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THE FIFTIETH ANNIVERSARY OF THE MINNESOTA CRIMINAL CODE: LOOKING BACK AND LOOKING FORWARD

Closing Remarks by Justice Paul H. Anderson†

It is a pleasure to join you this afternoon at William Mitchell College of Law to talk about Minnesota's Criminal Code. In the interest of fair play and full disclosure, I need to tell you that I may be here under false pretenses. I fear that Professors Brad Colbert, Ted Sampsell-Jones, and Peter Knapp all believed that, in light of my pending retirement from the court, my closing remarks would be benign. I even suspect that there may have been some hope for a bit of gravitas that can sometimes come with a supreme court justice who has served for nearly nineteen years. This will not be the case. My purpose for joining you today is much more radical. I want to incite all of you to join in a rebellion—to revise our current criminal code. Please be advised that while I use the word "rebellion" advisedly and with a smile on my face and tongue partially in my cheek—I am very serious about my belief that our current criminal code is in need of significant reform.

I am a fan of Victor Hugo's novel *Les Misérables*. So thinking of this story, I ask you to envision me as Enjolras, with Marius standing at his side, on the barricades inciting all of you to rebel. Like Enjolras, I have concluded that the need for reform is at hand. Like Enjolras, I have seen a signal that now is the time to rebel. Enjolras saw a sign in the death of General Lamarque. Two days ago, we received a sign from Governor Mark Dayton that now may be an opportune time to commence an effort to reform our criminal code. I will elaborate on the sign sent by the Governor a bit later.

Now, back to the business at hand. I am pleased that the subtitle of today's symposium is "Looking Back and Looking Forward." It is a good thing that we are not celebrating the current code. What we do

† Associate Justice, Minnesota Supreme Court. These are edited remarks that Justice Anderson delivered at the close of the symposium on the fiftieth anniversary of the Minnesota Criminal Code held at William Mitchell College of Law on February 8, 2013.

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here today should not be a celebration of what has happened during the fifty years following the 1963 adoption of Minnesota's revised Criminal Code. There is much about our current criminal code that does not warrant a celebration. In an effort to convey my thinking on this last point, I am going to do what the symposium title asks me to do. I will first look back, and I will finish by looking forward. In between, I will talk about the present.

Looking back to 1963, the time when our current code was first adopted, I see that there is much to celebrate. Minnesota became a state in 1858, and by 1885 we had incorporated much of the New York Criminal Code into our own criminal statutes. It appears as though we liked the New York Code because there was not much reform—or even discussion of major reform—until the mid-twentieth century. Even today, as a Minnesota Supreme Court justice, I have on occasion looked into New York's legal and legislative history in an effort to inform myself as to the meaning of parts of our own criminal code. Because there is much to celebrate about the process and the people who led that 1963 effort to adopt a new criminal code, let us take a look back at that process and the people who brought it about.

The reform process formally started in 1955 when an advisory committee was formed to undertake this project. The committee followed a process and adopted procedures that can inform us about what needs to be done to reform our current criminal code. After reviewing the mid-century reform process, I am optimistic during this second decade of the twenty-first century we can actually do what is required to reform our current code. The people who brought about the 1963 reform left us an excellent record of what it takes to get the job done. At the very beginning, the mid-twentieth-century committee established well-defined goals and objectives. First, the committee decided to remove the "duplications, inconsistencies, invalid provisions, and obsolete materials" from the code.[1] Does anybody here think that we should not get rid of "duplications, inconsistencies, invalid provisions, and obsolete materials" in our current criminal code? This is surely an admirable and attainable goal. Even if we have some areas—or even many areas—of disagreement, we can set those parts aside because it should be beyond question that there is much that we can agree on in an effort to accomplish this first goal.

1. ADVISORY COMM. ON REVISION OF THE CRIMINAL LAW, PROPOSED MINNESOTA CRIMINAL CODE 9 (1962).

A second goal of the mid-twentieth-century committee was "to state in clear, simple, and understandable terms the elements of the crime; avoiding over-generality on the one hand and detailed enumeration, so characteristic of present provisions, on the other."[2] While the reference to "present provisions" may sound familiar and even contemporary, the committee was not referring to our current code. No, they were expressing their concern about overdetailed enumerations that existed in the 1950s Code. I believe that the mid-twentieth-century committee members would have been surprised and maybe appalled if they read what is in our current code. They probably had no idea about how many detailed enumerations of criminal activity we could enact over the last fifty years.

