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# A Brief History of the Development of Minnesota's Criminal Law

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## A BRIEF HISTORY OF THE DEVELOPMENT OF MINNESOTA'S CRIMINAL LAW

Bradford Colbert<sup>†</sup> and Frances Kern<sup>††</sup>

I. INTRODUCTION .....	1441
II. CRIMINAL LAW BEFORE MINNESOTA BECAME MINNESOTA	1442
III. THE CREATION OF MINNESOTA AND ITS CRIMINAL LAW ....	1443
A. <i>From Territory to State</i> .....	1443
B. <i>Development of the Criminal Law</i> .....	1444
IV. REVISING MINNESOTA'S CRIMINAL CODE .....	1445
A. <i>The Advisory Committee</i> .....	1445
B. <i>The Model Penal Code</i> .....	1447
C. <i>Changes</i> .....	1448
D. <i>Obsolete Provisions</i> .....	1448
1. <i>No Longer a Part of the Code: Dueling</i> .....	1449
2. <i>Still Here: Fornication</i> .....	1450
E. <i>Clear and Understandable</i> .....	1453
F. <i>Revise but Not Revolutionize</i> .....	1454
V. CONCLUSION .....	1456

### I. INTRODUCTION

Codification was clearly in the air when Minnesota decided to recodify their criminal code in the 1950s. Wisconsin completely revised its criminal code in 1955;<sup>1</sup> Illinois revamped its code in 1961.<sup>2</sup> The granddaddy of all criminal codifications, the Model

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1. Alfred P. Murrah & Sol Rubin, *Penal Reform and the Model Sentencing Act*, 65 COLUM. L. REV. 1167, 1167 (1965).

2. Terri L. Mascherin et al., *Reforming the Illinois Criminal Code: Where the CLEAR Commission Stopped Short of Its Goals*, 41 J. MARSHALL L. REV. 741, 742 (2008).

Penal Code (MPC), was promulgated in 1962.

In revising its code, Minnesota took a substantially different track than the MPC. The drafters of the MPC intended to revolutionize criminal law; the Minnesota codifiers were trying something less controversial but perhaps equally difficult: they were trying to make sense of Minnesota's Criminal Code. To a large extent, they succeeded. The new criminal code was more coherent and fit better into Minnesota's overlying statutory scheme. But the decision to revise rather than revolutionize created problems.<sup>3</sup>

This article briefly describes the history of the revisions to the Minnesota Criminal Code and its relationship to the Model Penal Code, while making tangents into the history of the State of Minnesota when helpful.

## II. CRIMINAL LAW BEFORE MINNESOTA BECAME MINNESOTA

There were crimes, criminals, and criminal law before 1963; in fact, there were crimes, criminals, and criminal law before Minnesota became a state. The Dakota and Ojibwe/Chippewa/Anishinaabe tribes inhabited the territory from western Wisconsin to the Missouri River for many thousands of years before European exploration.<sup>4</sup> (Minnesota translates to "sky-tinted water" in the Dakota language.<sup>5</sup>) Their bands formed a political alliance called the Seven Fires<sup>6</sup> and were bound by their mutual obligation to protect their territory.<sup>7</sup>

Native American justice systems were very different than the Anglo-American system and frequently did not have written laws; as a result, many settlers believed that Native Americans had no laws. In fact, the Native American communities had many oral laws, traditions, and ceremonies that structured and regulated their communities.<sup>8</sup>

There are other fundamental philosophical differences between Anglo-American law and many tribal justice systems. For

3. See generally Ted Sampsel-Jones, *Mens Rea in Minnesota and the Model Penal Code*, 39 WM. MITCHELL L. REV. 1457 (2013).

4. MARY LETHERT WINGERD, *NORTH COUNTRY: THE MAKING OF MINNESOTA I* (2010).

5. Thomas D. Peacock & Donald R. Day, *Nations Within a Nation: The Dakota and Ojibwe of Minnesota*, DAEDALUS, Summer 2000, at 137, 138.

6. *Id.* at 140.

