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A NEW APPROACH TO OLD CRIMES: THE MODEL PENAL CODE

INTRODUCTION

One naturally has trepidations when beginning a study of any area as broad as that treated by the Model Penal Code. It is, of course, impossible to consider each of the changes formulated in this model legislation. Recognizing the inherent limitations in a study such as this, the authors have confined themselves to a consideration of some of the most apparent and significant changes effected by Code. Even within these selected areas, the authors do not purport to be exhaustive in their consideration of each of the problems within the respective areas. Rather, they have concentrated on the more important ramifications of the proposed changes and the reasons for such proposals which are the two most practical criteria for an evaluation such as the present.

The general areas which will be discussed are: (1) abortion, (2) statutory rape, (3) arson, (4) theft, (5) disorderly conduct, and (6) vagrancy.

A. ABORTION.

Since the turn of the century, a marked increase in criticism of existing abortion laws has taken place, both by legal and social reformers.¹ Representative of the former is the Institute, codifying its proposed reformation in section 207.11 of the Code. These changes, supported individually or *in toto* at one time or another by other scholars in the field, would have a significant impact on the present state of the law in the United States. It is not the authors' intent to pass final judgment upon the Institute's proposed solution to the legal and social problem of abortion. The propriety of justifiable abortion, both from a moral and practical standpoint, has been historically, and continues to be, one of the most disputed areas of the social sciences²; it would be naive to attempt to resolve the question within the limited scope of this article. Rather, the authors intend only to point out the changes that would result under the Code, and set forth the most common rationale offered either for the retention or the abolition of existing laws.

Abortion has been generally defined as "any untimely delivery voluntarily procured with the intent to destroy the fetus."³ The crime may be committed at any time before the natural birth of the child.⁴ In most states, the prohibition is absolute, except in those situations where the abortion is induced to "save" or "preserve" the life of the mother, *i.e.*, therapeutic abortion to a limited extent is permitted.⁵ Five jurisdictions, however, recognize the mother's health as a justi-

1 ROSEN, THERAPEUTIC ABORTION (1954); TAUSSIG, ABORTION, SPONTANEOUS AND INDUCED (1936); TAYLOR, THE ABORTION PROBLEM (1944); WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW (1957); STORER & HEARD, CRIMINAL ABORTION (1868).

2 "The scope of this topic is as broad as life itself, encompassing medicine, religion, social customs, public policy and precedent." Mills, *A Medicolegal Analysis of Abortion Statutes*, 31 So. CAL. L. REV. 181 (1958).

3 WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 146 (1957).

4 *Ibid.*

5 ALASKA STAT. ANN. § 11.15.060 (1962); ARK. STAT. ANN. § 41-301 (1947); ARIZ. REV. STAT. § 13-211 (1956); CAL. PEN. CODE § 274; CONN. GEN. STAT. REV. § 53-29-30 (1958); DEL. CODE ANN. tit. 11, § 301 (1953); FLA. STAT. ANN. § 782.10 (1944); GA. CODE ANN. § 26-1101 (1953); HAWAII REV. LAWS § 309-3-4 (1955); IDAHO CODE ANN. § 18-601 (1948); ILL. REV. STAT. c. 38, § 3 (1935); IND. ANN. STAT. § 10-105 (1956); IOWA CODE ANN. § 701.1 (1950); KAN. GEN. STAT. ANN. § 21-410 (Supp. 1959); KY. REV. STAT. § 436.020 (1963); ME. REV. STAT. ANN. c. 134, § 9 (1954); MICH. STAT. ANN. § 28.204 (1962); MINN. STAT. § 617.18 (1947); MISS. CODE ANN. § 2223 (1957); MO. REV. STAT. § 559.100 (1949); MONT. REV. CODES ANN. § 94-401 (1947); NEB. REV. STAT. § 28-405 (1956); NEV. REV. STAT. § 201.120 (1955); N.H. REV. STAT. ANN. § 585:13 (1955); N.Y. PEN. CODE § 294; N.C. GEN. STAT. § 14-44 (1953); N.D. CENT. CODE § 12-25-01 (1943); OHIO REV. CODE ANN. § 2901.16 (1954); OKLA. STAT. tit. 21, § 861 (1958); R.I. GEN. LAWS ANN. § 11-3-1 (1956); S.C. CODE § 16-82 (1962); S.D. CODE § 13.3101 (1939); TENN. CODE ANN. § 39-301 (1955); TEX. PEN. CODE ANN. c. 9, art. 1191-96 (1961); UTAH CODE ANN. 76-2-1

fication,⁶ while the statutes of four others admit of no exceptions.⁷

In contrast with existing law, the Code incorporates virtually all the exceptions that have ever seriously been offered. Section 230.3 (2) provides:

"*Justifiable Abortion.* A licensed physician is justified in terminating a pregnancy if he believes there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape, incest, or other felonious intercourse."⁸

The first exception of subsection (2) is not startling. As mentioned above, several states already permit therapeutic abortion where only the health, as opposed to the life of the mother, is in danger. Other jurisdictions, while not expressly providing for it in the words of their respective statutes, have achieved the same result. In the Iowa case of *State v. Dunkelbarger*,⁹ for example, the applicable statute read that an abortion is illegal unless such miscarriage be necessary to save her life. The defendant aborted a fifteen-year-old girl who had, prior to the operation, used instruments on herself and several times had jumped from a height of eight or ten feet in unsuccessful efforts to abort herself. In acquitting the defendant, the court stated: "In order to justify the act, . . . it was not essential that the peril to life should be imminent. It was enough that it be potentially present, even though its full development might be delayed to a greater or less extent."¹⁰

Such a liberal view is apparently in accord with *R. v. Bourne*,¹¹ the leading case in this area, and one often cited by the proponents of liberalized abortion. That case involved the prosecution of a well-known doctor for the abortion of a young rape victim. There was no question that the doctor performed the alleged illegal act, as he openly informed the prosecution of this fact and invited legal action to provide a test case for the English Offenses against the Person Act.¹² The law made in that case results from the instructions given the jury since Bourne was acquitted and no appeal was, therefore, taken. The Act condemning abortion stated: "Provided that no act specified in the last preceding article shall be punishable when such act is done in good faith with the intention of saving the life of the mother whose miscarriage is intended to be procured."¹³

It appears that it was not shown that the girl was in any danger of death from the continuance of her pregnancy. In his instruction, however, the trial judge, Macnaghten, J., told the jury: "Life depends upon health, and it may be that health is so gravely impaired that death results. . . . And if the probable consequence of the continuance of the pregnancy will be to make the woman a physical or mental wreck, the jury are quite entitled to take the view that the

(1953); VT. STAT. tit. 13,3101 (1958); VA. CODE ANN. § 18.1-62 (1960); WASH. REV. CODE § 9.02.010 (1961); W. VA. CODE ANN. § 5923 (1961); WIS. STAT. ANN. § 940.04 (1958); WYO. COMP. STAT. ANN. § 6-77 (1959).

6 ALA. CODE tit. 14, § 9 (1940); COLO. REV. STAT. ANN. § 40-2-23 (1953) [or to prevent serious and permanent bodily injury to her]; MD. ANN. CODE art. 27, § 3 (1957) [if no other method will secure the safety of the mother]; N. M. STAT. ANN. § 40A-3-1, 2, 3 (1964) [or to prevent serious and permanent injury]; ORE. REV. STAT. § 677.190(2) (1961) [for the relief of a woman whose health appears in peril].

7 LA. REV. STAT. ANN. § 14:87 (1950); MASS. GEN. LAWS ANN. c. 272, § 19 (1956); N.J. REV. STAT. ANN. § 2A:87.1 (1953); PA. STAT. ANN. tit. 18, §§ 4718, 4719 (1963). In Massachusetts, however, it was held by judicial construction that a physician may lawfully procure the abortion of a patient if in good faith he believes it to be necessary to save her life or to prevent serious impairment of her mental or physical health. *Commonwealth v. Wheeler*, 315 Mass. 394, 53 N.E.2d 4 (1944).

8 MODEL PENAL CODE (Hereinafter cited as MPC) § 230.3(2).

9 206 Ia. 971, 221 N.W. 592 (1928).

10 *State v. Dunkelbarger*, 206 Ia. 971, 980, 221 N.W. 592, 596 (1928).

11 (1938) 3 All. E.R. 615 (K.B.).

12 Offenses against the Person Act, 1861, 24 & 25 Vict., c. 100.

13 *Ibid.*

doctor, who, in those circumstances, and in that honest belief, operates, is operating for the purpose of preserving the life of the woman."¹⁴

The relationship between impairment of health and ultimate death is a logical one. However, the authors submit that the relationship does not extend to make poor health per se a justification. Assuming the possible death of the mother to exonerate an abortionist's act, impairment of health is quite another thing. To be sure, to cause grave physical harm may be tantamount to causing death if such a result is proximate and probable. Obviously, it is a question of degree. But, becoming a physical or mental wreck, grave and unfortunate though it may be, with death as only a remote and speculative result, is something less. The thought or sight of a human being in physical or mental pain or anguish is abhorred by all; and the desire to prevent such a condition is a natural human reaction. Nevertheless, the pity one feels for another person, and his desire to alleviate such a condition, cannot be expressed as a desire to prevent death and, thereby, provide a justification for abortion where, in fact, the condition does not enter the realm of impending loss of life. Life, however lamentable and burdensome it may be, is not the same as death in either theological or scientific contemplation.

