the special provision on resisting arrest.<sup>136</sup> Similar steps are taken in defining other offenses to eliminate several current ambiguities analogous to that in section 479.<sup>137</sup>

132. See Mich. Comp. Laws § 750.479 (1948), Mich. Stat. Ann. § 28.747 (1954).

133. See Note, Types of Activity Encompassed by the Offense of Obstructing a Public Officer, 108 U. Pa. L. Rev. 388, 390-92 (1960) (discussing cases involving verbal conduct). See also *In re Bacon*, 240 Cal. App. 2d 34, 51-55, 49 Cal. Rptr. 322, 332-34 (1966) (involving defendant who "went limp").

134. Section 479 is essentially the same as the original 1846 provision prohibiting resistance of officers. See Mich. Rev. Stat. 1846, ch. 156, § 23. It seems unlikely that that provision, in light of its context, was aimed at anything other than affirmative physical obstruction or threats thereof. See, e.g., *People v. Clements*, 68 Mich. 655, 36 N.W. 792 (1888); *People v. Jones*, 1 Mich. N.P. 194 (Cir. Ct. 1871).

135. In fact, a prosecution based on this theory was initiated in Washtenaw County a few years ago, but was later dropped. Several courts have found resistance in flight situations. See Note, *supra* note 133, at 398-99.

136. Mich. Rev. Crim. Code §§ 4505, 4625 (Final Draft 1967).

137. Thus, Mich. Pub. Acts 1955, No. 264, § 197a, Mich. Stat. Ann. § 28.394(1) (1962), prohibits escape from "lawful custody under any criminal process." The state police have interpreted this provision as applicable to a person who escapes from a police car after having been arrested. The ambiguity of the term "criminal process" naturally makes this interpretation subject to question. Mich. Rev. Crim. Code §§ 4601(2), 4607 (Final Draft 1967), are drafted so as to specifically include this situa-

Another unnecessary source of ambiguity under the current code is the practice of limiting definitions to the affirmative elements of an offense, without any reference to special grounds that may excuse liability for that particular offense. For example, the current extortion provision fails to consider whether an honest belief in liability excuses a threat to accuse another of a crime unless reimbursement is made.<sup>138</sup> Similarly, the bribery provision does not consider whether extortion is a defense to that crime, *i.e.*, whether a person is criminally liable if he makes an unlawful payment to a public servant, but only in response to the threat of the public servant that he otherwise would take action against that person.<sup>139</sup> Whether such excuses would be recognized under present law would depend ultimately upon a court's interpretation of somewhat ambiguous statutory requirements that the actor behave "maliciously" or "corruptly."<sup>140</sup> The Proposed Code prefers to avoid such needless uncertainty by providing a direct answer to issues of this nature in the section defining the specific offense.<sup>141</sup> Of course, not every special "justification" that might offset a basic element of a particular crime can be anticipated, but the Proposed Code does attempt to deal with at least the most common, *i.e.*, the most frequently litigated, matters of this type.<sup>142</sup>

The process of resolving ambiguities in these and other areas obviously involved more than simple drafting reforms. Various substantive policy decisions had to be made. In most instances, however, the decisions were largely dictated by the basic function of the par-

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tion. Those sections bar any escape from "custody" and define custody as "detention by a public servant pursuant to an arrest."

Similarly, under the current provision prohibiting possession of burglar tools, there is some question as to whether the actor must be shown to have intended to use the tools himself. See Mich. Comp. Laws § 750.116 (1948), Mich. Stat. Ann. § 28.311 (1962). Mich. Rev. Crim. Code § 2615 (Final Draft 1967), would clearly include the supplier who possesses burglar tools for distribution to others.

138. Mich. Comp. Laws § 750.213 (1948), Mich. Stat. Ann. § 28.410 (1962). Compare *In re Sherin*, 27 S.D. 232, 130 N.W. 761 (1911), and *O'Neill v. State*, 237 Wis. 391, 296 N.W. 96 (1941), with *State v. Burns*, 161 Wash. 362, 297 P. 212 (1931).

139. Mich. Comp. Laws § 750.117 (1948), Mich. Stat. Ann. § 28.312 (1962). *People v. Ritholz*, 359 Mich. 539, 103 N.W.2d 481 (1960), suggested that extortion would constitute an excuse for making a bribery payment.

140. Mich. Comp. Laws § 750.117 (1948), Mich. Stat. Ann. § 28.312 (1962), requires that the actor "corruptly" offer a bribe, and Mich. Comp. Laws § 750.213 (1948), Mich. Stat. Ann. § 28.410 (1962), requires that the threat be made "maliciously." As for the significance or insignificance of these terms see *In re Sherin*, 27 S.D. 232, 130 N.W. 761 (1911), and the cases cited therein.

141. Both "excuses" are accepted as valid. See Mich. Rev. Crim. Code § 3247(2) (Final Draft 1967) (extortion); *id.* § 4705(2) (bribery).

142. See, e.g., *id.* § 3310 (claim of right no defense to robbery); *id.* § 4930 (retraction under specified circumstances a defense to perjury); *id.* § 6135 (extraterritorial origin no defense to lottery).

ticular offense.<sup>143</sup> Thus, although there were no Michigan cases directly on point, the Committee had no doubt that the definition of false pretenses should include the failure to disclose an adverse claim on property even when one makes no specific affirmative representation as to marketability.<sup>144</sup> Similarly, the function of the "joy-riding" statute fairly well determined the appropriate definition of "unauthorized use" as applied to the bailee who makes personal use of the vehicle contrary to a bailment agreement. A strict interpretation making the statute applicable to every employee who used a company car for a personal side trip obviously would go far beyond the type of "joy-riding" that led to the adoption of the statute. Accordingly, unauthorized use was limited to "gross deviations" from the bailment agreement, such as the using of the company car for a month-long personal trip to California.<sup>145</sup> Not surprisingly, this type of analysis has not only served to eliminate ambiguities, but it also has encouraged the general utilization of definitions that should give the courts a much clearer indication of the basic thrust of each offense.

*Abolition of Common Law Crimes.* The Committee's efforts in improving the definitions of current statutory offenses generally have been well received. Some concern has been expressed, however, over the decision to abolish common law offenses.<sup>146</sup> That decision was

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143. In some instances, case law clearly indicated the appropriate resolution. See, e.g., *People v. Ritholz*, 359 Mich. 539, 103 N.W.2d 481 (1960). In at least one case, however, the Committee resolved an ambiguity contrary to the leanings of Michigan precedent. The general mens rea standard for perjury throughout the United States requires only that the actor did not believe that his false statement was true, i.e., he can either know his statement was false or testify in reckless disregard as to whether it is true or false. See 3 F. Wharton, *Criminal Law* § 1291, at 1308 (R. Anderson ed. 1957). A few states expressly require knowledge or belief that the statement was false, and two older cases indirectly suggest that Michigan follows this approach. *People v. Mankin*, 225 Mich. 246, 196 N.W. 426 (1923); *Smith v. Hubbell*, 142 Mich. 637, 648-49, 106 N.W. 547, 551 (1906). Neither court faced the issue directly, but only mentioned the point in passing. The Committee concluded that the majority rule was more consistent with the general standards for mens rea. See Mich. Rev. Crim. Code § 4905 (Final Draft 1967). The minority rule was premised on the misconception that the majority rule would not protect a person who swears to the truth of a matter when he is not absolutely certain it is true. However, since the majority rule only requires "good faith belief," not absolute certainty, such a person clearly would not have the requisite mens rea under the majority rule.

144. Mich. Rev. Crim. Code § 3201(a)(iv) (Final Draft 1967); *People v. Etzler*, 292 Mich. 489, 290 N.W. 879 (1940); *People v. Lee*, 259 Mich. 355, 243 N.W. 227 (1932); cf. *People v. Vida*, 2 Mich. App. 409, 140 N.W.2d 559 (1966).

145. See Mich. Rev. Crim. Code § 3230 (Final Draft 1967); id. § 3235, Comment.

146. Mich. Comp. Laws § 750.505 (1948), Mich. Stat. Ann. § 28.773 (1954) provides for the punishment of "any indictable offense at the common law." However, most of the common law offenses have been preempted by statutory provisions. See generally *Pettinger v. People*, 20 Mich. 336 (1870); *Drennan v. People*, 10 Mich. 169 (1862).

based on the premise that the combined objectives of fair warning and efficient administration require that each crime be statutorily defined.<sup>147</sup> Some attorneys have argued for retention of the common law of crimes, however, on the ground that if the Proposed Code should fail through oversight or otherwise to reach an obvious evil, the courts could always rely upon their common law power to declare that evil a crime. This contention is based, I believe, on a misconception of the judiciary's ability to expand the scope of common law crimes.<sup>148</sup> Any attempt to use the common law as a regular device for filling unintended loopholes in criminal legislation would raise serious constitutional problems.<sup>149</sup> Vagueness objections to the common law development of crimes have been overcome primarily because such crimes traditionally include only well established, previously defined offenses.<sup>150</sup> In fact, prosecutions based on the common law in this state and others have been limited to only a few, clearly identified offenses—largely inchoate crimes (*e.g.*, conspiracy and solicitation) and offenses against public administration (*e.g.*, coercion of witnesses and harboring fugitives).<sup>151</sup>

The Proposed Code replaces the traditional common law offenses with a series of separate statutory provisions.<sup>152</sup> These provisions not only cover the same ground as the common law crimes,<sup>153</sup> but very

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147. See 47 Colum. L. Rev. 1332 (1947).

148. See Brumbaugh, *A New Criminal Code for Maryland?*, 23 Md. L. Rev. 1, 31-34 (1963).

149. See *Bouie v. City of Columbia*, 378 U.S. 347 (1964); 47 Colum. L. Rev. 1332, 1335-37 (1947).

150. See J. Hall, *General Principles of Criminal Law* 52-53 (2d ed. 1960). But see *Commonwealth v. Mochan*, 177 Pa. Super. 454, 110 A.2d 788 (1955).

151. See, *e.g.*, *People v. Ormsby*, 310 Mich. 291, 17 N.W.2d 187 (1945); *People v. Tenerowicz*, 266 Mich. 276, 253 N.W. 296 (1934); *People v. Hammond*, 132 Mich. 422, 93 N.W. 1084 (1903). See generally 47 Colum. L. Rev. 1332 (1947). In 1966, the Michigan Legislature adopted a general statutory provision on conspiracy. Mich. Pub. Acts 1966, No. 296, § 157a, Mich. Stat. Ann. § 28.354(1) (Supp. 1968). However, this provision utilizes the common law definition of a punishable conspiracy, and only adds new penalties.

152. See, *e.g.*, Mich. Rev. Crim. Code §§ 4505 (obstructing governmental operations), 5010 (bribe receiving by a witness), 5045 (tampering with physical evidence) (Final Draft 1967).

153. See *id.* § 5010, Comment. In a few areas, the Proposed Code provisions modify the scope of the common law offense. For example, § 1010 extends criminal liability to the solicitation of misdemeanors as well as felonies. The common law of solicitation was generally thought to extend only to solicitations of felonies and "aggravated" misdemeanors, *i.e.*, those misdemeanors relating to obstruction of justice and breach of the peace. See Model Penal Code § 5.02, Comment (2) (Tent. Draft No. 10, 1960); W. Clark & W. Marshall, *Law of Crimes* § 4.04 (7th ed. M. Barnes 1967). Michigan cases dealing with solicitation have only involved solicitation of felonies. See, *e.g.*, *People v. Hammond*, 132 Mich. 422, 93 N.W. 1084 (1903). However, several specific provisions dealing with solicitation reach activities that would constitute misdemeanors

frequently clear up uncertainties as to the scope of these offenses. For example, as defined at common law, riot required the combination of only three or more people engaging in tumultuous and violent conduct.<sup>154</sup> While Michigan never adopted a substantive provision specifically prohibiting riots, it did adopt a special Riot Act governing the use of force to dispel riots.<sup>155</sup> This Act raises the minimum number of rioters to twelve persons armed or thirty unarmed.<sup>156</sup> Whether these minimums modify the substantive common law offense is unclear. In fact, an argument might even be made that the Riot Act, in effect, entirely supersedes the common law offense.<sup>157</sup> The Proposed Code eliminates the current confusion on this point. Section 5510 makes riot a separate offense, defined essentially as at common law except that the minimum number is set at five persons rather than three.<sup>158</sup> Other provisions, most notably sections 4560-61 and 4635-37 restating accessory-after-the-fact liability, eliminate similar ambiguities in other common law areas.<sup>159</sup> Accordingly, the various provisions replacing the common law offenses, taken together, should serve the ends of criminal law in a much better fashion than their predecessors. Certainly, experience in other states indicates that they will do no worse.<sup>160</sup>

*Restatement of General Principles.* In one sense, the Proposed

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under the Proposed Code. See Mich. Comp. Laws § 750.338 (1948), Mich. Stat. Ann. § 28.570 (1954); Mich. Comp. Laws § 750.425 (1948), Mich. Stat. Ann. § 28.667 (1954). Accordingly proposed § 1010 was extended to include solicitation of all offenses with the punishment correlated to the seriousness of the offense solicited (e.g., solicitation of a misdemeanor would itself constitute only a lesser grade misdemeanor).