7. WINGERD, *supra* note 4, at 1.

8. See CARRIE E. GARROW & SARAH DEER, *TRIBAL CRIMINAL LAW AND PROCEDURE* 9–11 (2004).

example, the Anglo-American system differentiates between criminal law and civil law; many Native communities did not recognize this difference.<sup>9</sup> In addition, many tribes treated a harmful act as harmful to all of society, while other tribes allowed individuals to avenge wrongs they suffered at the hands of others.<sup>10</sup>

There is also a substantial difference in the philosophical underpinnings of the two systems. Unlike Anglo-American laws, the traditional law of many Native societies was considered to have been given by the Creator and to possess a spiritual basis, including the duties that stem from those beliefs. As a result, unlike Anglo-American criminal laws that exclusively defined prohibited behavior, Native laws were both proscriptive and normative.<sup>11</sup>

### III. THE CREATION OF MINNESOTA AND ITS CRIMINAL LAW

#### A. *From Territory to State*

The land that would become Minnesota first came under the control of the United States government upon passage of the Northwest Ordinance in 1787.<sup>12</sup> The Northwest Ordinance established a government over the Northwest Territory, of which Minnesota was a part.<sup>13</sup>

On March 3, 1849, the United States Congress passed the Organic Act, providing for the territorial government of Minnesota and fixing the borders of Minnesota Territory.<sup>14</sup> The Act also established a bicameral legislative assembly, consisting of a nine-member council and an eighteen-member house of representatives,<sup>15</sup> and provided that certain laws of Wisconsin were in force in Minnesota Territory.<sup>16</sup> Since most of these laws were civil in nature,<sup>17</sup> it appears that the core of the criminal law existed

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9. *Id.* at 4.

10. *Id.* at 13–16.

11. *Id.* at 10–11.

12. MINNESOTA LEGISLATIVE MANUAL 1957–1958, at 357 (1958).

13. *Id.* at 358.

14. *Id.* at 362.

15. *Id.*

16. *See* Laws of Wisconsin Now in Force in the Territory of Minnesota, ch. 45–73, 1849 Minn. Laws 106–60 (1850). Wisconsin's laws provided the basis for establishing county courthouses and jails, *id.* ch. 55; criminalizing certain offences against the public health, such as selling rotten food or inoculating with smallpox, *id.* ch. 56; providing for writ of habeas corpus for anyone imprisoned, *id.* ch. 57; and abrogating the common law writ, *id.*

17. *See id.* ch. 45–73.

only in common law form. The first territorial legislative session convened on September 3, 1849, and went about enacting laws to supplement those established by the Organic Act.<sup>18</sup>

The next major landmark in Minnesota's history was its transition from territory to state. Henry M. Rice, the delegate to Congress from the Territory of Minnesota, introduced a bill for an act to authorize a state government for Minnesota in December 1856.<sup>19</sup> This bill would become the Enabling Act and was approved on February 27, 1857.<sup>20</sup> While the act did not directly concern the development of Minnesota's criminal law—its primary purpose was to establish state boundaries and provide for a state constitutional convention<sup>21</sup>—it put in place the structures necessary to establish the State of Minnesota and, consequently, the legislative body that would create and redefine the criminal law in the state.

Minnesota's state constitutional convention was held from July 13 through August 29, 1857.<sup>22</sup> Voters approved the constitution on October 13, 1857, and it was submitted to the United States Senate in December for ratification.<sup>23</sup> At the same time, a bill to admit Minnesota to the Union was submitted to Congress.<sup>24</sup> On May 11, 1858, that bill passed Congress and was signed by President James Buchanan.<sup>25</sup>

The state constitution provided that all territorial laws consistent with the state constitution remain in force unless they expire or are changed by the legislature.<sup>26</sup> Thus the criminal laws Minnesota adopted when it became a territory became the laws of the new state.

### B. *Development of the Criminal Law*

The criminal law in place when Minnesota became a territory—essentially the common law, with a few statutory additions<sup>27</sup>—remained largely unchanged for almost thirty years. It

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18. *Id.* at 5.

19. MINNESOTA LEGISLATIVE MANUAL, *supra* note 12, at 368.

20. *Id.*

21. THEODORE C. BLEGEN, MINNESOTA: A HISTORY OF THE STATE 221 (2d ed. 1975).

22. MINNESOTA LEGISLATIVE MANUAL, *supra* note 12, at 370.

23. *Id.* at 370–71.

24. *Id.* at 401.