The mid-twentieth-century committee also agreed that any "statement of the offense should not be so general that a reading of the statute leaves unclear the prohibited conduct."[3] (Today we have several statutes that do not meet this standard—the prohibited conduct is not clear. Two of our court's law clerks are here with me today. They will back me up when I say that we often struggle with the problem of deciphering an unclear criminal statute.) At the same time, the committee agreed that a criminal statute "should not be so detailed that it runs the risk of omission of specific acts not thought of when the enumeration was made and invites technicality in the administration of criminal justice."[4] Here I want to reiterate that the proper goal of the reform effort I propose is not to change the substance of our existing law but to make our criminal law clear and understandable. The goal is to make the law sufficiently clear so that people can understand whether their conduct is prohibited.

A third goal of the mid-twentieth-century committee was "to conform the law to accepted modern standards and concepts within the field of the specific crime considered."[5] Modernization of both language and concepts was deemed to be a good thing for the law. I agree, and I hope that you do too.

Fourth, the mid-twentieth-century committee made an effort to confine provisions of the criminal code to those matters of substantive criminal law that properly belong in a criminal code. The committee went on to elaborate on this point. For a matter to be included in the criminal code, the matter must be relevant to criminal law. The

2. *Id.*
3. *Id.*
4. *Id.* at 9–10.
5. *Id.* at 10.

committee clearly acknowledged the need to ask the relevancy question and to ask it often—does a particular provision really belong in the code? This appears to be a relatively simple question, but it is not, especially when it is asked repeatedly. I have no doubt about the huge potential for serious debates on what should be in and what should be out of the code, but there undoubtedly can be some general agreement as to what belongs in the code, especially if drafters start with some agreed-upon criteria. We do not have to look too far for some criteria. We already have the mid-twentieth-century committee's guidelines.

Getting the right people to do the work is an important part of any reform process. I hope that at some point those who want to see reform happen will revisit what is written in the book I have in my hand.[6] This small book contains much more than just the proposed 1963 Code—it is much too large for just the proposed code. It contains a summary of the proceedings and recommendations of the committee that proposed the 1963 Code. The book includes the proposed code, committee comments, a summary of the proceedings, an executive report, and the names of the people who worked on the reform efforts.

It will be instructive to review with you a partial list of people who were involved. It is an impressive list. Unfortunately, I do not have time to list all of the names; I will just give you a few committee members so you can get some flavor as to who served. Harold Schultz, a district court judge and former state senator, was there and also served as the chair. Harold was doing his work only eleven short years after he walked the beaches of Normandy in early June 1944. There were two supreme court justices—Chief Justice Oscar Knutson and Justice William Murphy—two county attorneys, and prominent bar association members like Henry Haverstock, Jr., Phillip Neville before he became a federal district court judge, and Robert Sheran before he began to serve the first of two supreme court terms. Bob Sheran was appointed to the court twice. Joseph Bright, the Revisor of Statutes, served, as did several district and municipal court judges. A couple of other names of note include Yale Kamisar, professor at the University of Minnesota Law School before he went on to achieve national and international renown as a legal scholar, and Maynard Pirsig, then a professor at the University of Minnesota Law School and later a

6. *See generally* ADVISORY COMM. ON REVISION OF THE CRIMINAL LAW, *supra* note 1.

professor here at William Mitchell. Professor Pirsig served as the committee's reporter. Finally, there is the name of someone who is less revered, a person that some of you who have been around for a while may recognize. T. Eugene Thompson was on the committee before he was convicted of murdering his wife, Carol.[7]

It is obvious that the mid-twentieth-century reform effort brought to the table some of the best legal minds of the time—people who were leaders in Minnesota's legal community. They were people who agreed to serve because they had a focus on the commonweal—that is, they were concerned about the general welfare or common good of the people of Minnesota.

The reform took place at a time when Minnesota legislators were not labeled as either being a Democrat or a Republican, but they carried the label of either Liberal or Conservative. I am old enough to have known several of these legislators. Art Gillian was my former law partner. I appeared before Judge Harold Schultz and then worked with him when he served as a retired judge on the court of appeals. They both talked with me about how they were able to set aside partisanship. Now do not mistake me on this point, partisanship clearly existed back then, but on many issues there was a clear desire to transcend partisanship and work together to get things done.