154. R. Perkins, *supra* note 130, at 346.

155. Mich. Comp. Laws §§ 750.521-528 (1948), Mich. Stat. Ann. §§ 28.789-796 (1954).

156. Mich. Comp. Laws § 750.521 (1948), Mich. Stat. Ann. § 28.789 (1954).

157. See generally 1 G. Gillespie, *Michigan Criminal Law and Procedure* § 4 (2d ed. 1953); 4 *id.* § 2206.

158. Mich. Rev. Crim. Code § 5510 (Final Draft 1967).

159. See *id.* §§ 4560-61, 4635-37, Comments. Sections 4560-61 deal with the accessory liability of the person who assists in disposing of the proceeds of an already completed offense. Since such a person would not necessarily have the purpose of hindering the apprehension of the original felon, there is some question as to whether he could properly be classified as an accessory after the fact. See Model Penal Code § 208.32, Comment (7) (Tent. Draft No. 9, 1959). But see *Skelly v. United States*, 76 F.2d 483 (10th Cir. 1935).

160. See generally Brumbaugh, *supra* note 148; Smith, *How Louisiana Prepared and Adopted a Criminal Code*, 41 J. Crim. L. & C. 125, 135 (1950); 47 Colum. L. Rev. 1332 (1947). The common law of crimes has long been abolished in numerous states including California and New York. See *id.* at 1332 & nn.1 & 2, collecting a list of these states. Common law offenses were more recently abolished in both Illinois and Wisconsin as a part of their general code revisions. See Ill. Ann. Stat. ch. 38, § 1-3 (Smith-Hurd 1964); Wis. Stat. § 939.10 (1958). As previously noted, experience with the new codes in these states has been very good. See Keeton & Reid, *Proposed Revision of the Texas Penal Code*, 45 Texas L. Rev. 339, 405 n.24, 407 (1967).

Code also seeks to "replace" the common law in its restatement of the so-called "general principles" of the criminal law. Our current penal law is largely hybrid in form; the legislature provides the basic definitions of individual offenses in the penal code, but the judiciary formulates basic doctrines that limit the general applicability of the code provisions. These doctrines, dealing with concepts such as mistake, duress and mental responsibility, automatically qualify the scope of every offense although mentioned in the definition of none. Rather than rely solely on judicial development of these principles, the Proposed Code includes them within its basic statutory framework. Part I of the Proposed Code defines all of the general defenses to criminal liability—necessity, duress, entrapment, mistake, etc.—as well as the general justifications for the use of force.<sup>161</sup> It also establishes the standards for determining liability as an accessory and liability for inchoate crimes (*i.e.*, attempt, solicitation and conspiracy).<sup>162</sup> Though it follows a pattern employed in several other states,<sup>163</sup> Part I clearly constitutes an innovation for Michigan. The Committee felt, however, that inclusion of the general principles in the criminal code was necessary for several reasons.

First, just as with the substantive definitions, the general principles should be viewed as an integrated part of a total body of law. Because courts deal with bits and pieces of the total substantive law, they lack an adequate vantage point from which to take that view. Case law development, with its emphasis on the specifics of the individual case, does not readily avail itself to the integration of the various common threads of the criminal law. Courts have had, for example, too much difficulty attempting to relate the various justifications for the use of force—defense of property or person, preventing crime and making an arrest<sup>164</sup>—to even consider the relationship of rules developed in this area to the general treatment of mistake and mens rea in the law.<sup>165</sup> If the general principles are to be properly

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161. See Mich. Rev. Crim. Code chs. 3 (culpability), 6 (justification), 7 (responsibility) (Final Draft 1967).

162. See *id.* chs. 4 & 10.

163. See, e.g., Ill. Ann. Stat. ch. 38, tits. I-II (Smith-Hurd 1964); N.Y. Pen. Law pt. I. Other penal codes, like California's, have long included many general principles, although such provisions are not as comprehensive as those in the more modern revisions. See Cal. Pen. Code §§ 20-22, 26-33, 197, 692-94.

164. Compare, e.g., *People v. Shaffran*, 243 Mich. 527, 220 N.W. 716 (1928) (limiting the use of force to protect property), with *People v. McGrandy*, 9 Mich. App. 187, 156 N.W.2d 48 (1967) (holding one spouse could use deadly force to repel an attack by the other even though retreat was available). See also Model Penal Code § 3.07, Comment (2) at 57 (Tent. Draft No. 8, 1958).

165. See Model Penal Code § 3.09, Comment (1) at 76-77 (Tent. Draft No. 8, 1958).



placed within the total comprehensive scheme of the criminal law, they must be drafted as a single package.<sup>166</sup> Thus, for much the same reason that the legislature is the primary body in formulating the definitions of specific offenses, it also must be the primary source in formulating the general principles limiting those definitions.

Second, various issues concerning general principles are too important to remain unsettled, yet are unlikely to be resolved by judicial decision, at least not in the near future. General doctrines that have rarely been the subject of litigation nevertheless may have a significant impact upon a prosecutor's decision not to prosecute or to reduce a given charge. For example, the concept of necessity—justifying the commission of what would otherwise constitute an offense when absolutely necessary to prevent a greater evil—is well recognized in the practical operation of the law, even though there are no Michigan cases on point. The criminal liability of an individual who, in an emergency, forcibly restrains a person infected with a highly contagious disease, or destroys the property of another to prevent a flood, is rarely questioned.<sup>167</sup> The Proposed Code's formal recognition of the necessity justification<sup>168</sup> would furnish the prosecutor with appropriate legal support for his decision not to prosecute in such cases. On the other hand, a clear-cut statement that impossibility is not a defense to a charge of attempt or conspiracy might support more vigorous enforcement in other cases more appropriate for prosecution. While the few relevant Michigan decisions clearly lean in the direction of rejecting impossibility as a defense, the issue is hardly settled, especially as it relates to so-called "legal impossibility."<sup>169</sup> A prosecutor knows he must be prepared for appellate litigation if he seeks to charge a "fence" with attempted receipt of stolen property in a case where the goods were accepted as stolen property, but cannot be shown in fact to have been stolen. The same holds true for a charge of bribery against a person who, in a case of mistaken identities, sought to bribe

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166. See Wechsler, *The Challenge of a Model Penal Code*, 65 Harv. L. Rev. 1097, 1107-08 (1952).

167. Cf. Mich. Pub. Acts 1963, No. 17, Mich. Stat. Ann. § 14.563 (Supp. 1968) (exempting physicians and nurses from liability for emergency care rendered in good faith and without "grossly negligent or willful and wanton conduct").

168. See Mich. Rev. Crim. Code § 605 (Final Draft 1967). See also *id.* § 610.

169. In *People v. Jones*, 46 Mich. 441, 9 N.W. 486 (1881), the court rejected an alleged impossibility defense where the defendant had picked an empty pocket. See also *People v. Hirschfield*, 271 Mich. 20, 25-26, 260 N.W. 106, 107-08 (1935). However, courts have tended to distinguish between such cases of "factual impossibility" and so-called "legal" or "inherent" impossibility. See, e.g., *People v. Jaffe*, 185 N.Y. 496, 78 N.E. 169 (1906); *Booth v. State*, 398 P.2d 863 (Okla. Crim. 1964); *Commonwealth v. Johnson*, 312 Pa. 140, 167 A. 344 (1933); *R. Perkins*, *supra* note 130, at 492-94.

a private citizen under the belief that he was a public official. Yet, impossibility quite clearly should not be a bar to prosecution in either case. In each the individual has indicated both his willingness and ability to engage in criminal acts, and fortuity should no more shield him from criminal liability than the person who fires a pistol at another and misses.<sup>170</sup> The restatement of general principles in Part I would eliminate any uncertainty on this point and on several others that have much more practical significance than many of the issues settled in the restatement of individual substantive offenses.<sup>171</sup>

Finally, Part I also offers several minor advantages that should assist in providing a more efficient administration of the criminal law. The collection of general principles in a single place would provide lawyers with a ready checklist in preparing their cases. It should also encourage counsel's recognition of the interrelationship of the various principles.<sup>172</sup> Additionally, Part I would provide an effective starting point for intensive research on particular doctrines, in much the same way as the definitional sections provide a starting point for research on individual crimes. In particular, it should permit a more orderly analysis of current case law, which will, of course, be a primary authority in construing the various principles restated in Part I.<sup>173</sup>

Admittedly, some of these advantages may be offset by the intricacy of several of the provisions in Part I. Simplicity of expression and structure are sharply limited by the complexity of the subject. The definition of an offense like "escape from custody" can be simply stated, but a statement of the various grounds justifying the use of

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170. See Model Penal Code § 5.01, Comment at 30-38 (Tent. Draft No. 10, 1960).

171. See, e.g., Mich. Rev. Crim. Code, § 415(b) (Final Draft 1967) (accomplice liability of persons knowingly facilitating criminal activity through the distribution of supplies, etc.); id. § 430 (criminal liability of corporations); id. § 1010(3) (relation of voluntary renunciation to liability for an attempt); id. § 1015(3) (renunciation and conspiracy liability).

172. Consider, for example, the potential impact of this approach on *People v. Marshall*, 362 Mich. 170, 106 N.W.2d 842 (1961). The court there refused to impose accessorial liability upon a person who knowingly lent his car to a drunk driver who subsequently caused a fatal accident. The owner's liability was rejected on the ground that he had not purposely aided the driver. See Mich. Rev. Crim. Code § 415 (Final Draft 1967). No attempt was made to view the owner's liability in terms of the Proposed Code's § 410, dealing with an individual's responsibility for the acts of an innocent agent. Under this approach, liability might well have been established on the ground that the act of lending the car to the drunk driver was itself the proximate cause of the accident.

173. Of course, in a few areas, changes have been made that will render prior decisions obsolete. Ordinarily, however, the provisions in Part I of the Proposed Code merely restate generally accepted common law principles, and older Michigan cases, where available, will be particularly relevant as a basis for interpretation. See Brumbaugh, *supra* note 148, at 25.

force in defense of the person cannot. The subject is just too complex to be effectively delineated without the use of three or four subsections with several paragraphs in each.<sup>174</sup> Yet, even though such a complex provision may appear confusing at first glance, it should not be difficult to apply. Ordinarily, the provisions will not be applied *in toto* since only one or two subsections will relate to the particular facts of the case. Moreover, the provisions will not replace the individual judge's own formulation of relevant principles, but only serve as an initial source in the construction of his charge to the jury.<sup>175</sup> Employed in this manner, similar provisions have proved valuable in other states.

*Eliminating Loopholes.* Another basic objective of the Proposed Code is to fill the various loopholes in the current law. In using the term "loopholes," I refer only to those gaps in the coverage of the penal law that are clearly inconsistent with policies expressed in current code provisions. These gaps stem from several sources. Some are simply a product of legislative oversight in drafting the current provisions. For example, our present bribery provisions generally prohibit both acceptance or solicitation of a bribe.<sup>176</sup> The provision prohibiting bribery of jurors, however, refers only to acceptance of a bribe.<sup>177</sup> Similarly, while one existing statute<sup>178</sup> prohibits offering a bribe to a person elected to office but not yet seated, another statute<sup>179</sup> appears to prohibit receipt of bribes only by persons presently in office. The Proposed Code eliminates various inconsistencies of this type.<sup>180</sup> Moreover, by utilizing a standard format in drafting related provisions, it should help to avoid such oversights in the future.

Many of the loopholes in the current law can be traced to legis-

174. See Mich. Rev. Crim. Code § 615 (Final Draft 1967).

175. See Wechsler, Foreword to Symposium on the Model Penal Code, 63 Colum. L. Rev. 589, 590-91 (1963).

176. See, e.g., Mich. Comp. Laws § 750.214 (1948), as amended, Mich. Stat. Ann. § 28.319 (1962); Mich. Comp. Laws § 750.125 (1948), Mich. Stat. Ann. § 28.320 (1962).