25. *Id.*

26. MINN. CONST. sched. § 4.

27. *E.g.*, MINN. STAT. ch. 28, tit. 9, § 83 (1873) (providing for imprisonment

wasn't until 1885 that the legislature enacted a full codification of Minnesota's criminal laws.<sup>28</sup> The revision, which went into effect on January 1, 1886, consisted largely of adaptations of New York's 1881 Penal Code.<sup>29</sup> Importantly, however, the 1886 Code abolished common-law criminal offenses; only acts or omissions criminalized by statute were now punishable.<sup>30</sup>

#### IV. REVISING MINNESOTA'S CRIMINAL CODE

##### A. *The Advisory Committee*

For the next seventy-five years, Minnesota's Criminal Code remained substantially the same. Changes were made to the criminal code, of course, but those changes were not well integrated with other criminal provisions or made consistent with prior laws.<sup>31</sup> By the middle of the twentieth century, change was afoot, and not just in Minnesota. Wisconsin completely revised its criminal code in 1955;<sup>32</sup> Illinois revamped its in 1961.<sup>33</sup>

In 1955, the Minnesota legislature established the Interim Commission on Juvenile Delinquency, Adult Crime, and Corrections; the commission was tasked "to deal with the broad problem of 'juvenile delinquency, crime, and correction.'"<sup>34</sup> One of the herculean tasks that commission took on was the revision of the criminal code.

The commission recognized that, while the ultimate responsibility for revising Minnesota's Criminal Code belonged to the legislature, the "technical nature of the task" required the input of the state's bench and bar.<sup>35</sup> The commission wrote to "all district judges and all county attorneys"<sup>36</sup> asking their opinion of the need

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or a fine for mistreating animals).

28. The state constitution provided that all territorial laws consistent with the state constitution remain in force unless they expire or are changed by the legislature. MINN. CONST. sched. § 4.

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

30. MINN. STAT. ANN. § 622.01 cmt. 1 (West 1945).

31. ADVISORY COMM. ON REVISION OF THE CRIMINAL LAW, *supra* note 29, at 9.

32. Murrah & Rubin, *supra* note 1, at 1167.

33. Mascherin et al., *supra* note 2, at 742.

34. Maynard E. Pirsig, *Proposed Revision of the Minnesota Criminal Code*, 47 MINN. L. REV. 417, 417 (1963) (citation omitted).

35. ADVISORY COMM. ON REVISION OF THE CRIMINAL LAW, *supra* note 29, at 5-6.

36. Apparently the commission did not feel the need to ask the opinions of criminal defense lawyers.

for and the feasibility of revising the criminal laws.”<sup>37</sup> A “substantial number urged the necessity for revision,” as did the leadership of the Minnesota State Bar Association.<sup>38</sup>

As a result, the commission invited “the legal organizations most concerned [to] designate[] representatives”<sup>39</sup> to serve on the Advisory Committee on Revision of the Criminal Law. The legislature did not renew the commission in 1961, but Governor Elmer Anderson made state funds available that allowed the advisory committee to complete its revision and submit it to the 1963 legislative session.<sup>40</sup>

The drafters of the Minnesota Code looked mainly to Wisconsin, which had adopted a new code in 1955, and the American Law Institute, which was developing the Model Penal Code at the time, for guidance.<sup>41</sup> The 1961 Illinois Code revision also proved helpful to the commission in reexamining the policies of its nearly finished product.<sup>42</sup>

In reevaluating and proposing revisions to the Minnesota Criminal Code, the committee had several main objectives in mind. First, it sought to remove inconsistent, duplicative, or obsolete provisions.<sup>43</sup> Gone, then, was the prohibition against taking more than one-eighth of a portion as a toll for grinding grain.<sup>44</sup> The committee also worked to ensure that the elements of a crime were stated in “clear, simple, and understandable terms.”<sup>45</sup> The committee also believed that it was important to include in the criminal code only matters of substantive criminal law, not procedural provisions or regulatory measures, and recommended transferring these provisions to other chapters.<sup>46</sup>

In addition, the committee considered the degree of revision, that is, whether to restate the law as it existed or to recommend substantive improvements.<sup>47</sup> The committee could have left the wording of the statutes unaffected and instead simply deleted obsolete provisions, removed inconsistencies, and improved

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37. ADVISORY COMM. ON REVISION OF THE CRIMINAL LAW, *supra* note 29, at 6.