I think it will be more difficult to transcend partisanship in today's polarized political environment. For example, I find it distressing that even though President Barack Obama is willing and even wants to have his picture taken with certain Republican members of Congress, he understands that most of them do not want to take pictures with him. Many Republicans believe that if they have their picture taken with the President, they will face the risk of having a primary contest back in their home district. What a distressing turn of events. If we have any hope of reforming the criminal code, we have to find a way to transcend partisanship, to set it aside. A well-written, understandable criminal code should not be a partisan issue—period.

If reform is to happen, legislators from both sides of the aisle must be enlisted in the reform effort. This includes the legislators who were here today. All of us must be willing to open ourselves up to a meaningful dialogue. I loved it when one of the legislator-panelists here today said, "Come to my door; knock on my door." Well, do you hear me? I am knocking on your door in an effort to enlist your help.

7. A full list of the members of the final committee is attached as Appendix A.

When we consider how to tackle this issue of reform, we need to be willing to focus on what I call the legacy question. We need to ask ourselves how we plan to answer this question. As public officials and members of the bar, we need to be prepared to answer a question that should be posed to us by our children and grandchildren: What did we do to make things better than they were when we found them? Looking at the criminal code with an eye toward reform is one way to establish a positive legacy—it presents an opportunity to change things for the better.

To illustrate my point about building a legacy, I now ask you to take another look at some of the people who were involved in the 1963 reform effort. This time I direct your attention to the legislators who served when the 1963 Code was passed. I wish I could go through the whole list, but I cannot. A partial list includes:

- Gordon Rosenmeier—reputed to be one of the most powerful Senators in Minnesota history and law partner of future Minnesota Supreme Court Justice John Simonett;
- Wendell Anderson—a future Governor and U.S. Senator;
- Dr. Rudy Perpich—a future Governor and Lieutenant Governor;
- Henry McKnight—who later developed the town of Jonathan;
- Douglas M. Head—a future Attorney General and candidate for Governor;
- Harold Krieger—who ran for Lieutenant Governor and later became a district court judge;
- Nick Coleman—who later distinguished himself as Senate Majority Leader; and
- Martin Sabo—future long-time U.S. Congressman.[8]

I could go on and on, but my point with respect to naming some of the legislators who participated in the 1963 reform is to make sure you are aware that we are celebrating people who were willing to stand up and be counted as leaders, who were willing to make a positive change. History has shown us that these were people who asked and knew how to answer the legacy question. We need to enlist like-minded leaders in a current code reform effort.

Another thing the 1963 reform did was to acknowledge that the rules of criminal procedure should not be part of the criminal code. Here, the reformers did a marvelous thing. As I mentioned earlier, the committee repeatedly asked what was relevant to the criminal code. Then they recommended that the legislature pass legislation

8. MINNESOTA LEGISLATIVE MANUAL 1963–64, at 46, 66–67 (1964).

turning the responsibility for the criminal rules over to the Minnesota Supreme Court. The legislature took the rules out of the statutes so that our court could design the rules and assume the responsibility for administering them and keeping them current. I think, for the most part, the judicial branch has done a good job managing the rules after receiving this mandate from the legislature. To illustrate my point, the criminal rules committee recently undertook a major revision of the rules and reduced the number of words in the rules by over thirty-seven percent. When the rules committee started this revision effort, we heard many pessimistic comments to the effect that we could not do it, but we plunged into the task. Reform can happen if we muster the will to do it, but we must enlist people who are willing to do the hard work that goes with such an effort.

As I look back, I agree that it is fitting and proper that we celebrate what happened fifty years ago. The 1963 criminal code revision was really a marvelous accomplishment. But we should not celebrate what has happened since. When we move beyond 1963 and look at the present, I do not think it looks all that pretty.