177. See Mich. Comp. Laws § 750.120 (1948), Mich. Stat. Ann. § 28.315 (1962).

178. See Mich. Comp. Laws § 750.117 (1948), Mich. Stat. Ann. § 28.312 (1962).

179. Mich. Comp. Laws § 750.118 (1948), Mich. Stat. Ann. § 28.313 (1962).

Compare Mich. Rev. Crim. Code § 5030 (Final Draft 1967).

180. Compare, e.g., Mich. Comp. Laws § 750.306 (1948), Mich. Stat. Ann. § 28.538 (1954) (prohibiting possession of pool tickets), with Mich. Comp. Laws § 750.373 (1948), Mich. Stat. Ann. § 28.605 (1954) (prohibiting possession of lottery tickets only if held with intent to sell); Mich. Comp. Laws § 750.375 (1948), Mich. Stat. Ann. § 28.607 (1954) (making it a crime to print lottery tickets), with Mich. Comp. Laws § 750.305 (1948), Mich. Stat. Ann. § 28.537 (1954) (making it a crime to publish gambling odds, but not pool tickets or policy sheets); Mich. Pub. Acts 1964, No. 147, Mich. Stat. Ann. § 28.759 (Supp. 1968) (prohibiting carrying away or mutilating, but not falsifying, public records), with Mich. Comp. Laws § 326.20 (1948), Mich. Stat. Ann. § 14.241 (1956) (prohibiting falsification of certain records). See Mich. Rev. Crim. Code §§ 4555, 6115 (Final Draft 1967).

lative attempts to meet new developments with narrow, piecemeal amendments directed at specific fact situations. For example, in 1964, the legislature amended the disorderly conduct statutes in order to reach harassing telephone calls. The new provision designates as disorderly, any person who "telephones . . . any other person and uses . . . any vulgar, indecent, obscene, threatening or offensive language . . ." <sup>181</sup> The legislature obviously concentrated solely on the particular type of harassing call that had been the source of current complaints and did not consider other forms of telephone calls that might be equally disturbing. As a result, the present code would not reach such practices as calling a person several times in the middle of the night and simply "hanging up" as he answers. A similar legislative pattern is revealed in a 1942 provision prohibiting false reports of crime to the police.<sup>182</sup> This provision covers persons who report entirely fictitious crimes, but not those who furnish fictitious information about an actual crime. Neither does it reach the mischief maker who calls the police to investigate a fictitious emergency other than a crime, such as an alleged drowning or serious fall. Again, by concentrating on only one aspect of a general problem, the legislature failed to reach equally disruptive conduct of a similar nature. The Proposed Code, by describing offenses in terms of their general elements, has effectively plugged several gaps in coverage of this type.<sup>183</sup>

The Proposed Code's more functionally related definitions should also eliminate those loopholes that stem from the current use of separate provisions to regulate the same basic activity as applied to different subjects. For example, while a special provisions bars the smuggling of alcohol, narcotics or a dangerous item into a prison,<sup>184</sup> only a much more limited section, requiring an intent to assist an escape, applies to mental hospitals.<sup>185</sup> Similarly, the present code makes it a crime to possess plates for counterfeiting money or commercial notes, but fails to deal with possession of plates for counterfeiting other items that the individual could not lawfully reproduce (e.g., state liquor stamps).<sup>186</sup> Such distinctions are largely unintended by-

181. Mich. Comp. Laws § 750.167 (1948), as amended, Mich. Stat. Ann. § 28.364 (Supp. 1968). Compare Mich. Rev. Crim. Code § 5535 (Final Draft 1967).

182. Mich. Comp. Laws § 750.411a (1948); as amended, Mich. Stat. Ann. § 28.643(1) (Supp. 1968). Compare Mich. Rev. Crim. Code § 4540 (Final Draft 1967).

183. See, e.g., Mich. Rev. Crim. Code § 4525, Comment at 338 (Final Draft 1967); id. § 7020, Comment at 498-99.

184. Mich. Comp. Laws § 800.281 (1948), Mich. Stat. Ann. § 28.1621 (1954); Mich. Comp. Laws § 800.283 (1948), Mich. Stat. Ann. § 28.1623 (1954).

185. Mich. Comp. Laws § 750.198 (1948), Mich. Stat. Ann. § 28.395 (1962).

186. Mich. Comp. Laws §§ 750.255, .262, .264 (1948), Mich. Stat. Ann. §§ 28.452, .459, .475 (1962).

products of ad hoc legislation and were easily eliminated through expansion and consolidation of the current provisions.<sup>187</sup> In other situations, however, the distinctions were tied to the nature of the actor's position and presented a stronger basis for differential treatment. For example, a current provision applicable only to legislators prohibits them from receiving compensation for personal services rendered in connection with any contract or claim on which they later are to exercise discretionary authority.<sup>188</sup> Although many other public officials are restricted by conflict of interest laws, not all would be subject to the same prohibition as the legislator.<sup>189</sup> While one could argue that the legislator's special position justifies holding him to a higher standard of responsibility, the Committee felt that the basic act prohibited by this legislation often constituted a disguised form of bribery and should be applicable to all employees, as is the bribery provision.<sup>190</sup> Similarly, the Committee saw no reason to limit to unmarried women the current provision prohibiting concealment of the death of a newborn child.<sup>191</sup> Whether the infant was illegitimate or not has no relevance for the purposes of this statute, which is designed to deal with possible homicide situations.<sup>192</sup>

In several instances, unnecessary distinctions creating loopholes in the law have been the product of outmoded judicial doctrines rather than legislative oversight. Perjury is probably the most notorious example of an offense made ineffective by technical common law doctrines that have no relation to the basic function of the offense.<sup>193</sup> In fact, the President's Commission's major recommendation in the area of substantive law reform concerned the elimination of technical restrictions on perjury prosecutions.<sup>194</sup> Most of these restrictions relate to special requirements for the proof of perjury, and the Proposed Code has either eliminated or modified these restrictions in line with the recommendations of the President's Commission, the Commis-

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187. See Mich. Rev. Crim. Code §§ 4020, 4615-16 (Final Draft 1967).

188. Mich. Comp. Laws § 750.411b (1948), Mich. Stat. Ann. § 28.643(2) (1954).

189. Mich. Rev. Crim. Code § 4720, Comment at 378-79 (Final Draft 1967) (collecting the various conflict of interest provisions).

190. See *id.* § 4715, Comment at 377-78. See also *id.* § 4810, Comment at 387 (extending the provisions prohibiting misuse of confidential information to all government employees).

191. Mich. Comp. Laws § 750.150 (1948), Mich. Stat. Ann. § 28.347 (1962).

192. Mich. Rev. Crim. Code § 7025, Comment at 500 (Final Draft 1967). Cf. *id.* § 7050, Comment at 507.

193. See Model Act on Perjury, Prefatory Note (1952); A Report by the President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 141 (1967) [hereinafter cited as President's Commission].

194. President's Commission at 141.

sioners on Uniform State Laws and the American Law Institute.<sup>195</sup> However, the Proposed Code also attacks technical doctrines that impose needless substantive limits on the perjury offense. For example, under present law, a notarized statement would not be treated as such if the notary testifies that, notwithstanding his jurat, he probably had not properly administered the oath.<sup>196</sup> In view of the prevalent looseness of notarial practices, this possibility exists in many cases.<sup>197</sup> As a result, a defendant who knowingly submits a notarized false affidavit or deposition with full intention of having it treated as a sworn statement may nevertheless escape perjury liability simply because he selected, perhaps intentionally, a negligent notary. The Proposed Code's perjury provision closes this escape hatch by providing, in effect, that a notarized statement will be taken as made under proper oath, irrespective of the notary's subsequent disclaimer, if the declarant intentionally represents it as such.<sup>198</sup> Along the same lines, the Proposed Code also rejects several other technical objections to perjury prosecutions that have no relation to the basic criminality of the false swearing (*e.g.*, that the defendant's false testimony was inadmissible under the rules of evidence).<sup>199</sup> Of course, with perjury so frequently a product of unrealistic substantive law (*e.g.*, the tort rule on contributory negligence), discarding these technical restrictions is not likely to have a major impact on its prevalence.<sup>200</sup> Nevertheless, combined with other changes, elimination of these loopholes should restore the effec-

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195. The recommendations concerned the special corroboration or "two witness" rule and the direct evidence standard of proof. The Proposed Code eliminates the direct evidence concept by permitting the prosecutor to establish falsehood by introducing two contradictory sworn statements without proving which in fact was false. See Mich. Rev. Crim. Code § 4915 (Final Draft 1967). This follows the recommendations of: President's Commission at 141; Model Act on Perjury § 2 (1952); Model Penal Code § 241.1(5) (Official Draft 1962). The Proposed Code did not totally discard the special corroboration requirements of the "two witness" rule, but it did eliminate those aspects of the rule generally viewed as unnecessarily restrictive. Proposed § 4920 permits the normal rules of evidence to govern proof of perjury except that "falsity . . . may not be established solely through contradiction by the testimony of a single witness." For an explanation of this limitation see Mich. Rev. Crim. Code § 4920, Comment at 402 (Final Draft 1967).

196. The jurat is only "presumptive evidence" that the oath was properly administered. Mich. Comp. Laws § 55.113 (1948), Mich. Stat. Ann. § 5.1047 (1961). See *Johnson v. Van Velsor*, 43 Mich. 208, 5 N.W. 265 (1880).

197. See Proposed N.Y. Pen. Law § 215.40, Staff Comment at 375-76 (Study Draft 1964) (discussing the New York experience).

198. Mich. Rev. Crim. Code § 4901(3) (Final Draft 1967). See also *State ex rel. Marachowsky v. Kerl*, 258 Wis. 309, 45 N.W.2d 668 (1951).

199. Mich. Rev. Crim. Code § 4925, Comment at 406 (Final Draft 1967).

200. See generally Hibschan, "You Do Solemnly Swear!" or That Perjury Problem, 24 J. Crim. L. & C. 901 (1934). The Proposed Code also adopts a lenient retraction provision that provides a valuable aid in encouraging corrections of sworn mistatements. Mich. Rev. Crim. Code § 4930 (Final Draft 1967).

tiveness of perjury prosecutions in certain limited areas, including those in which perjury penalties play an especially important role in implementing immunity statutes.<sup>201</sup>

The Proposed Code's effort to eliminate loopholes is also likely to have some practical impact in the important area of commercial crimes. In particular, several changes in the formulation of the basic theft offense should afford greater protection against commercial fraud.<sup>202</sup> Under present law, for example, obtaining property through a false statement as to a future event will not constitute false pretenses, although it may be larceny by trick.<sup>203</sup> Liability thus will depend upon whether the actor received title to the property or only possession.<sup>204</sup> The Proposed Code rejects this distinction, making misrepresentation by future promise a basis for liability in either case.<sup>205</sup> A "tout" at a race track who converts money received from another under a false pretense that he will bet it on behalf of that person will now be liable irrespective of whether he technically can be classified as a bailee.<sup>206</sup> The crucial factor will be the fraudulent use of deception, rather than the type of property interest acquired through that deception.

A somewhat similar approach is employed to strike a serious loophole in the current treatment of misappropriation of restricted funds. Under the present provisions, embezzlement liability extends only to such funds as the actor actually received in trust from another.<sup>207</sup> Thus, an employer would not be liable for misappropriation of funds deducted from an employee's wages under a union dues check-off plan. He would be liable, however, if he directly paid the employee's entire

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201. The President's Commission report particularly stressed the significance of perjury prosecutions in supporting the effective use of immunity statutes. President's Commission at 141.

For illustrations of other areas in which technical loopholes are eliminated see Mich. Rev. Crim. Code § 1015, Comment at 101-02, 3215 (Final Draft 1967); *Id.* § 3215, Comment at 232.

202. Although not normally viewed as a serious crime problem, business frauds account for considerably greater economic losses than robbery, burglary and larceny combined. See President's Commission at 32-34.

203. See *People v. Widmayer*, 265 Mich. 547, 251 N.W. 540 (1933); *People v. Martin*, 116 Mich. 446, 74 N.W. 653 (1898). See generally Pearce, *Theft by False Promises*, 101 U. Pa. L. Rev. 967 (1953).

204. *People v. Niver*, 7 Mich. App. 652, 152 N.W.2d 714 (1967); *People v. Martin*, 116 Mich. 446, 74 N.W. 653 (1898). See also Pearce, *supra* note 203.

205. See Mich. Rev. Crim. Code §§ 3201(a)(v), 3205(1)(c) (Final Draft 1967). To insure these provisions will not be misused by application to an ordinary debtor-creditor situation, § 3205(2) provides that deception cannot be shown simply by "failure to perform standing alone . . ." See also *People v. Ashley*, 42 Cal. 2d 246, 267 P.2d 271 (1954).