38. *Id.*

39. *Id.*

40. *Id.* at 5.

41. *Id.* at 7.

42. *Id.*

43. *Id.* at 9.

44. MINN. STAT. § 614.51 (1961) (repealed 1963).

45. ADVISORY COMM. ON REVISION OF THE CRIMINAL LAW, *supra* note 29, at 10.

46. *Id.*

47. Pirsig, *supra* note 34, at 424.

classification.<sup>48</sup>

But the Committee concluded that merely restating the present law would not meet the needs of the present criminal code nor the intent of the legislation which established the Commission. . . .

The Committee felt that the revision should reflect present-day standards in the science of legislation, the progress that has been made in the administration of criminal justice, and the improvements which present-day standards, experience and practice have indicated are need in the substantive provisions of the criminal code.<sup>49</sup>

The committee, however, did not want to completely rewrite criminal law in Minnesota; instead, it “operated within the framework of the existing criminal code. For the most part, it did not undertake to incorporate new criminal offenses. Rather, it restated exiting crimes with such changes and improvements as appeared justified in the light of present day knowledge and principles.”<sup>50</sup>

#### B. *The Model Penal Code*

The limited goals of the advisory committee stand in sharp contrast to the ambitious goals of the drafters of the Model Penal Code. The Reporter of the MPC described the three requisite inquiries in the study of penal law:

(1) What behavior ought to be made criminal and how should it be defined? (2) What variations in the nature, circumstances or results of criminal behavior or in the character or situation of the individual offender should have the legal consequences of varying the mode of treatment of offenders? (3) What methods of treatment ought to be prescribed or authorized in dealing with offenders; what scope of discretion as to method should be vested in administration; and in what agency or agencies should such discretion be reposed?<sup>51</sup>

The Model Penal Code contemplated “a systematic re-examination”<sup>52</sup> of these broad issues rather than simply making the

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48. ADVISORY COMM. ON REVISION OF THE CRIMINAL LAW, *supra* note 29, at 9.

49. *Id.*

50. *Id.*

51. Herbert Weschler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1104–05 (1952).

52. *Id.* at 1130.



criminal law more coherent and concise.

The disparate goals of the two projects are perhaps best illustrated by the makeup of the two committees. The Model Penal Code had a “remarkably diverse advisory committee of law professors, judges, lawyers, and prison officials, as well as experts from the fields of psychiatry, criminology, and even English literature.”<sup>53</sup> The advisory committee in Minnesota, on the other hand, was made up of almost exclusively lawyers and judges (and, as far as could be determined, all white men).<sup>54</sup> To be fair, however, the advisory committee did add diversity and, perhaps, special insight into criminal law by including one member who was subsequently convicted of murder.<sup>55</sup>

### C. Changes

So, what changed? The title remained the same, descriptive and alliterative: “Crimes, Criminals.”<sup>56</sup> (The title has since been changed but remains alliterative: “Criminal Code.”)<sup>57</sup>

One noticeable difference between the 1963 Code and its predecessor is the length. In 1961, the criminal code was 136 pages;<sup>58</sup> after the revisions, it was down to seventy-five.<sup>59</sup> The reduction in length is consistent with one of the general goals of the advisory committee: removing unnecessary provisions (i.e., those that were duplicative, inconsistent, invalid, or obsolete).<sup>60</sup>

### D. Obsolete Provisions

In its effort to remove unnecessary provisions, the drafters of the 1963 revision took certain crimes off the books in furtherance of the goal of eliminating obsolete provisions. Overhauling the entire criminal code provided a rare opportunity to rid the law of statutes whose utility had long since passed, including those crimes that, because of political realities, might be impossible to excise any

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53. Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 323 (2007).

54. ADVISORY COMM. ON REVISION OF THE CRIMINAL LAW, *supra* note 29, at 6–7.

55. *See* State v. Thompson, 273 Minn. 1, 139 N.W.2d 490 (1966); ADVISORY COMM. ON REVISION OF THE CRIMINAL LAW, *supra* note 29, at 7.

56. MINN. STAT. ch. 609 (1965); MINN. STAT. ch. 610 (1961).

57. MINN. STAT. ch. 609 (2012).

58. MINN. STAT. ch. 610–23 (1961).

59. MINN. STAT. ch. 609–23 (1965).

60. ADVISORY COMM. ON REVISION OF THE CRIMINAL LAW, *supra* note 29, at 9.

other way. The committee got it right by eliminating express provisions against dueling but missed the mark by maintaining fornication as a crime. Here, a glance at why one crime was removed while the other remained.