When preparing for this symposium, I visited with Martin Costello about what it was like when he started practicing criminal law in the early 1970s. Martin responded that it was much less complex and more collegial. He noted that today there are many more criminal statutes, some of which are not all that clear. Then Martin said, with a bit of a smile, that back when he started to practice criminal law, if a prosecutor really wanted to go after a defendant, the best the prosecutor could do was throw a pamphlet at him. Now, if you want to, you can literally throw a good-sized book at a defendant. Let me illustrate this point for you. In 1965, the criminal code—chapter 609—consisted of 32 pages; in 1967, 35 ½ pages; in 1982, 71 pages; in 1992, 137 pages; and now, in 2013, 228 pages. If we were to increase the code by the same percentage over the next fifty years, it would be over 1770 pages long. Most of us will not be practicing law in fifty years, so let me just go out twenty years—the code will be 414 pages long if we keep up the current pace. Criminal code creep is a reality, and it is getting out of hand—no, it is already out of hand.

As I make this last point I do not want to appear to be a troglodyte or a curmudgeon, or to appear to be too much like I have a nostalgic yearning for the good old days. Without question, there is much that has been added to the present code that needs to be there. There are many new circumstances surrounding modern technology and life in general that need to be addressed, but the code is still way

too long and complex.

A book that was recently published has the title *Three Felonies a Day*.[9] This book was brought to my attention by my colleague, Justice Barry Anderson. At a recent meeting, Justice Anderson shared the following comment: "I am concerned that I may be a felon and I don't know it." Justice Anderson went on to say: "With so many laws out there, many of which lack precision, clarity, or even mens rea, the odds are that I am doing something criminal." He told us that he had read the book *Three Felonies a Day* and that reading it caused him to fear that every day he was committing some unknown crime. He then went on to express concern that some aggressive prosecutor might also read the book and attempt to do something about his prohibited conduct. Justice Barry Anderson then looked at the rest of us and said, "You may be felons, too."

My colleague's comments caused me to wonder how many felonies I have committed. I immediately began to examine my life—with a special emphasis on revisiting that part that was within relevant statutes of limitation. I think you get my point here—we should not put our citizens in a situation where they fear that they may be committing a crime on any given day and not know it.

To make this last point more clearly, I will describe a couple of these potentially unknown crimes. One of my law clerks, Peter Farrell, tells me that his grandparents may be felons. Well, they are not felons yet; at least they have yet to be arrested and convicted. Pete's grandparents each have prescription medications that they put in a weekly pill sorter—sometimes they even sort more than one week's worth of medication. They are elderly and believe that they need a system that lets them know how much medication to take and when to take it, and to remind them if they have taken it. But by putting their medication in a weekly pill sorter, they are likely violating a state law with respect to controlled drugs.[10] They are potentially felons under the law. Pete, tell your grandparents that they have my sympathy. Tell them we are trying to do something about the peril they face. It should be an ominous sign that Pete's grandparents could be felons as the result of their innocent behavior. This should be another signal

9. HARVEY SILVERGLATE, THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT (2011).

10. Heather L. Finley, *It's the Law: Keep Those Prescription Medicines in Their Original Containers*, TIMES-GEORGIAN, Aug. 8, 2008, http://www.times-georgian.com/view/full_story/3282357/article-It-s-the-law—Keep-those-prescription-medicines-in-their-original-containers.

that we need to do something about the code.

A few years ago, I participated in a symposium at the University of Saint Thomas Law School and wrote an article for that school's law review about Minnesota's incarceration crisis. My remarks focused on the fact that in Minnesota we have a disproportionate number of persons of color in prison. This tragedy is in part due to our criminal code and how it is enforced, and how our sentencing guidelines are administered. The sentencing guidelines are another part of our criminal justice system that may need to be revisited and reformed, but I must be careful to only promote one rebellion at a time. We also need to face the whole issue of collateral consequences, but again I do not have the time to get into either of these two issues. Suffice to say that when there is a confluence of an overly expansive, outdated criminal code with several other problems in the criminal justice system, you can expect collateral damage—collateral damage that leads to too many people who are consigned to significantly diminished or marginal roles in our society.

Now, on to my next point. This point may get some of you upset at me, but that is all right. I am equally capable of getting both prosecutors and public defenders upset with me. What I want to talk about now is what I call "Inspector Javert Syndrome." Once again, I return to the story *Les Misérables*. How many of you here identify with Jean Valjean as opposed to Inspector Javert? How many are with Javert? How many identify with Valjean? Valjean or Javert? I see that a large majority of you identify with Jean Valjean, but there are a few who identify with Javert. That is okay because Javert is not a villain; he is not ignoble. He represents the justice system. He is a minister of justice. Victor Hugo describes him as symbolizing "probity, sincerity, candor, conviction, the sense of duty,"[11] and passion. Unfortunately, these noble characteristics become hideous when wrongly directed.