206. Cf. *People v. Martin*, 116 Mich. 446, 74 N.W. 653 (1898), holding a defendant liable in a somewhat similar situation on the ground that she was a bailee.

207. See, e.g., *People v. Gregg*, 170 Mich. 168, 135 N.W. 970 (1912).

wages, and the employee had then returned the actual funds held by the employer to pay the union.<sup>208</sup> This distinction is purely artificial. The crucial factor should be whether the employer recognized a clear duty to make specified disposition of the particular funds, irrespective of their original source. The Proposed Code would base liability on exactly that factor.<sup>209</sup>

The Proposed Code also includes several changes that would reach other, more direct patterns of commercial crime. As previously noted, the scope of the general theft provision is expanded to include misappropriation of all types of commercial services.<sup>210</sup> Similarly, the extortion provision is expanded to include a broader range of threats used in blackmailing. The present extortion provision applies only to threats to either "accuse another of a crime . . . or . . . threaten injury to the person or property or mother, father, husband, wife or child of another . . . ." <sup>211</sup> The Proposed Code extends the class of proscribed threats to include those made against persons other than the victim and his close relatives.<sup>212</sup> A threat to injure a fiancé, child of a friend or an employee may be just as effective in extorting money as a threat against a spouse. The Proposed Code also includes threats to engage in other illegal acts (*e.g.*, denial of a legal right) or to expose a secret that will subject another to community contempt. These threats may not be as dangerous as those presently covered, and they are, in fact, categorized as involving a lower level offense.<sup>213</sup> Nevertheless, they still constitute a form of blackmail and should be treated as such.

In almost every case in which the Proposed Code expands the scope of present provisions, the Committee's aim was to eliminate serious, existing loopholes, such as those found in the area of commercial crime. In a few instances, however, statutes were broadened primarily in anticipation of future changes that might make current provisions inadequate. For example, as the number of sundry governmental forms continuously increases, it seems obvious that the requirement that these forms be made under oath will have to be discarded.

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208. Model Penal Code § 206.4, Comment at 80-81 (Tent. Draft No. 2, 1954). See also *Commonwealth v. Mitchneck*, 130 Pa. Super. 433, 198 A. 463 (1938).

209. See Mich. Rev. Crim. Code §§ 3226-27, Comments at 236-37 (Final Draft 1967). Compare Mich. Comp. Laws § 207.118a (1948), Mich. Stat. Ann. § 7.308(1) (1960), with *People v. Wadsworth*, 63 Mich. 500, 30 N.W. 99 (1886).

210. See p. 775 & notes 19 & 20 *supra*; Mich. Rev. Crim. Code § 3220 (Final Draft 1967). See also Comment, *The Michigan Revised Criminal Code and Offenses Involving Theft*, 14 Wayne L. Rev. p. 969 *infra*.

211. Mich. Comp. Laws § 750.213 (1948), Mich. Stat. Ann. § 28.410 (1962). See *People v. Watson*, 307 Mich. 378, 11 N.W.2d 926 (1943).

212. Mich. Rev. Crim. Code § 3245 (Final Draft 1967).

213. *Id.* § 3247.



In most cases, however, the information sought will still be of sufficient significance to require criminal penalties for material falsifications. Accordingly, under section 4906 (perjury in the second degree), a statement is treated as equivalent to having been made under oath if it is "made on or pursuant to a form bearing notice, authorized by law, to the effect that false statements made therein are punishable."<sup>214</sup> The function of the oath requirement basically is to put the individual on notice of the special significance of the information required; the special formality of the oath serves to evidence the seriousness of the state's demand for honesty, and forewarns the actor that falsification will bear special sanctions.<sup>215</sup> Experience with the federal income tax forms indicates that printed notices, if presented in appropriate form, can adequately serve this function. Accordingly, section 4901(3) would permit the substitution of such forms for an oath, but only where specifically authorized by the legislature.<sup>216</sup> The anticipation of similar changes in other areas led to slight expansion of several current provisions.<sup>217</sup> In each instance, however, the expansion was carefully limited so as not to be subject to abusive application under current circumstances.

In examining potential loopholes in the present law, the Committee occasionally came across problem areas that were probably covered by current provisions, but only in a rather indirect fashion. In several instances, these areas were considered of sufficient importance to create entirely "new" provisions aimed at the specific evils involved. One provision of this type is section 4505, prohibiting the intentional physical obstruction of any governmental activity. Physical obstruction of a governmental activity usually will involve a violation of the criminal trespass statutes.<sup>218</sup> Many obstructions that might not fall under the ambit of such statutes, such as locking an administrator out of his office, would constitute criminal tampering under section 2712.<sup>219</sup> Still

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214. See id. § 4901(3)(a).

215. The oath requirement originally had a theological basis, see Silving, *The Oath*, 68 *Yale L.J.* 1329 (1959). Its justification today, however, must be based strictly on functional grounds. See *Torcaso v. Watkins*, 367 U.S. 488 (1961).

216. See Mich. Rev. Crim. Code § 4901(3) (Final Draft 1967); id. § 4906, Comment at 391-92.

217. See, e.g., Mich. Rev. Crim. Code § 2720 (Final Draft 1967) (extending prohibition against noxious substances to materials other than valerium); id. § 4620 (extending bail jumping to persons released from custody without bond).

218. See *Adderley v. Florida*, 385 U.S. 39 (1966); cf. *People v. Weinberg*, 6 Mich. App. 345, 149 N.W.2d 248 (1967).

219. Mich. Rev. Crim. Code § 2712(1)(a) (Final Draft 1967) makes it a Class B misdemeanor to "[t]amper with the property of another person with intent to cause substantial inconvenience to that person or to another." The door-locking case would clearly come within this provision, see id. § 2710(a) (defining "tamper"). Such activity

other obstructions would involve disorderly conduct. In each instance, however, the relevant provision gives no weight to the fact that governmental activities are being impaired. There is presently a series of statutes that do emphasize that factor, but prohibit obstruction only of certain officers (e.g., conservation officers, dairy inspectors and firemen).<sup>220</sup> The Committee agreed with the premise of these statutes, that intentional interference with general governmental services adds a dimension to otherwise unlawful conduct that justifies its separate treatment. Accordingly, section 4505 expands upon these provisions to protect all lawful governmental functions from intentional physical interference.<sup>221</sup>

This type of analysis also led to the expansion of the right of the law officer to disperse unlawful assemblies. Present law authorizes dispersement only of any "riotous" group.<sup>222</sup> Section 5520 would also include persons participating in illegal non-violent conduct that causes "serious inconvenience" to the public.<sup>223</sup> Of course, since the underlying activity must be illegal, the officer would always have the right to arrest these participants. The Committee believed, however, that he should also have an independent authority to disperse the crowd where he does not desire to rely on his arrest authority. Moreover, if the participants refuse to disperse, the prosecutor can proceed under section 5520 which appropriately emphasizes the serious inconvenience caused by the participants' activities rather than just the technical violation of property rights involved in a simple trespass charge. Here again, the "new" crime does not really extend the coverage of the

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might not constitute a trespass because the individuals involved may not have been "forbidden" to "enter upon" the government property. See Mich. Comp. Laws § 750.552 (1948), Mich. Stat. Ann. § 28.820(1) (1954). Similarly, it would not constitute malicious destruction because no physical damage results. See, e.g., Mich. Comp. Laws § 750.380 (1948), Mich. Stat. Ann. § 28.612 (1954).

220. See Mich. Comp. Laws § 289.40 (1948), Mich. Stat. Ann. § 12.836 (1967) (dairy inspectors); Mich. Comp. Laws § 300.17 (1948), as amended, Mich. Stat. Ann. § 13.1227 (1967) (resisting a conservation officer); Mich. Comp. Laws § 750.241 (1948), Mich. Stat. Ann. § 28.438 (1962) (firemen).

221. Mich. Rev. Crim. Code § 4505, Comment at 325-26 (Final Draft 1967).

222. Mich. Comp. Laws § 750.521 (1948), Mich. Stat. Ann. § 28.789 (1954), refers to any group "unlawfully, riotously or tumultuously assembled . . ." Despite its reference to those "unlawfully" assembled, this provision probably would not be applicable to a group of persons peacefully participating in an unlawful demonstration (e.g., a sit-in). The Michigan provision is patterned after the English Riot Act of 1714 and would be limited to conduct that at least threatens violence. See R. Perkins, Criminal Law 348-49 (1957). Cf. *People v. Dixon*, 188 Mich. 307, 154 N.W. 1 (1915) (refusing to apply § 750.521 to a group unlawfully assembled to see a movie on Sunday).

223. Like the riot provisions, § 5520 also requires an assemblage of 5 or more persons. It also applies to illegal assemblies that cause "substantial harm or serious . . . annoyance or alarm . . ." Mich. Rev. Crim. Code § 5520(1) (Final Draft 1967).

present law, but merely seeks to deal directly with a particular type of evil that is only reached indirectly under present provisions. With only a few exceptions, most of the apparently "new" offenses under the Proposed Code actually fall into this category.<sup>224</sup>

*Restricting Overbreadth.* Just as the Committee found it necessary to broaden some provisions in order to plug loopholes, it also found it necessary to restrict others in order to prevent potentially pernicious and unnecessary "overbreadth." A statute was viewed as overbroad only when its coverage encompassed activities substantially beyond that which it was designed to punish. In most instances, the overbreadth stemmed from the literal application of the statute to conduct widely recognized by society as morally innocent. Of course, statutes so broadly drafted are rarely enforced to the fullest extent. But this factor neither renders them harmless nor justifies their retention. The appropriate restraint shown by prosecutors generally cannot be attributed to all prosecutors under all circumstances; and, even if it could, leaving such a basic determination as to the scope of the penal law entirely in the prosecutor's discretion is fundamentally inconsistent with the basic premises of codification.<sup>225</sup> Moreover, the very presence

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224. Typical of the "new crimes" in this category is Mich. Rev. Crim. Code § 2322 (Final Draft 1967). Section 2322 creates the crime of subjecting another to sexual contact less than rape without that person's consent. Where a minor is involved, such abuse is usually classified as indecent liberties. See Mich. Comp. Laws § 750.336 (1948), as amended, Mich. Stat. Ann. § 28.568 (1954). The sexual abuse of an adult, however, is merely treated as a form of assault. While it clearly does fit within the definition of assault, the crucial aspect of the act relates to its sexual motivation. Section 2322 properly emphasizes this factor.

It should also be noted that § 2322 applies only where the actor believed under all circumstances that his victim did not consent. It does not prohibit the normal advance of the "nothing ventured, nothing gained" variety. See Mich. Rev. Crim. Code §§ 2320-22, Comment (Final Draft 1967). As with the indecent liberties provision, proper emphasis upon this requisite mental element will prevent misapplication. Compare *People v. Noyes*, 328 Mich. 207, 43 N.W.2d 331 (1950), with *People v. Healy*, 265 Mich. 317, 251 N.W. 393 (1933).

225. This is not to suggest that administrative discretion will not play a large part in limiting the Proposed Code's provisions to their proper function. A code that encompasses only such cases as we intend to make criminal, and clearly excludes all others, is beyond the skill of legislative draftsmen. See President's Commission at 130. However, it is one thing to seek a fair degree of precision in statutory definitions and rely on administrative discretion to round off the rough edges, and quite another to assign the basic task of draftsmanship itself to administrative discretion. See generally LaFave, *Penal Code Revision: Considering the Problems and Practices of the Police*, 45 Texas L. Rev. 434 (1967). The Committee did not attempt to draw lines too finely. It is often possible to visualize some hypothetical situation that might technically violate a code provision, yet would not generally be viewed as involving a criminal act. Yet where 99% of the cases covered by a provision are likely to be appropriate situations for imposing penal sanctions and 1% are not, it is usually best to cover the entire area, leaving the 1% to the common sense of police and prosecutors in fashioning enforcement policy, rather than attempt to carve that 1% out of the statutory framework.

of such broadsweeping provisions on the statute books may in itself place a needless burden on local police. The police ordinarily have no desire to enforce such provisions to the letter of the law. They are fully aware, for example, that most of the public accept the friendly poker game at the local Elks Club and that a midnight raid will hardly enhance their working relationship with the community. Yet, they cannot readily undermine their image as the agency responsible "only for enforcing the law, not judging it." This image imposes a continuing pressure for full enforcement that makes it difficult for the police to simply refuse to respond when such clearly illegal action is called to their attention by an insistent complainant.<sup>226</sup> Thus, the Proposed Code's elimination of unnecessary overbreadth should serve both to promote more equal enforcement of the law and to facilitate more efficient police administration.