1. *No Longer a Part of the Code: Dueling*

The prohibition against dueling,<sup>61</sup> a practice with a long history in the American South,<sup>62</sup> made its way into the territorial and state statutes of Minnesota. The practice, “the ritual of retiring to a field and firing pistols at one another to satisfy a social insult,”<sup>63</sup> occurred among those of high social standing, much to the chagrin of state governments.<sup>64</sup> If a man felt insulted, he would challenge the offending man to a duel, and that man was then obliged to fight or lose his honor and status within the community.<sup>65</sup>

The biggest problem with dueling was that it frequently resulted in death. Even a slight insult could result in death, and the mode of the duel did not ensure that it was the guilty party who received punishment. Whether or not a duel actually resulted in the death of one of the principals, however, the practice undermined state authority by substituting a private contest for public adjudication.<sup>66</sup>

Killing another in a duel that took place within the territory of Minnesota constituted second-degree murder,<sup>67</sup> the penalty for which was life imprisonment.<sup>68</sup> Seconds—representatives of each party who managed the duel and advised their principals<sup>69</sup>—of either party present at the time a mortal wound was inflicted were

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61. See generally Warren F. Schwartz et al., *The Duel: Can These Gentlemen Be Acting Efficiently?*, 13 J. LEGAL STUD. 321 (1984) (providing a detailed treatment of dueling and its social context).

62. Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 968 (1995).

63. *Id.*

64. Katharine K. Baker, *Sex, Rape, and Shame*, 79 B.U. L. REV. 663, 700–01 (1999).

65. *Id.* at 700. Newspaper editors were among the most vociferous proponents of anti-dueling laws, as their occupations involved leveling insults, and, consequently, they were among the most likely to be challenged to a duel. Lessig, *supra* note 62, at 970 n.79.

66. Lessig, *supra* note 62, at 969. “The duel was like a lawsuit where the judge, after establishing that indeed there was a wrong, flips a coin to decide who, between the plaintiff and the defendant, should be executed for the wrong.” *Id.*

67. MINN. STAT. ch. 100, § 24 (1851).

68. *Id.* § 2.

69. Schwartz et al., *supra* note 61, at 322 n.4.

considered accessories before the fact to second-degree murder.<sup>70</sup> Murder by dueling, then, was simply a specific application of the general prohibition against homicide.

The substance of the nineteenth-century law still remained in the early 1960s<sup>71</sup> but was removed in the 1963 revision.<sup>72</sup> Under the 1963 Code, “if mutual combat does in fact take place, it will be dealt with as a form of assault.”<sup>73</sup> Society had sufficiently changed so a more general provision could handle dueling.

## 2. *Still Here: Fornication*

Although dueling is no longer a crime in Minnesota, certain sexual behavior still is. Specifically, “[w]hen any man and single woman<sup>74</sup> have sexual intercourse with each other, each is guilty of fornication,”<sup>75</sup> which is a misdemeanor offense. The current statute is remarkably similar to the analogous provision in the 1851 territorial statutes: “If any man shall commit fornication with any single woman, each of them shall be punished by imprisonment in the jail, not more than thirty days, or by fine not exceeding thirty dollars.”<sup>76</sup>

Ten states besides Minnesota currently have statutes criminalizing fornication on the books,<sup>77</sup> but courts in three of these states have declared those statutes unconstitutional.<sup>78</sup> While

70. MINN. STAT. ch. 100, § 25.

71. See MINN. STAT. §§ 619.46–.50 (1961).

72. Pirsig, *supra* note 34, at 417–18.

73. *Id.* at 418.

74. A married woman having sex with a man other than her husband is punished under the adultery statute. MINN. STAT. § 609.36 (2012).

75. *Id.* § 609.34.