Here, I will recite some lines from the story that may help you define the two characters and help you decide which one you must identify with:

> *Jean Valjean*: But this is common humanity! Are you a machine?
>
> *Inspector Javert*: I am an officer of the law doing my duty. I have no choice in the matter. It makes no difference what I think or feel or want. It has nothing to do with me—

11. 1 VICTOR HUGO, LES MISÉRABLES bk. VIII, ch. III (Isabel F. Hapgood, trans., New York, Thomas Y. Crowell & Co. 1887) (1862), *available at* http://www.gutenberg.org/files/135/135-h/135-h.htm#link2HCH0030.

> nothing! Can't you see that?[12]

The attitude expressed by Javert is what I refer to as the "Inspector Javert Syndrome." It can be unsettling and even dangerous when wrongly directed. We recently had a case before our court in which I thought that there should be some room or latitude for the exercise of discretion by both the State and the court, but the prosecutor appeared to have none of it. I told him that he was sounding a lot like Inspector Javert. The prosecutor responded by saying that by nature he was somewhat sympathetic with Javert. He said that he knows that mercy must happen, but it is entrusted to others, not to him.

I see at least a two-fold problem for prosecutors and the judiciary when we have a criminal code that is overly broad and contains duplications, inconsistencies, invalid provisions, obsolete provisions, together with imprecise statements. First, it blurs and complicates the tension that exists in determining what falls into a prosecutor's legitimate authority to exercise discretion as to what offense to charge, and the judicial role to ascertain the proper scope and application of a criminal statute. Second, it can make it too easy for a prosecutor, when exercising his or her discretion, to seek refuge in the ideology contained in the statement made by Javert. Again, let me recite it to you:

> *Inspector Javert*: I am an officer of the law doing my duty. I have no choice in the matter. It makes no difference what I think or feel or want. It has nothing to do with me—nothing! Can't you see that?[13]

Now you can legitimately ask me to describe for you the impact of this "Inspector Javert Syndrome" on our criminal justice system. Whenever this rationale exists, it is more difficult to achieve a just result, much less to discern what the right thing to do is. There are adverse consequences to looking at the law this way. The rationale exposes another problem with the code. When it is not clear what the crime is (i.e., what conduct is criminal), there is often a tendency to take what I refer to as a "Velcro approach" to charging—that is, to throw a number of criminal charges at a defendant's conduct and hope that at least one or two of the charges stick. This is particularly true when there are more and more crimes that do not involve mens rea, crimes where conduct alone can lead to the conviction of a person, crimes where intent is irrelevant.

12. LES MISERABLES (20th Century Fox 1952).
13. *Id.*

What I have labeled "Inspector Javert Syndrome" can have an adverse ripple effect on the justice system. When the trunk of the tree that embodies the criminal code becomes adorned with excess foliage that is vague and/or imprecise, irrelevant, or even foreign to the core purpose of the code, justice is not served. This excess foliage can tempt a minister of justice like Javert to assert that he has no "choice in the matter" and that it makes "no difference what [he] think[s] or feel[s] or want[s]" because it has "nothing to do" with him; he is only "an officer of the law doing [his] duty."[14] Such an attitude can lead to too many, too severe, or even unjustified criminal charges being filed against a defendant, charges that are not warranted and do not correctly reflect the defendant's conduct when that conduct is objectively and critically examined. This rationale will then lead a defendant's counsel, whether a private attorney or a public defender, to respond with both zeal and vigor by employing and sometimes exploiting the maximum amount of procedures available to correct what is perceived to be a hideous misdirection in the enforcement of the law. This ripple effect is capable of bogging down the criminal justice system and can severely overtax a system's limited resources. This ripple effect can reach to all parts of the justice system—even up to the Minnesota Supreme Court. I know this to be true because I have witnessed this phenomenon firsthand.

Now I see that my assistant, Alayne Svee, is giving me a signal that I am getting close to the end of my allotted time; therefore, I need to quickly take a look forward. I will switch my focus to the future. It is when I look forward that I clearly see the need for a rebellion. This is why I am symbolically mounting the barricades with Enjolras and Marius, and I am calling for all of you to join us.