Much of the overbreadth in current provisions results from technical defects in legislative drafting. For example, the prohibition against "fortune telling for gain" fails to exclude fortune telling performed as part of a theatre or nightclub act.<sup>227</sup> The statute making it a crime for a citizen to refuse a police request for assistance in apprehending a fugitive fails to except the person who, because of a weak heart or other circumstances, is clearly justified in refusing the request.<sup>228</sup> And the statute providing for the registration of found property fails to separate clearly its requirements from those minimum steps needed to exempt from criminal liability a finder who eventually converts the found property to his own use.<sup>229</sup> Defects such as these were easily

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What the Committee was concerned with in the area of overbreadth was statutes that covered large areas that clearly were not appropriate for penal sanctions and could easily be excluded from the statutory coverage.

226. See Goldstein, *Police Discretion: The Ideal Versus the Real*, 23 *Pub. Admin. Rev.* 140 (1963); *La Fave*, *supra* note 225, at 436-39.

227. Mich. Comp. Laws §§ 750.267-268 (1948), Mich. Stat. Ann. §§ 28.478-479 (1962). Compare Mich. Rev. Crim. Code § 4225(2) (Final Draft 1967).

228. Mich. Comp. Laws § 750.483 (1948), Mich. Stat. Ann. § 28.751 (1954). Compare Mich. Rev. Crim. Code § 4520 (Final Draft 1967). The current provision is overly broad in one other respect. As written, it permits a police official to request assistance in the general "execution of his office, in any criminal case." Taken literally this would permit an officer to demand assistance in searching a house, unloading a truck filled with contraband, etc. Police officials on the Committee stressed that there was no need for such broad power, and that its use in such situations would be contrary to acceptable standards for police administration. Accordingly, § 4520 is limited to requests for assistance in "[e]ffectuating or securing an arrest" or "[p]reventing the commission by another of any offense." *Id.*

229. Mich. Comp. Laws §§ 434.1-12 (1948), Mich. Stat. Ann. §§ 18.701-712 (1957). See *People v. Harmon*, 217 Mich. 11, 185 N.W. 679 (1921). Most people are unaware of this statute, and could easily take reasonable steps to discover and notify the owner without complying with its specific provisions. The Proposed Code requires only that the finder take "reasonable measures to discover and notify the owner" but does

remedied through the adoption of comparatively minor statutory changes.<sup>230</sup>

The possible overbreadth in other provisions, however, raised far more difficult issues and often required a careful reconsideration of the basic objective of each provision.<sup>231</sup> The current provision on indecent exposure is so broadly stated that it has been applied to members of a secluded nudist colony.<sup>232</sup> Obviously, this goes beyond the basic statutory objective. A nudist camp is hardly a public place nor are the people there likely to be affronted by nudity.<sup>233</sup> But should the statute even apply in every instance where these factors are present? Should it apply, for example, to a drunk who attempts to urinate in a well-lighted alley knowing that pedestrians might walk by at any moment? The Committee concluded that in most instances it should not. The statute should emphasize mens rea as well as the disturbance of others, and primary application should be in the case of true exhibitionism.<sup>234</sup> Accordingly, the Proposed Code limits indecent exposure to the public exposure of genitals with the intent to arouse or gratify sexual desire.<sup>235</sup> Some question has been raised concerning the prose-

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not limit the definition of "reasonable measures" to compliance with the "finders" statute. See Mich. Rev. Crim. Code § 3215 (Final Draft 1967). The Committee also recommended that the "finders" statute "be revised to take account of the special coverage of the matter in the Criminal Code itself." Id. § 3215, Comment at 233.

230. See Mich. Rev. Crim. Code §§ 3215, 4225(2), 4520 (Final Draft 1967). See notes 225-27 *supra*. For illustrations of similar defects cured by the Proposed Code, see id. § 3260, Comment (scope of presumption arising from possession of machinery with manufacturer's serial number defaced or removed); id. § 4040, Comment at 277 (scope of requisite mens rea for negotiating worthless checks); id. § 5730, Comment (scope of provision prohibiting advertisements for the sale of firearms).

231. In addition to the indecent exposure provision previously discussed, see Mich. Rev. Crim. Code §§ 3230-35, Comment at 241 (Final Draft 1967) (limiting the applicability of the joy-riding provision to riders who knew that the vehicle was stolen at the time of entry); id. § 4705, Comment at 373-74 (limiting the bribery provisions to the solicitation or offer of "pecuniary benefits").

232. Mich. Pub. Acts 1952, No. 73, Mich. Stat. Ann. § 28.567(1) (1954). See *People v. Ring*, 267 Mich. 657, 255 N.W. 373 (1934). In a later case, *People v. Hildabridge*, 353 Mich. 562, 92 N.W.2d 6 (1958), the court divided evenly on the nudism issue, casting serious doubt on the continuing validity of the *Ring* case. See Comment, Sex Offenses and Penal Code Revision in Michigan, 14 Wayne L. Rev. p. 934 *infra* at 963.

233. Compare *People v. DeVine*, 271 Mich. 635, 261 N.W. 101 (1935), with *People v. Hildabridge*, 353 Mich. 562, 572-73, 92 N.W.2d 6, 10 (1958).

234. Mich. Rev. Crim. Code § 3225, Comment (Final Draft 1967).

235. Mich. Rev. Crim. Code § 3225 (Final Draft 1967). A somewhat similar approach was taken in the provision prohibiting the public display of indecent material. Id. § 6320. This provision would prohibit public display of photographs and statues revealing genitals or pubic areas when "presented in such a manner as to exploit lust." Thus, it clearly would not be applicable to works of art. Compare Mich. Comp. Laws § 750.38 (1948), Mich. Stat. Ann. § 28.227 (1962) (making it a crime to display "any representation of the human form in an attitude or dress which would be indecent in the case of a living person . . .").

cutor's ability to show such *mens rea*, but the Committee was informed that this is an easy enough task in the case of the repeating offender, and that is primarily where the statute is employed.

Significant limitations upon statutory overbreadth are also suggested in the area of gambling offenses. Present provisions absolutely prohibit all gambling.<sup>236</sup> While there was considerable dispute as to whether anti-gambling provisions were properly aimed at such events as church-sponsored bingo, it was generally agreed that such statutes clearly were not aimed at true social gambling, *i.e.*, unsponsored gambling for which there is no direct or indirect charge. The literal application of current provisions to such gambling only serves to hinder proper enforcement of the gambling statutes.<sup>237</sup> Accordingly, the Proposed Code, following the pattern of the Model Anti-Gambling Act,<sup>238</sup> specifically excludes "social games of chance" in which each participant competes on equal terms.<sup>239</sup>

The gambling provisions also except the participant in nonsocial gambling who is merely a player, *i.e.*, one who does not promote or advance the gambling in any way other than merely by betting.<sup>240</sup> This exemption is based in part on recognition that gambling is an exceedingly widespread and accepted activity, and that the criminal law therefore must be directed at those who exploit the popular urge to gamble.<sup>241</sup> More significantly, the exemption of bettors should make their testimony more readily available to prosecutors since the exemption will bar bettor reliance on self-incrimination as a ground for refusing to testify.<sup>242</sup> The Committee's treatment of bettors might seem,

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236. See Mich. Comp. Laws § 750.301 (1948), Mich. Stat. Ann. § 28.533 (1954) (prohibiting acceptance of money or other valuable thing with payment contingent on a certain event); Mich. Comp. Laws § 750.314 (1948), Mich. Stat. Ann. § 28.546 (1954) (making it an offense to win money at cards, dice, or any other game); Mich. Comp. Laws § 750.315 (1948), Mich. Stat. Ann. § 28.547 (1954) (making it a misdemeanor to pay a gambling debt and not sue to recover the payment within 3 months).

237. 2 ABA Comm. on Organized Crime, Organized Crime and Law Enforcement 74 (1953). The Model Act proposes this exemption as an optional provision. See also *id.* at 75.

238. See LaFave, *supra* note 225, at 436-38.

239. Mich. Rev. Crim. Code §§ 6101(h), 6105-06 (Final Draft 1967). A similar position is taken in the provision barring the distribution of pornographic material to adults (but not children). *Id.* § 6305(1). Compare *id.* § 6310.

240. Mich. Rev. Crim. Code §§ 6101(h), 6105-06 (Final Draft 1967).

241. *Id.* § 6106, Comment at 465.

242. *Id.* See also *In re Vickers*, 371 Mich. 114, 123 N.W.2d 253 (1963). Compare the position taken in the provision on compounding. The Committee there rejected a special exemption for the victim of a crime who agrees to drop prosecution if the alleged offender restores property belonging to the victim or pays damages for the harm the victim suffered. Although such persons are rarely prosecuted, the threat of prosecution is sometimes used to prevent the victim from "backing out" of the prosecution after he has recovered reimbursement. Mich. Rev. Crim. Code § 4530, Comment at 339-40 (Final Draft 1967).

however, to conflict with its treatment of the individual who patronizes a prostitute. In this area, the Proposed Code provision probably expands upon present coverage in holding the patron as well as the prostitute criminally liable.<sup>243</sup> Arguably, the moral turpitude of one who patronizes a prostitute is no greater than the patron of a bookie.<sup>244</sup> However, the patron of a prostitute is far more likely to become a victim of a crime, often one of violence.<sup>245</sup> The presence of criminal liability might serve as some deterrence in keeping prospective patrons away from high crime areas in which prostitution flourishes. In any event, it will afford the police sufficient authority to exercise their arrest power in the interest of protecting the patron as well as the general community. This function was formerly served by a provision prohibiting loitering in houses of prostitution,<sup>246</sup> but changes in the operation patterns of prostitutes have made that section far less effective.<sup>247</sup>

In both situations discussed above—gambling and indecent exposure—it is quite clear that the current provisions are overbroad, although views may vary as to the degree of overbreadth. This is true in most instances in which the Proposed Code restricts current coverage,<sup>248</sup> but not all. In the area of offenses against privacy, for example, the broad scope of a recently adopted statute posed considerable difficulty in determining the intended function of current anti-eavesdropping provisions. That statute, adopted in 1967, makes it a felony to

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243. See Mich. Rev. Crim. Code § 6205 (Final Draft 1967). Under current law, the male technically could be held under Mich. Comp. Laws § 750.448 (1948), Mich. Stat. Ann. § 28.703 (1954), if he originally solicited the prostitute, or under Mich. Comp. Laws § 750.167 (1948), as amended, Mich. Stat. Ann. § 28.364 (Supp. 1968), if found loitering in a house of prostitution. But see *People v. Brandt*, 306 P.2d 1069 (Cal. Super. Ct. 1956); *People v. Anonymous*, 161 Misc. 379, 292 N.Y.S. 282 (Magis. Ct. 1936), suggesting that a single visit to a house of prostitution is not a sufficient basis for a loitering conviction.

244. In large part, this depends upon whether one views the prostitute as the "victim" of the offense. See George, Legal, Medical and Psychiatric Considerations in the Control of Prostitution, 60 Mich. L. Rev. 717, 744-53 (1962).

245. Although separate statistics were not available, law enforcement officials suggested that it is not unusual for a substantial percentage of the robbery victims in Detroit on any given weekend night to be either customers or prospective customers of prostitutes. See generally American Bar Foundation, Law Enforcement in the Metropolis 85, 89 (D. McIntyre, Jr. ed. 1967).

246. See Mich. Comp. Laws § 750.167 (1948), as amended, Mich. Stat. Ann. § 28.364 (Supp. 1968) (classifying as disorderly persons "any person found loitering in a house of ill-fame or prostitution or place where prostitution or lewdness is practiced, encouraged or allowed").

247. See American Bar Foundation, *supra* note 245, at 86: "Full fledged brothels, as such, were rare. Instead, the prostitutes solicited their trade on the street and escorted their patrons to rooms in their own homes or in nearby accommodations which they rented."

248. See, e.g., Mich. Rev. Crim. Code § 2807, Comment at 215 (Final Draft 1967) (limiting the arson provisions as applied to a person who burns his own property); *id.* § 7005, Comment (rendering the incest provision inapplicable to cousins, etc.).