76. MINN. STAT. ch. 107, § 5 (1851).

77. See Georgia (GA. CODE ANN. § 16-6-18 (West, Westlaw through 2012 Reg. Sess.)); Idaho (IDAHO CODE ANN. § 18-6603 (West, Westlaw through 2013)); Illinois (720 ILL. COMP. STAT. ANN. 5/11-40 (West, Westlaw through 2012 Reg. Sess.)); Mississippi (MISS. CODE ANN. § 97-29-1 (West, Westlaw through 2012 Reg. Sess.)); North Carolina (N.C. GEN. STAT. ANN. § 14-184 (West, Westlaw through S.L. 2013-14 of 2013 Reg. Sess.)); North Dakota (N.D. CENT. CODE ANN. § 12.1-20-08 (West, Westlaw through 2011 Reg. and Special Sess.) (criminalizing fornication in public)); South Carolina (S.C. CODE ANN. § 16-15-60 (West, Westlaw through 2012 Reg. Sess.)); Utah (UTAH CODE ANN. § 76-7-104 (West, Westlaw through 2012 4th Special Sess.)); Virginia (VA. CODE ANN. § 18.2-344 (West, Westlaw through 2012 Reg. Sess.)); Wisconsin (WIS. STAT. ANN. § 944.15 (West, Westlaw through 2013 Wis. Act 9) (criminalizing fornication in public)).

78. Georgia (*In re J.M.*, 575 S.E.2d 441 (Ga. 2003)), North Carolina (Hobbs v. Smith, No. 05 CVS 267, 2006 WL 3103008 (N.C. Super. Ct. Aug. 25, 2006)), and Virginia (Martin v. Zihlerl, 607 S.E.2d 367 (Va. 2005)).

the statute remains in the criminal code in Minnesota, the Minnesota Supreme Court has noted that “police and prosecutors generally have considered [the fornication statute] unenforceable.”<sup>79</sup> The last cited conviction for fornication occurred in 1927,<sup>80</sup> although it has been charged as recently as 1986.<sup>81</sup>

The Model Penal Code does not criminalize fornication,<sup>82</sup> although early in the code’s development the MPC Advisory Committee approved a fornication/cohabitation statute that made sexual behavior between unmarried, opposite-sex couples a misdemeanor if “[t]he behavior is open and notorious.”<sup>83</sup> When it considered criminalizing fornication, the MPC Advisory Committee recognized that such provisions might present problems;<sup>84</sup> it aimed to “identify certain categories of illicit intercourse which the code might reasonably undertake to punish”<sup>85</sup> and encompass them in the MPC.

The criminalization of fornication did not survive to the final version of the MPC.<sup>86</sup> A ten-page comment to Article 213 sets out several reasons why the crime was eliminated. First, simply contravening community norms of ethical behavior—the primary reason underlying fornication laws—is “an insufficient basis for imposition of penal sanctions” and criminalizes moral decisions best left to the individual.<sup>87</sup> Fornication laws also involve enforcement techniques that are injurious to personal privacy interests and invade personal liberty. The allocation of scarce law enforcement and judicial resources also supported the decision: “It makes more sense to concentrate on conduct directly harmful to

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79. *In re Agerter*, 353 N.W.2d 908, 915 (Minn. 1984).

80. *See State v. Cavett*, 171 Minn. 222, 213 N.W. 920 (1927).

81. *See State v. Ford*, 397 N.W.2d 875, 877 (Minn. 1986) (school teacher originally charged with one count of sodomy under Minn. Stat. § 609.294, subdiv. 5, and one count of fornication under Minn. Stat. § 609.34 but convicted only of misconduct of a public officer).

82. MODEL PENAL CODE art. 213 introductory note (Official Draft and Revised Comments 1980).

83. MODEL PENAL CODE § 207.1(a) (Tentative Draft 4 1955).

84. *Id.* § 207.1 cmt. I.

85. *Id.*

86. MODEL PENAL CODE art. 213 note on adultery and fornication 3 (Official Draft and Revised Comments 1980). The requirement that the behavior occur “openly” is the language suggested for the 1963 revision, but that language did not make it into the final version of the statute. ADVISORY COMM. ON REVISION OF THE CRIMINAL LAW, *supra* note 29, at 97–98.