What I want to encourage is a meaningful rebellion in the form of a significant effort to reform the Minnesota Criminal Code—chapter 609. My call for rebellion does not mean literally going to the barricades armed with an AK-47 and a thirty-plus bullet magazine. No, we do have other better and more civilized ways of rebelling in this country. We can do it by enlisting our leaders, our legislators, the Governor, our judges, and our fellow attorneys in this rebellion. And if they refuse to join us, we can vote for people who will. When starting this rebellion, we should begin by looking back at our past. Look back at that time span from 1955 to 1963. Look at the people and the procedures they followed to reform the criminal code. We

14. *Id.*

can learn another lesson from the past—we must not just leave the reform to the legislature.

We have many respected legislators who talk about the need to reform, but remember what U.S. Senator Orrin Hatch once said in a *Newsweek* interview. He said that the worst thing we can do with respect to criminal law is to leave its design to the Congress. Senator Hatch went on to say that Congress, when given the choice, will most likely do the wrong thing and pass yet another crime du jour statute. Senator Hatch's statement is not kind to legislators, but most likely it is more true than false. By the way, I just checked out Senator Hatch's website, and he takes the standard "tough on crime" stance and brags about the recent "tough on crime" legislation that he helped to pass in Congress. When given a choice, legislators will most always lean toward more crimes and harsher penalties. A friend of mine confirmed this scenario when she recounted a recent conversation with a Missouri legislator whom she met at a legal conference. The legislator told her that he did not want to enact the crime du jour. He thought that it was generally bad legislation, but he voted for it because he wanted to be reelected.

So, what should we do? Again, I suggest that we go back to look at what was done in the 1950s and 1960s. I think we need to draw on some of the best and most respected citizens involved in all aspects of the criminal justice system, people on all sides—prosecutors, defense, counsel, academics, and victims. We need to do something like we did with the reform of our criminal rules. We even enlisted those who did not want to see any reform. Then we sat everyone down in a room and said that we are not about changing anything substantive, we are just going to make sure that everything is relevant, understandable, and clear. Trust me, it is okay if you get people like Lenny Castro, Mark Nyvold, Ben Butler, and Brad Delapena on one side and Mike Young, Paul Scoggins, Matt Frank, and Kristine Joseph on the other, and let them go at it tooth and nail as we did when we revisited the criminal rules. What happens after people like this go at it tooth and nail for a while is something marvelous. They figure out there are many areas where there is common ground and that there is a way to find agreement in key issues.

So, there is a way—an outline exists for how it can be done. If we do not start doing something soon we are going to have a criminal code of over 400 pages within twenty years. The code will probably be close to 2,000 pages fifty years from now. In order to save ourselves from this fate, we are going to have to rebel. Here, I do not want to

minimize the pessimism that has been expressed today about actually accomplishing the reform I propose. But I believe this is the time to get started. James Webb, the former U.S. senator from Virginia, who is a strong advocate for criminal justice reform, recently said that "the time is now." This symposium is sending the same message—the time is now. The very fact that we are gathered here today says that many of us believe that the time for reform is now. The time is right.

I talked earlier about looking for some special signal that indicates that now is the time. In *Les Misérables* it was the death of General Lamarque. We received a similar signal from the legislators who were part of this symposium. Both Senator Scott Newman and Representative Debra Hilstrom said that they would consider doing something to put this issue on the table at the legislature. But even more importantly, we received a signal two days ago from Governor Mark Dayton. The governor called for an "unsession" of the legislature in 2014 to look at issues like this. He said:

> Back in 1998, when I first ran for Governor, a campaign that most people have forgotten and I would like to, there was a television commercial for the soft-drink Seven-Up. Contrasting itself to Coke and Pepsi, it proudly called itself the "un-cola."
>
> In my campaign, I proposed making an even-year legislative session "The Unsession." Except for responding to a fiscal or other emergency and passing a bonding bill, the session would be devoted to eliminating unnecessary or redundant laws, rules, and regulations; reducing the verbiage in those that remain; shortening the timelines for developing and implementing them; and undoing anything else, which makes government nearly impossible to understand, operate, or support.[15]

In essence, Governor Dayton has sent a signal similar to the one that Enjolras received. The time is now. It is time to go to the barricades. It is the time to get this job done—we should start doing it at next year's "unsession" of the legislature. That is why I am more than a little bit rebellious today.