"overhear, record, amplify or transmit" any private conversation without the consent of *both* parties to the conversation.<sup>249</sup> Ordinarily, anti-eavesdropping statutes, such as the federal and state wiretap prohibitions, permit eavesdropping with the consent of either party.<sup>250</sup> This protects the citizen's right to make some record of his conversation with the aid of a secret listener. It is not unusual, for example, for an employer to ask his secretary to "listen in" secretly on a conversation with a client. Of course, to some, such activity constitutes a basic invasion of privacy.<sup>251</sup> The legislature's failure to modify the Michigan wiretap provision (requiring the consent of only one party) indicates, however, that the 1967 statute was not based on this broad view of privacy.<sup>252</sup> The Committee accordingly treated the enlarged application of the 1967 provision as a legislative oversight and recommended that eavesdropping as well as wiretapping be permitted where one party consents.<sup>253</sup>

The Committee's efforts to eliminate overbreadth were also made more difficult by the inherent vagueness of several overly broad provisions.<sup>254</sup> For example, provisions making it a crime to be a "vagrant" or a "person who engages in an illegal occupation" establish highly ambiguous status offenses of doubtful constitutionality.<sup>255</sup> Yet, the vagueness of such provisions is almost essential if they are expected to serve as primary authority for police efforts to control suspicious

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249. Mich. Pub. Acts 1966, No. 319, §§ 539a(2), 539e, Mich. Stat. Ann. §§ 28.807 (1)-(2), .807(5) (Supp. 1968).

250. See Mich. Comp. Laws § 750.540 (1948), Mich. Stat. Ann. § 28.808 (1954). See also *Rathbon v. United States*, 355 U.S. 107 (1957); *People v. Marinian*, 359 Mich. 361, 102 N.W.2d 568 (1960).

251. See Greenawalt, *The Consent Problem in Wiretapping & Eavesdropping: Surreptitious Monitoring with the Consent of a Participant in a Conversation*, 68 Colum. L. Rev. 189, 208-09, 214-21 (1968) (listing the various objections to the consent exemption). See also *People v. Kurth*, 34 Ill. 2d 387, 216 N.E.2d 154 (1966).

252. See Mich. Comp. Laws § 750.540 (1948), Mich. Stat. Ann. § 28.808 (1954). See also *People v. Marinian*, 359 Mich. 361, 102 N.W.2d 568 (1960).

253. If, on the other hand, the Committee's view of the policy expressed in the 1967 eavesdropping bill is incorrect, then the wiretapping statute should be amended to require the consent of both parties. Compare Cal. Pen. Code §§ 631(a), 632(a) (Supp. 1967).

254. Of course, a certain degree of vagueness was found to be inherent in some legislation. For example, a provision seeking to insure so broad an objective as the proper upbringing of a child must, of necessity, be somewhat vague. The Proposed Code provision on endangering the welfare of a child simply prohibits knowing action "likely to be injurious to the physical or mental welfare of a child under 17." Mich. Rev. Crim. Code § 7040 (Final Draft 1967).

255. Mich. Comp. Laws § 750.167 (1948), Mich. Stat. Ann. § 28.364 (1962). On the constitutionality of such provisions, see *Fenster v. Leary*, 20 N.Y.2d 309, 229 N.E.2d 426, 282 N.Y.S.2d 739 (1967); *Edelman v. California*, 344 U.S. 357, 362 (1953) (dissenting opinion; the majority did not reach the merits).



persons through "investigative arrests," or "on-the-street stops" and interrogation.<sup>256</sup> The Committee recognized this factor, but concluded that the validity of such police activities should be faced directly in specific legislation on police authority rather than through manipulation of the substantive law.<sup>257</sup> Accordingly, the various status offenses were replaced by provisions prohibiting specific acts, such as prostitution, loitering and disorderly conduct.<sup>258</sup>

A somewhat similar approach was taken in defining criminal conspiracy. Our current provision prohibits conspiracies to either commit "an[y] offense prohibited by law, or to commit a legal action in an illegal manner."<sup>259</sup> Under this definition, any agreement to perform a tortious or otherwise wrongful act carries the potential of being punished as a criminal conspiracy.<sup>260</sup> Admittedly, judicial interpretation has somewhat narrowed the literal scope of the offense by insisting that the wrongful act be sufficiently far-reaching to have "a harmful effect on society and the public."<sup>261</sup> Nevertheless, the offense remains largely "open-ended" and subject to serious constitutional objections. In fact, a somewhat similar provision has been held unconstitutional in two

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256. See LaFave, *supra* note 225, at 451-54 & nn.77-78; Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 Harv. L. Rev. 904, 912-13 (1962). See also American Bar Foundation, *supra* note 245, at 78-80, 84-86.

257. See Foote, *Vagrancy-Type Law and Its Administration*, 104 U. Pa. L. Rev. 603, 649 (1956).

258. Mich. Rev. Crim. Code §§ 5520, 5540, 5545, 6201 (Final Draft 1967). Of course, a certain degree of vagueness is also inherent in some of these provisions. The definition of disorderly conduct, for example, specifies particular acts (e.g., fighting, using obscene language in a public place, obstructing traffic, etc.) but also includes a *ejusdem generis* clause prohibiting any activity that "creates a hazardous or physically offensive condition by any act that serves no legitimate purpose." Mich. Rev. Crim. Code § 5525(1)(g) (Final Draft 1967). To some degree, the vagueness of this provision is offset by the requirement that the actor at least be aware of a substantial likelihood that his acts will cause "public inconvenience, annoyance or alarm." Cf. *Screws v. United States*, 325 U.S. 91 (1945). Nevertheless, such standards as "legitimate purpose" and "public . . . annoyance or alarm" hardly meet the usual standards of precision. They may be necessary, however, if the provision is to adequately cover the great variety of acts that are commonly viewed as disorderly conduct. E.g., *Commonwealth v. Wysocki*, 2 Pa. D. & C.2d 334 (1954) (firecrackers on highway); *State v. Duvall*, 140 Kan. 456, 36 P.2d 958 (1934) (defendant had herself bound and left on a public highway). See also Mich. Rev. Crim. Code § 5540(1)(e) (Final Draft 1967), defining loitering as "remain[ing] in or about a school building or grounds, not having any reason or relationship involving custody of or responsibility for a pupil or any other specific, legitimate reason for being there . . . ."

259. Mich. Pub. Acts 1966, No. 296, § 157a, Mich. Stat. Ann. § 28.354(1) (Supp. 1968).

260. See *People v. Tenerowicz*, 266 Mich. 276, 253 N.W. 296 (1934); *State v. Kemp*, 126 Conn. 60, 9 A.2d 63 (1939). See generally Pollack, *Common Law Conspiracy*, 35 Geo. L.J. 328 (1947).

261. *People v. Tenerowicz*, 266 Mich. 276, 283-84, 253 N.W. 296, 299 (1934); see *Commonwealth v. Donoghue*, 250 Ky. 343, 63 S.W.2d 3 (1933).

states and its validity questioned by the United States Supreme Court.<sup>262</sup> The Committee preferred to avoid such objections by restricting the general conspiracy provision in the Proposed Code to conspiracies to commit criminal acts. At the same time, however, it acknowledged that

behavior that the law [generally] does not regard as sufficiently undesirable to punish criminally when pursued individually may nevertheless be so immoral, oppressive to individual rights or prejudicial to the public as to necessitate criminal liability when pursued by a group.<sup>263</sup>

Accordingly, it recommended that "such [behavior] should be dealt with by special conspiracy provisions in the legislation governing the class of conduct in question."<sup>264</sup> These separate provisions would include such legislation as the recent proposal to proscribe conspiracies to charge extravagantly usurious interest rates on loans (*i.e.*, "loan sharking").<sup>265</sup>

The Committee's effort to eliminate unnecessary vagueness is also reflected in the treatment of conflicts of interest by public officials. Several current provisions make it a crime for specified public servants to be "directly or indirectly interested in any contract, purchase, or sale" by the public institution which they serve.<sup>266</sup> As numerous opinions of the attorney general illustrate, what constitutes an "indirect interest" in a contract or sale is not easily determined.<sup>267</sup> The complexity of this issue was recently recognized by the legislature in adopting a new civil conflict of interest provision that establishes a special procedure for obtaining advisory opinions on potential conflict situations.<sup>268</sup> The Committee believed that "the remedy afforded by that law, namely, making the contract subject to being voided by the state agency plus possible non-criminal disciplinary action provided by other provisions, *e.g.*, removal from office . . . should be entirely

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262. *Musser v. Utah*, 333 U.S. 95 (1948); *State v. Bowling*, 5 Ariz. App. 436, 427 P.2d 928 (1967); *State v. Musser*, 118 Utah 537, 223 P.2d 193 (1950), all dealing with a provision prohibiting conspiracies "injurious to public morals."

263. Mich. Rev. Crim. Code § 1015, Comment at 98 (Final Draft 1967).

264. *Id.*

265. Proposal made by the Organized Crime Division of the Attorney General's Office. See *Commonwealth v. Donoghue*, 250 Ky. 343, 63 S.W.2d 3 (1933), for a discussion at common law.

266. Mich. Comp. Laws § 750.122 (1948), Mich. Stat. Ann. § 28.317 (1962); see, *e.g.*, Mich. Comp. Laws § 45.82 (1948), Mich. Stat. Ann. § 5.1152 (1961); Mich. Comp. Laws § 88.16 (1948), Mich. Stat. Ann. § 5.1712 (1949).

267. See, *e.g.*, [1967-68] Mich. Att'y Gen. Biennial Rep. No. 4555; [1955-56] Mich. Att'y Gen. Biennial Rep. pt. 1, at 593; [1919] Mich. Att'y Gen. Annual Rep. 173.

268. Mich. Pub. Acts 1966, No. 317, § 4, Mich. Stat. Ann. § 4.1700(4) (Supp. 1968).

satisfactory in most cases.<sup>269</sup> Rather than discard criminal sanctions entirely, however, it developed easily ascertainable standards that would permit application of those sanctions to complement the civil legislation where needed. The Proposed Code's conflict of interest provision, section 4720, defines the applicable standard as the exercise of discretionary authority in connection with a transaction involving a firm in which the actor possesses an ownership interest or holds an executive office.<sup>270</sup> Moreover, rather than determining whether such an interest completely bars the individual's participation, section 4720 merely imposes a duty upon him to disclose his interest. In this way, it should encourage use of the advisory opinion procedure available under the civil act, while still imposing criminal sanctions in those few cases where the official attempts to hide his interest in order to cover his misuse of authority.

Although the functional analysis employed by the Committee in reducing vagueness and overbreadth was applied primarily to the definitions of offenses, it was also responsible for the reformulation of other material. For example, it led to recognition of mistake of law as a valid defense where defendant acted in reliance upon an attorney general's opinion or court decision that, at the time, upheld the legality of his behavior.<sup>271</sup> Normally, of course, a person is not relieved of liability because he acted under a mistaken belief that his behavior was not criminal.<sup>272</sup> The justifications for this rule are varied, and rest on several separate premises.<sup>273</sup> None, however, are appropriate where the defendant relied on an official legal opinion, only to have it subsequently overruled as applied to his case.<sup>274</sup> Such a defendant clearly has made every effort to determine and abide by the law, his reliance is patently reasonable, and the official nature of the opinion reduces difficulties in proving reliance. In fact, under a recent Supreme Court decision, exemption from liability in such a situation may even be constitutionally required.<sup>275</sup>

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269. Mich. Rev. Crim. Code § 4720, Comment at 379 (Final Draft 1967).

270. Id. § 4720(2). This definition is based upon the standard employed in Mich. Pub. Acts 1966, No. 317, § 3(a), Mich. Stat. Ann. § 4.1700(3)(a) (Supp. 1968).

271. Mich. Rev. Crim. Code § 325(2) (Final Draft 1967).

272. See J. Hall, *General Principles of Criminal Law* 376-92 (2d ed. 1960); R. Perkins, *Criminal Law* 807-12 (1957). Of course, this is not true where an actor's mistaken belief negates mens rea. See J. Hall, *supra*, at 392-401.

273. See *Long v. State*, 44 Del. 262, 65 A.2d 489 (1949); J. Hall, *supra* note 272, at 378-87.

274. J. Hall, *supra* note 272, at 389-92, Model Penal Code § 2.04, Comment 3 (Tent. Draft No. 4, 1955). See *People v. Ferguson*, 134 Cal. App. 41, 24 P.2d 965 (1933); *State ex rel. Williams v. Whitman*, 116 Fla. 196, 156 So. 705 (1934). But see *United States v. One Hundred Barrels of Vinegar*, 188 F. 471 (D. Minn. 1911).