87. MODEL PENAL CODE art. 213 note on adultery and fornication 3.

others than to divert attention and resources to instances of private immorality.”<sup>88</sup> While simply refusing to prosecute fornication could solve these issues, the problems of selective enforcement, private coercion, and disrespect for the criminal law would remain.<sup>89</sup> Finally, the drafters noted that, as more and more people see cohabitation and sex outside of marriage as the norm, criminalization will not equate to reducing or eliminating behavior:<sup>90</sup> “[T]here is no reason to believe that maintaining symbolic condemnations of fornication and adultery will have any effect in inhibiting such conduct.”<sup>91</sup>

The MPC drafters were correct, but Minnesota chose not to follow their lead. In choosing to outlaw fornication, the Minnesota drafters relied on comments to the earlier, unapproved draft of the MPC that did criminalize fornication<sup>92</sup> and simply creatively quoted comments advanced in that draft as their reasoning for doing so.<sup>93</sup>

Minnesota’s code drafters believed that fornication statutes provide leverage against a putative father to provide support for a child and give prosecutors a bargaining chip in plea negotiations in rape cases.<sup>94</sup> The advisory committee rationalized its decision to continue to criminalize fornication by claiming that “[t]he Code does not attempt to use the power of the state to enforce purely moral or religious standards.”<sup>95</sup>

But this is precisely what the statute does: it criminalizes moral decisions best left to the individual.<sup>96</sup> And so fornication remains a crime in our state.

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88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. MODEL PENAL CODE § 207.1 (Tentative Draft 4 1955). That draft required the behavior to be “open and notorious.” *Id.* § 207.1(a). The proposed criminal code likewise included the “openly” language, ADVISORY COMM. ON REVISION OF THE CRIMINAL LAW, *supra* note 29, at 98, but the “open and notorious” requirement did not survive to become law.

93. ADVISORY COMM. ON REVISION OF THE CRIMINAL LAW, *supra* note 29, at 97–98.

94. *Id.* at 98.

95. ADVISORY COMM. ON REVISION OF THE CRIMINAL LAW, *supra* note 29, at 98.

96. MODEL PENAL CODE § 213.6, note on adultery and fornication at 437 (Official Draft and Revised Comments 1980).

*E. Clear and Understandable*

Another goal of the committee was to state the law in clear, simple, and understandable terms.<sup>97</sup> Professor Pirsig nicely illustrated the difference when describing theft from a vending machine. Before 1963, the law provided, in a single sentence:

Any person who shall operate or cause to be operated or who shall attempt to operate or attempt to cause to be operated any automatic vending machine, coin-box telephone or other receptacle designed to receive lawful coin of the United States of America in connection with the sale, use or enjoyment of property or service, by means of a slug or of any false, counterfeited, mutilated or sweated coin, or by any means, method, trick or device whatsoever not lawfully authorized by the owner, lessee or licensee of such machine, coin-box telephone or receptacle; or who shall take, obtain or receive from or in connection with any automatic vending machine, coin-box telephone or other receptacle designed to receive lawful coin of the United States of America in connection with the sale, use or enjoyment of property or service, any goods, wares, merchandise, gas, electric current, article of value, or the use or enjoyment of any telephone or telegraph facilities or service, or of any musical instrument, phonograph or other property, without depositing in and surrendering to such machine, coin-box telephone or receptacle, lawful coin to the amount required therefore by the owner, lessee or licensee of such machine, coin-box telephone or receptacle, shall be guilty of a misdemeanor.<sup>98</sup>

The proposed law, which encompassed the same conduct, was covered in the theft section in a much simpler, more understandable, and shorter sentence: “[Whoever intentionally] obtains property or services, offered upon the deposit of a sum of money or tokens in a coin or token operated machine or other receptacle, without making the required deposit or otherwise obtaining the consent of the owner [commits theft].”<sup>99</sup>

97. ADVISORY COMM. ON REVISION OF THE CRIMINAL LAW, *supra* note 29.

98. Pirsig, *supra* note 34, at 422–23 (quoting MINN. STAT. § 621.341 (1961)).

99. *Id.* at 423 (quoting MINN. STAT. §609.52, subdiv. 2(7) (1965)).

*F. Revise but Not Revolutionize*

Contrary to the drafters of the Model Penal Code, the advisory committee wanted to revise, but not revolutionize, criminal law. How the advisory committee dealt with the most serious offense, first-degree murder, illustrated its intent to refine, but not revolutionize, criminal law in Minnesota.