I intend to leave you with a manifesto—every rebellion needs a manifesto. I was going to nail the manifesto to the doors of William Mitchell, but the doors I found are metal and the nails kept bending,

15. Governor Mark Dayton, State of the State Address (May 6, 2013) (transcript available at http://mn.gov/governor/newsroom/pressreleasedetail.jsp?id=102-54689).

so I will have to proclaim my manifesto from this podium. The manifesto is a paraphrase of what Thomas Jefferson said in a letter to his friend William Smith.[16] The letter to Smith was the one where Jefferson wrote his famous words about the need for the tree of liberty to be periodically nourished by the blood of tyrants. I am paraphrasing, but this is the manifesto I want to leave you with today:

> God forbid we should ever be more than twenty years—much less, fifty years—without a rebellion that takes the form of a revision of the Minnesota Criminal Code—chapter 609. Unfortunately, the people cannot be all and always well informed as to what must be done. Therefore, the part of the code which is most likely wrong will be in proportion to the importance of the facts the people misconceive. If the people remain quiet under their misconceptions, it is lethargy, the forerunner of the death of public liberty.
>
> We have been a state for nearly 155 years. There has been only one major reformation of our criminal code since 1858. That comes to one rebellion in over a century and one-half. What state criminal code can exist or should exist with so long a time without being subject to strict scrutiny? What state can preserve its citizens' liberties if its leaders are not warned that the citizens still preserve the spirit of resistance and inaction is likely to kindle that spirit?
>
> So let us take action. The remedy is to set things right as to the facts and the law; adverse, indeed dire consequences will be the result of inaction. What significance is it if a few of our favorite "crimes de jour" or "mens rea"-deficient offenses are killed off in the process? The tree of liberty must be refreshed from time to time with the blood, sweat, and toil of those who believe in life, liberty, and the pursuit of happiness. It is the natural manure of a free society. So let us set about to do the right thing. Reform Minnesota's obsolete criminal code and do it now.[17]

I end my presentation of this manifesto by noting that rebellions are risky and frequently do not end well for those who rebel. That was the fate of the June Rebellion, or Paris Uprising, of 1832. Enjolras and

16. Letter from Thomas Jefferson, U.S. Minister to Fr., to William S. Smith (Nov. 13, 1787), *in* JEFFERSON: WRITINGS 910–12 (Merrill D. Peterson ed., 1984).

17. *See id.*

ninety-two other young rebels died at the barricades—but that does not mean we should not try.

Here we can look to another Frenchman for inspiration. In 1835, three short years after the failed June Rebellion, Alexis de Tocqueville, a French political thinker and historian, published his famous treatise, *Democracy in America*.[18] In this treatise, de Tocqueville states that "American aristocracy is at the attorney's bar and on the judge's bench."[19] He talks about how without constant vigilance by both judges and attorneys the law can stray from its core purpose. He cited English law of the early nineteenth century as an example of how the law can stray. De Tocqueville wrote:

> English legislation is like an ancient tree on which the lawyers have constantly grafted the most foreign branches in the hope that, while yielding different fruits, they will at least intermingle their foliage with the venerable stock that supports them.[20]

I fear that de Tocqueville's comments about English law may apply to our criminal code in 2013. There is too much foliage that has been grafted on our code; there has been too much grafting of foreign branches that do not belong on the trunk. We need to prune this excess foliage, we need to cut off the foreign branches, and we need to make sure that what foliage remains is compatible with the trunk—the core purpose of the criminal code.

I see that I am getting a signal from the back of the room that my allotted time has now expired. Therefore, I must step down from the barricade. Fortunately, a volley of missiles has not been launched in my direction, nor do I see any gendarmes waiting for me at the door. I have had a bit of fun with all of you today with my literary references and my call to start a rebellion. That said, please do not ignore my message. Our criminal code is in need of reform, and the time for change is close at hand. There are risks for those of us who are willing to take the lead, but the risks are worth it. Let us get about doing what needs to be done. To the barricades. And may the result be that justice prevails.

18. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Harvey C. Mansfield & Delba Winthrop eds., 2000) (1935).

19. *Id.* at 256.

20. *Id.*

Appendix A

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