275. See *Cox v. Louisiana*, 379 U.S. 559 (1965). In *Cox*, the Court reversed a con-

## III

## BASIC SUBSTANTIVE CHANGES

Most of the proposed substantive changes discussed so far are rather limited in scope.<sup>276</sup> More significantly, they are all based on policies that the Committee found to be presently incorporated in our criminal law. There are a few areas, however, in which the Committee has recommended either outright abandonment or very significant modifications of present policy. These are: (1) the abolition of criminal sanctions for adultery, private consensual homosexual activity among adults and illicit cohabitation; (2) the expansion of the grounds for legalized abortion; (3) the recognition of mistake as to the female's age as a defense to statutory rape; (4) the adoption of a somewhat broader definition of legal insanity; and (5) the imposition of new restrictions on the use of force in effecting or resisting an arrest.<sup>277</sup> Although each of these changes is discussed at length in the symposium comments that follow, I would like to add a few comments here. For while I agree with much of what is said in those

viction under an admittedly constitutional statute prohibiting picketing "near" a courthouse on the ground that the defendants had been told "in effect" by the city's highest police officer that their demonstration "would not be one 'near' the courthouse within the terms of the statute." *Id.* at 571.

276. The exact degree of change is often difficult to determine. Many "changes" adopted by the Proposed Code probably reflect the same position that the Michigan courts would take if forced to consider that "change." For example, the Proposed Code provision on provocation judges the reasonableness of the actor's behavior "from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be." See Mich. Rev. Crim. Code § 2005(2) (Final Draft 1967). While this might depart from the common law in many states, see Model Penal Code § 201.3, Comment (5) (Tent. Draft No. 9, 1959), the Michigan Supreme Court has already taken a more flexible view of provocation than most courts. See *Maher v. People*, 10 Mich. 212 (1862). Similarly, the new provision on reckless endangerment, Mich. Rev. Crim. Code § 2115 (Final Draft 1967), encompasses activities that constitute assaults in those states which recognize a "reckless" assault. However, the Michigan courts have not faced this issue, though dicta indicate an intent to injure would be necessary for an assault. See *People v. Doud*, 223 Mich. 120, 193 N.W. 884 (1923); *People v. Sheffield*, 105 Mich. 117, 63 N.W. 65 (1895). But cf. Mich. Pub. Acts 1952, No. 45, § 1, Mich. Stat. Ann. § 28.436(21) (1962).

277. At points, one or two articles in the symposium seem to suggest that the Proposed Code contains other basic changes. I believe, however, that most of the changes mentioned, e.g., the consolidation and expansion of the theft provision, properly reflect an implementation of present policy. See pp. 809-10 *supra*. Others, e.g., the alleged change in the requirement of retreat prior to the employment of deadly force, are not likely to be viewed as changes at all when more recent cases are taken into consideration. See, e.g., *People v. McGrandy*, 9 Mich. App. 187, 156 N.W.2d 48 (1967).

One basic change not mentioned above is the employment of an affirmative defense in the area of felony murder. Mich. Rev. Crim. Code § 2005(4) (Final Draft 1967). Ordinarily, however, the Proposed Code follows the traditional Michigan practice of imposing the burden of proof for all elements on the prosecution, although the defense may have the duty to inject certain issues. See *id.* § 135(n).

Comments, I have found certain areas of disagreement and a few others to which some supplementary points might be added.

The proposed abolition of the offense of adultery is probably the most controversial of the basic changes suggested by the Committee. Unfortunately, much of the controversy stems from a misunderstanding of the Committee's reasons for proposing this change. The Committee's recommendation quite clearly is not based on the premise that adultery is a proper or even harmless activity.<sup>278</sup> Rather, it is grounded exclusively on difficulties created by the generally non-enforceable nature of the offense. Full or even fairly comprehensive enforcement of our adultery provision is a practical impossibility, both in terms of the manpower it would take and the police techniques of surveillance and entrapment that would be needed.<sup>279</sup> Some have argued, however, that the adultery provision, even though not enforced, does make an important contribution to the moral climate of society. The criminal prohibition, in their view, reinforces community ideals in providing a basic standard for the training of youth and the setting of personal goals of conduct. They also feel that repeal of our current, long standing provision would be particularly damaging because it might be viewed as official acceptance of adultery as an "inevitable evil."<sup>280</sup>

Members of the Committee offered two grounds for rejecting this position. First, many disagreed with the basic premise that the current criminal provision reinforces our moral standards and that its repeal would undermine these standards. They noted that attitudes toward adultery and fornication are not noticeably different in those states that lack provisions punishing one or the other.<sup>281</sup> Nor have attitudes

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278. Model Penal Code § 207.1, Comment at 208-09 (Tent. Draft No. 4, 1955) (potential threat of adultery to the family relationship). Some authorities have argued that adultery is productive of "no 'public mischief' or demonstrable impairment to the individuals concerned." Cohen, *Reflections on the Revision of the Texas Penal Code*, 45 *Texas L. Rev.* 413, 423 (1967). See generally Schwartz, *Moral Offenses and the Model Penal Code*, 63 *Colum. L. Rev.* 669 (1963).

279. The Kinsey studies indicate that a substantial percentage of married males and females commit at least one adulterous act during marriage. See A. Kinsey, W. Pomeroy & C. Martin, *Sexual Behavior in the Human Male* 585-89 (1948); A. Kinsey, W. Pomeroy, C. Martin & P. Gebhard, *Sexual Behavior in the Human Female* 416 (1953). On difficulties that would be presented by a policy of full enforcement, see Cohen, *supra* note 278, at 423-25; Note, *Post-Kinsey: Voluntary Sex Relations as Criminal Offenses*, 17 *U. Chi. L. Rev.* 162 (1949).

280. See generally Remington and Rosenblum, *The Criminal Law and the Legislative Process*, 1960 *U. Ill. L.F.* 481, 493-94 (1960); Cohen, *supra* note 278, at 423 & n.37.

281. See A. Kinsey, W. Pomeroy & C. Martin, *Sexual Behavior in the Human Male* 384-86, 583-84 (1948) (discussing the factors influencing attitudes towards various sexual activities). A dozen states do not prohibit private fornication under any circumstances. Only 20 punish a single act of intercourse. Note, *supra* note 279, at 166; Model

changed in Illinois as a result of repeal of the prohibition against private consensual sodomy in that state's 1961 code revision.<sup>282</sup> Criminal laws recognized by the community as totally unenforced simply do not establish morality. On the contrary, they tend to undermine respect for the penal law generally. Second, many members expressed concern over the potential for improper and discriminatory enforcement of the current adultery provision.<sup>283</sup> Complaints are generally filed either to secure a favorable divorce settlement or to force a spouse to return "home." In either instance, they place the prosecutor in a situation that is often personally distasteful as well as disrespectful of the criminal process.

Quite similar arguments were advanced in favor of eliminating current provisions prohibiting illicit cohabitation and private homosexual activity between consenting adults.<sup>284</sup> The emphasis was primarily upon difficulties created by enforcement rather than the moral quality of the acts involved.<sup>285</sup> In the area of homosexuality, moreover, the relation of that activity to mental illness furnished an additional ground for not imposing criminal sanctions.<sup>286</sup> It should be emphasized that neither proposal is new. Several states do not prohibit illicit

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Penal Code § 207.1, Comment at 204-06 (Tent. Draft No. 4, 1955). Two states do not punish adultery, Louisiana and Tennessee, and six others punish it only if open, notorious and habitual. See Note, *supra* note 279, at 165 n.18, 166.

282. Ill. Ann. Stat. ch. 38, §§ 11-2 to 11-3, & Comments (Smith-Hurd 1964). Although no scientific sampling was taken, reports from Illinois indicated that the restriction of the Illinois provisions on deviate sexual behavior has caused little concern.

283. See generally Remington & Rosenblum, *supra* note 280, at 493-94; Model Penal Code § 207.1, Comment at 205-06 (Tent. Draft No. 4, 1955).

284. See Mich. Comp. Laws § 750.335 (1948), as amended, Mich. Stat. Ann. § 28.567 (1954) (illicit cohabitation); Mich. Comp. Laws §§ 750.338-338a (1948), as amended, Mich. Stat. Ann. §§ 28.570-.570(1) (1954) (consensual homosexual activity); Mich. Comp. Laws § 750.58 (1948), as amended, Mich. Stat. Ann. § 28.355 (1962) (sodomy).

285. The difficulties involved in enforcing sanctions against private, consensual homosexuality are discussed in Comment, Sex Offenses and Penal Code Revision in Michigan, 14 Wayne L. Rev. p. 934 *infra* at 956-57. It should be emphasized that the Committee was not opposed to the enforcement of morality through criminal sanctions where basic interests were involved and the sanctions could be effectively enforced. See Mich. Rev. Crim. Code § 6310 (Final Draft 1967) ("Promoting Lascivious Materials for Minors").

286. [E]fforts to cope with homosexuality by criminal prosecutions are inconsistent both with medical experience and with the general doctrine of responsibility in the Draft. Medical writings approach consensus that homosexuality is symptomatic of psychological disorder, stemming from a failure to achieve mature psychic development, and that it cannot be cured unless the underlying psychological deviation is cured [see the medical authorities summarized in George, Legal, Medical and Psychiatric Considerations in the Control of Prostitution, 60 Mich. L. Rev. 717, 753-57 (1962); Sexual Behavior and the Law 434-77 (Slovenko ed. 1964)].

Mich. Rev. Crim. Code §§ 2315-17, Comments at 186 (Final Draft 1967).

cohabitation, and consensual homosexual activity is not punished under the Illinois revision.<sup>287</sup> Of course, activities disruptive of special state interests, such as public solicitation, victimization of the immature and forcible abuse would still be punished.<sup>288</sup>

The Proposed Code provision on abortion follows the general pattern of the new California, North Carolina and Colorado statutes and the recently proposed McCauley Bill.<sup>289</sup> It would permit a physician to perform an abortion legally where he believes either the pregnancy resulted from rape or incest, the fetus would be born with grave physical or mental defect or the abortion is necessary to preserve the life or physical or mental health of the pregnant female.<sup>290</sup> These justifications have been the subject of considerable debate in various journals, and there would be little value in repeating the arguments "pro" and "con" here.<sup>291</sup> However, the Proposed Code does deviate from similar proposals in several respects that are worth mentioning. First, it does not require that the abortion be approved by more than one physician.<sup>292</sup> Ordinarily, abortions performed in hospitals must be approved by committees of three or more physicians. The Committee favored this practice, but felt that any requirements concerning the use and composition of such committees would best be left to regulations issued by the Department of Public Health. The criminal code is not an appropriate place for regulating the details of hospital practice.<sup>293</sup> Second, the Proposed Code provision does not contain a special requirement that the abortion be performed prior to the twenty-sixth week of pregnancy.<sup>294</sup> Again, this was considered primarily a

287. See notes 281 & 282 *supra*.

288. See, e.g., Mich. Rev. Crim. Code §§ 2315-17, 2320-21, 5540(c) (Final Draft 1967).

289. Cal. Health & Safety Code §§ 25950-54 (Supp. 1967), complementing Cal. Pen. Code §§ 274-76 (Supp. 1967); Colo. Rev. Stat. Ann. §§ 40-2-50 to -52 (Supp. 1967); N.C. Gen. Stat. § 14-45.1 (Supp. 1967); Mich. S. 568, 74th Legis., Reg. Sess. (1967) (McCauley Bill). For a thorough discussion of the California statute see Leavy and Charles, *California's New Therapeutic Abortion Act: An Analysis and Guide to Medical and Legal Procedure*, 15 U.C.L.A.L. Rev. 1 (1967).

290. Mich. Rev. Crim. Code § 7015 (Final Draft 1967), the abortion would have to be performed in a licensed hospital. Some concern has been expressed over the absence of an "emergency" provision authorizing abortion outside of a hospital when necessary. The Committee was informed that "emergency abortions" just don't exist. Radical surgery necessitated, for example, by an auto accident would not be viewed as an "abortion" in a medical sense, particularly if the uterus had to be excised.

291. See authorities collected in Comment, *Abortion Reform in Michigan—An Analysis of the Proposed Code's Provisions*, 14 Wayne L. Rev. p. 1006 *infra*.

292. Compare, e.g., Cal. Health & Safety Code § 25951 (Supp. 1967); Model Penal Code § 230.3(3) (Official Draft 1962).

293. Cf. Mich. Pub. Acts 1961, No. 231, § 1, Mich. Stat. Ann. § 14.1171 (1956) (regulating maternity hospitals).

294. See Comment, *supra* note 291, at 1028 n. 157; cf. Colo. Rev. Stat. Ann. § 40-

matter of medical practice that should not be regulated by statute. Very few abortions are undertaken after the twenty-sixth week and then only under the most compelling danger to the female. Third, the provision does not require that the prosecuting attorney be notified when the aborted pregnancy was the product of rape.<sup>295</sup> Ordinarily, hospital committees would be most reluctant to accept an unsubstantiated allegation of rape unless such a report was made. On the other hand, requiring such reports as a matter of law would impose such additional pressure on a rape victim that she might seek out a "quack" rather than consult a qualified physician.