Famously, the MPC eliminated the degrees of murder and rejected the idea that a premeditated murder was the most culpable type of murder.<sup>100</sup> The advisory committee recognized that a premeditated murder might not be the most culpable type of murder: “The person who ponders, hesitates, and doubts, but under the stress of real or supposed circumstances, finally determines to commit the final act is a less dangerous individual and less to be condemned than one who without hesitation or inhibitions and without premeditation instantly but intentionally kills his victim.”<sup>101</sup>

Moreover, the advisory committee also recognized that, as interpreted, premeditation had almost no meaning, “only that an interval of time was needed sufficient to form the intent.”<sup>102</sup> Pirsig illustrated his point by citing, somewhat disdainfully, *State v. Prolov*, a decision from the Minnesota Supreme Court that sustained an instruction defining premeditation:

[P]remeditation may be formed at any time, moment, or instant before the killing. Premeditation means thought of beforehand for any length of time, no matter how short. There need be no appreciable space of time between the intention of killing and the act. They may be as instantaneous as the successive thoughts of the mind.<sup>103</sup>

Nonetheless, the advisory committee put aside “[c]onsiderations of this kind” and elected to continue to distinguish between intentional and premeditated murders.<sup>104</sup> But the advisory committee did attempt to “give some substance and meaning to the distinction between first and second degree murder” by defining premeditation as meaning “to consider, plan or prepare for, or determine to commit, the act referred to prior to

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100. See MODEL PENAL CODE § 201.6 cmt. 3 (Tentative Draft 9 1959).

101. Pirsig, *supra* note 34, at 426.

102. *Id.*

103. 98 Minn. 459, 461, 108 N.W. 873, 874 (1906).

104. Pirsig, *supra* note 34, at 426

its commission.”<sup>105</sup> By so defining premeditation, the advisory committee hoped that the severe sentence of life imprisonment for first-degree murder “[would] be reserved for those cases involving the murderer who lies in wait for his victim, or plans, calculates, and prepares to commit the fatal act.”<sup>106</sup>

Alas, this is not what happened. In fact, the Minnesota Supreme Court has held almost the opposite: “In a prosecution for murder in the first degree, extensive planning and calculated deliberation need not be shown by the prosecution.”<sup>107</sup> According to the Minnesota Supreme Court, “[t]he requisite ‘plan’ to commit a first-degree murder can be formulated virtually instantaneously by a killer.”<sup>108</sup> In reaching this conclusion, the Supreme Court cited *State v. Prolow*—the same case that Pirsig had used disdainfully to illustrate his point that there should be some substance and meaning to the distinction between first- and second-degree murder.<sup>109</sup>

And, it is important to note, it is now even more crucial to distinguish between first- and second-degree murder. The advisory committee attempted to import “substance and meaning” to the term premeditation because of the difference in punishment between the two offenses; first-degree premeditated murder carried a sentence of life in prison with the possibility of parole, while the punishment for second-degree intentional murder was for a term of not exceeding forty years.<sup>110</sup>

Now, the sentence for first-degree premeditated murder is life *without the possibility of parole*<sup>111</sup> while the term of imprisonment for second-degree murder is a little less than seventeen years.<sup>112</sup>

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105. MINN. STAT. § 609.18 (1965).

106. Pirsig, *supra* note 34, at 426.

107. *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988).

108. *Id.* (citing *State v. Neumann*, 262 N.W.2d 426, 430 (Minn. 1978)).

109. *Id.* at 155–56.

110. Pirsig, *supra* note 34, at 425.

111. MINN. STAT. § 609.106, subdiv. 2 (2012).

112. This is the presumptive term of imprisonment according to the Minnesota Sentencing Guidelines for a person with a criminal history score of zero. See MINN. SENTENCING GUIDELINES & COMMENTARY § 4.A (2012). In Minnesota, a person serves two-thirds of his sentence in prison and one-third on parole; the actual presumptive sentence under the Guidelines would be twenty-five and one-half years. *Id.* The statutory sentence for second degree intentional murder is still for a term not exceeding forty years. MINN. STAT. § 609.19, subdiv. 1.



## V. CONCLUSION

Seventy-eight years passed between the adoption of the first criminal code in Minnesota and the passage of its revision in 1963. As the '63 revision reaches its fiftieth anniversary this year, it is wise to reflect upon the changes it made to Minnesota law, both where it improved the law and where we might seek to improve the criminal code as we look to the future.