The Proposed Code also follows a recent trend in recognizing mistake as to age as a defense to statutory rape.<sup>296</sup> Under current law, the male is not excused even if the female purposely lied about her age.<sup>297</sup> The result, in effect, is to make statutory rape a strict liability offense. The Committee could find no justification for this position which is at odds with our usual policy toward strict liability.<sup>298</sup> The only real issue of concern was whether any honest mistake should constitute an excuse or only an honest and "reasonable" mistake.<sup>299</sup> The Committee viewed the objective standard as merely another means of reducing the level of mens rea. Accordingly, it recognized any mistake as a defense. The practical significance of this decision is questionable, however, since a jury is unlikely to accept as honest any mistake that is patently unreasonable.

The Proposed Code provision on legal insanity, although described by some as reflecting a basic change in policy, actually represents

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2-50(4)(a)(ii) (Supp. 1967). Neither does the Proposed Code require consent of the husband. Compare *id.* § 40-2-50(4)(a). This was thought inconsistent with normal medical practice. While a doctor may well consider the husband's position, his primary responsibility must be to his patient (or "patients" if the fetus is also viewed in this perspective).

295. Compare Cal. Health & Safety Code § 25952(a) (Supp. 1967).

296. Mich. Rev. Crim. Code § 2331 (Final Draft 1967). Compare *People v. Hernandez*, 61 Cal. 2d 529, 393 P.2d 673, 39 Cal. Rptr. 361 (1964); Ill. Ann. Stat. ch. 38, § 11-4(b) (Smith-Hurd 1964); 6 N.M. Stat. Ann. § 40A-9-3 (1964). The term "defense" is used loosely. The defendant has only the burden of injecting the issue, but the prosecutor carries the burden of proof. Mich. Rev. Crim. Code §§ 135(n), 2331(2) (Final Draft 1967).

297. See *People v. Gengels*, 218 Mich. 632, 188 N.W. 398 (1922); Model Penal Code § 207.4, Comment at 253 (Tent. Draft No. 4, 1955). A contrary view is taken under the statute prohibiting the "debauching" of a male under 15. See *People v. Bailey*, 341 Mich. 592, 67 N.W.2d 785 (1954).

298. Cf. p. 791 & note 91 *supra*. A similar position is taken in the treatment of mistake as to eligibility to marry under the bigamy provision. Mich. Rev. Crim. Code § 7001(2) (Final Draft 1967).

299. Compare Ill. Ann. Stat. ch. 38, § 11-4(b)(1) (Smith-Hurd 1964) (reasonable), with N.Y. Pen. Law § 130.10 (good faith).



more of an extension of current principles. The present Michigan standard for determining legal insanity is generally taken to be the *M'Naghten* rule, though a recent survey indicated several trial judges employ the *Durham*, American Law Institute (ALI) and *Currens* tests.<sup>300</sup> Section 705 of the Proposed Code adopts the *Currens* test, which along with the ALI standard, rests on the same basic premise as *M'Naghten*—that the crucial factor is the defendant's ability to control himself.<sup>301</sup> Section 705 provides that "[a] person is not criminally responsible for his conduct if at the time he acts, as a result of mental disease or defect, he lacks capacity to conform his conduct to the requirements of law."<sup>302</sup> The Committee preferred this standard because, by avoiding "judgmental terms like 'nature,' 'quality,' 'right' or 'wrong,'" it promotes "a full presentation of the defendant's mental condition and a direct determination of the effect of his condition on the ultimate question of criminal responsibility."<sup>303</sup> The original *Currens* standard referred to a lack of "substantial capacity" to conform, but the Committee dropped the term "substantial" in fear that it would give rise to the same kinds of technical disputes as have plagued the *M'Naghten* test.<sup>304</sup> For the same reason, no attempt was made to provide a detailed definition of "mental disease or defect."<sup>305</sup> In particular, the Committee rejected the ALI provision excluding from the definition of disease any "abnormality manifested only by repeated criminal or otherwise anti-social conduct."<sup>306</sup> Although agreeing that legal insanity cannot be established simply by showing repeated anti-social conduct, the Committee feared

300. *People v. Krugman*, 377 Mich. 559, 562, 141 N.W.2d 33, 34 (1966) suggests that Michigan follows the *M'Naghten* test supplemented by irresistible impulse. However, the leading Michigan decision takes a very broad view of the "right-wrong" standard. *People v. Durfee*, 62 Mich. 487, 29 N.W. 109 (1886). See also *People v. Beverly*, 108 Mich. 509, 66 N.W. 379 (1896). Comment, The "Insanity" Defense Under the Michigan Revised Criminal Code, 14 Wayne L. Rev. p. 863 *infra*.

Responses to the recent survey indicated seven circuit judges have instructed juries under *Durham*, four under the ALI standard, and one under *Currens*. Lewin, *The Procedural Road to the Insanity Defense: A Field Study of the Practice of Michigan Defense Attorneys and Prosecutors in Relation to the Defense of Insanity*, June 1, 1967, at 31 (unpublished thesis in University of Michigan Law Library).

301. See *United States v. Currens*, 290 F.2d 751, 774-76 (1961). The *Durfee* standard, note 300 *supra*, specifically included the lack of "power to resist the impulse to do the act." 62 Mich. at 493, 29 N.W. at 111.

302. Mich. Rev. Crim. Code § 705 (Final Draft 1967).

303. *Id.*, Comment at 73-74.

304. Cf. the Committee position on the *Durham* test: "the so called 'Durham Rule' . . . is not at all incompatible with Michigan case law. But the *Durham* language itself has created a number of difficulties of interpretation and application." *Id.*, Comment at 74.

305. *Id.*

306. Model Penal Code § 4.01 (Official Draft 1962).

that the ALI provision would be interpreted restrictively to bar a psychiatrist from relying upon such conduct as the sole overt manifestation of a mental illness suggested by his examination.<sup>307</sup> Again, the Committee's objective was to avoid disputes over conclusional labels and encourage full and complete testimony concerning the "development, adaptation and functioning" of the defendant's "mental or emotional processes and . . . behavior controls."<sup>308</sup>

The Proposed Code also institutes two basic changes relating to the use of force in an arrest situation, although only one has received much attention. Section 4625 provides that it is no defense to a charge of resisting arrest "that the police officer was acting unlawfully in making the arrest, providing he was acting under color of his official authority."<sup>309</sup> Under present law, the individual takes his chances in attacking an officer who seeks to arrest him.<sup>310</sup> If the arrest was unlawful, there is no liability. But if arrest was lawful, then the individual is liable no matter how honest or reasonable his mistaken belief that it was illegal. The Committee's grounds for rejecting this position are succinctly stated in its commentary:

The Committee believes . . . that persons should not be encouraged to resort to self-help to resist an arrest which they know is being made by a peace officer in his official capacity. Even if a citizen feels the arrest is unlawful, he should submit and rely upon his legal remedies. The resort to force is an improper remedy that will usually only lead to an escalation of force by the officer and result in far greater injury to the actor than the improper arrest.<sup>311</sup>

A similar concern about the escalation of force also led the Committee to suggest a modification of the peace officer's authority to use deadly force in effecting an arrest. Current Michigan law on this

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307. Compare *United States v. Freeman*, 357 F.2d 606, 625 (2d Cir. 1966), with *United States v. Currens*, 290 F.2d 751, 761-63 (3d Cir. 1961). Such a restrictive interpretation was not intended by the draftsmen of the ALI provision. See Model Penal Code § 4.01, Comment at 160 (Tent. Draft No. 4, 1955). Nevertheless, the Committee believed the language of the provision lent itself to such an interpretation, which might pose serious constitutional questions under *Robinson v. California*, 370 U.S. 660 (1962). See Mich. Rev. Crim. Code § 705, Comment at 74 (Final Draft 1967).

308. See *Washington v. United States*, 390 F.2d 444, 452 (D.C. Cir. 1967).

309. Mich. Rev. Crim. Code § 4625(2) (Final Draft 1967). A similar position is taken in § 4506(2) (obstructing a peace officer). Cf. *id.* § 3310 (claim of right no defense to robbery).

310. See *People v. Krum*, 374 Mich. 356, 132 N.W.2d 69 (1965); *People v. De Meaux*, 194 Mich. 18, 160 N.W. 634 (1916); *People v. Rounds*, 67 Mich. 482, 35 N.W. 77 (1887).

311. Mich. Rev. Crim. Code § 4625, Comment at 365 (Final Draft 1967). The Commentary goes on to emphasize that this provision would not apply where "the actor apprehends bodily injury, as when the arresting officer uses unnecessary force to make the arrest." *Id.*

point is not entirely clear, but it would appear to permit the officer to use deadly force when necessary to arrest a fleeing felon.<sup>312</sup> Law enforcement officials on the Committee generally agreed that this authority was far too broad. If the choice comes down to shooting a passer of bad checks or letting him escape, the officer will not risk taking the man's life to enforce a comparatively minor felony. On the other hand, if the fleeing felon is potentially a serious danger to others, and other means of apprehension have failed, the use of deadly force is appropriate.<sup>313</sup> The Committee's difficulties arose in trying to identify those fleeing felons who are potentially dangerous. The Proposed Code originally authorized the officer to use deadly force only if he reasonably believed that the suspected felon had "committed or attempted to commit a felony involving the use or threatened use of deadly physical force."<sup>314</sup> A subsequently adopted alternative extends this authority to the arrest of any fleeing suspect reasonably believed to have committed any "felony involving force against either person or property."<sup>315</sup> This would apply to persons suspected of burglary and robbery even where there is no indication the felon is armed. The advantages and disadvantages of both proposals have been fully discussed elsewhere.<sup>316</sup> Whether one prefers the original proposal or the alternative, it is generally agreed that either is an improvement over our present law.

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312. See *People v. Gonsler*, 251 Mich. 443, 232 N.W. 365 (1930); cf. *Firestone v. Rice*, 71 Mich. 377, 38 N.W. 885 (1888). This was the common law rule, 4 Blackstone Commentaries \*293, but it was developed at a time when felonies generally were punishable by death. Some authorities suggest it would no longer be applicable to minor felons. See Moreland, *The Use of Force in Effecting or Resisting Arrest*, 33 Neb. L. Rev. 408, 412-15 (1954). See also Waite, *Some Inadequacies in the Law of Arrest*, 29 Mich. L. Rev. 448, 463-68 (1931); 34 N.C.L. Rev. 122 (1955). Neither of the Michigan cases cited speak directly to this point. *Gonsler* did not involve a police officer, and *Firestone* did not involve deadly force.

313. President's Commission at 119.

314. Mich. Rev. Crim. Code § 630(2) (Final Draft 1967). This provision also authorized the use of deadly force where necessary to effect the arrest of a person who "otherwise indicates, except through a motor vehicle violation, that he is likely to endanger human life or to inflict serious physical injury unless apprehended without delay." *Id.* § 630(2)(b)(iii).

315. Alternative Draft § 630(2), was adopted December 2, 1967, and does not appear in the original publication of the Proposed Code. See note 1 *supra*. This provision also permits the use of deadly force to "lawfully suppress a riot or insurrection." Also, it probably should be amended to include part (iii) of the original § 630(2). See note 314 *supra*.

316. See Comment, *Justifiable Force in Property Defense and Arrest Under the Michigan Revised Criminal Code*, 14 Wayne L. Rev. p. 847 *infra*, at 857-60 and authorities cited therein. The original proposal is similar to the New York provision that was recently amended after lengthy debate. N.Y. Pen. Law § 35.30. See also Ill. Ann. Stat. ch. 38, § 7-5(a) (Smith-Hurd 1964); Model Penal Code § 3.07, Comment at 55-63 (Tent. Draft No. 8, 1958).

## IV

## CONCLUSION

Although the basic substantive changes are important, the heart of the Proposed Code is the collective impact of the minor changes—the consolidation of scattered provisions, the modernization of language, the closing of loopholes, etc. Although the Committee believes that these changes are significant improvements, it does not suggest that the Proposed Code is perfect even on the most technical level. Many ambiguities have been eliminated, but undoubtedly some also have been created. Taken as a whole, however, the Proposed Code should facilitate a more efficient and just administration of the criminal law. This is particularly true of the modifications in penalty structure that will be discussed in a later article.

Of course, while the substantive law is important, problems of personnel and procedure are equally if not more important. The improvement of the administration of criminal justice must begin with the adoption of a more rational and orderly criminal code; but it cannot end there. The overall task of reform is large and difficult, but not impossible. Above all, penal law reform needs the interest of a wider segment of the bar, for improved administration of our most basic law is not the responsibility merely of prosecutors, defense counsel and judges, but of all lawyers.