In making a "substantial risk"¹⁵ of grave impairment¹⁶ a justification, it should be noted that the mental health of the mother is expressly stated to be considered along with the physical health. Again, to the extent that mental health may result in death as discussed above, the inclusion is logical. Medical science has proven, beyond reasonable doubt, the disastrous implication of mental illness. While cases such as *Bourne* have adopted this view through judicial construction, the express inclusion adds certainty and consistency to the provision.

The Code provides for further justification where the child may be born with grave physical or mental defect, or where the pregnancy resulted from rape by force or from incest.¹⁷ The law, as it exists today, does not permit such considerations to overcome the prohibition of the abortion statutes. The desire for such exceptions is understandable. Whether such a desire, in light of considerations to be mentioned later, is enough to sustain the justifiable termination of a "live" fetus will again be left to the reader.

To buttress its proposed legislation, the Institute reviewed at least three reasons commonly advanced therefor. First, the Institute contends that the weight of public opinion probably favors a much more restricted application of criminal sanctions than present law contemplates.¹⁸ Second, it is suggested that criminal repression of abortions can only lead to the illicit performance of the operation by quacks under conditions much more likely to kill the mother.¹⁹ Finally, "There seems to be an obvious difference between terminating the development of such an inchoate being, whose chance of maturing is still somewhat problematical, and, on the other hand, destroying a fully formed viable fetus of eight months. . . ."²⁰

As concerns public opinion, it is difficult to refute the fact that abortion is no longer thought of with such animosity as it was in the past. The apathy with which the prosecuting officials treat the problem is evidenced by the lack of prosecutions brought against such acts. For example, one authority has estimated that the annual number of criminal abortions committed in the United States approached 300,000, while the number of convictions totaled only 2,500.²¹ Since

14 *R. v. Bourne* (1938) 3 All. E.R. 615, 617-19 (K.B.).

15 MPC § 230.3(2).

16 *Ibid.*

17 *Ibid.*

18 MPC § 230.3, comment at 149 (Tent. Draft No. 9, 1959).

19 *Id.* at 150.

20 *Id.* at 149.

21 42 J. CR. LAW AND CRIM. 244 (1951). The proportion of illegal abortions has been put at anywhere from 30-70%. POLLACK, *THE CRIMINALITY OF WOMEN* 43-44 (1950).

such a high percentage of the populace is apparently condoning abortion by submitting to it, pressure upon public authorities to enforce more stringently the existing law will probably not be forthcoming.

Assuming that public opinion is not against liberalization, and may, in fact, be favored in some groups, it may be argued that the legislatures should respond. Further, it is said that statutes should never declare as criminal conduct that which is regarded as proper and desirable by a respectable minority. However, this contention has its limits. For example, murder and rape have increased in number over the years in the United States. Surely this does not mean that when these crimes reach a certain total, the determination should be made that public opinion favors such acts and, therefore, those laws which make them crimes should be repealed. Nor can the persecution of the Jews in Nazi Germany during the Second World War be justified by the social attitudes and public opinion of the people. Certainly, the laws should reflect to some extent the prevailing views of the people they govern. However, there is a point, be it determined by moral, natural, theological, or utilitarian laws — or by a combination of all of these — past which public opinion may not exert its influence. That point is reached before an innocent human life can be taken.

Statistics again bear out the truth of the statement regarding the second reason, *i.e.*, the repression of legalized abortion drives pregnant women to incompetent and unethical practitioners, thereby endangering the health and security of the mother. It is estimated that the death rate of aborted mothers in the United States is 1.2 per cent.²² Often compared is the low rate of .0001 per cent achieved in Russia where abortion is legalized and performed in hospitals by skilled physicians.²³ Thus, it is argued that if abortion were legalized in the United States, loss of life would be drastically reduced albeit more abortions would be performed by reason of the more efficient and safer means employed by recognized and approved hospitals. Such an argument is not very persuasive for two reasons. First, while reducing one evil, *i.e.*, the high death rate of aborted women, another evil, the number of fetuses killed is greatly increased. The effect would be to encourage one undesirable activity for the sake of reducing another. As an analogy, one might consider the problem of drug addiction. Using the rationale proposed by the Institute, in order to prevent drug addicts from robbing and committing other crimes to obtain money for their drugs, the state should furnish the addicts with ample supplies and, thereby, protect the community from their illegal methods. Secondly, to assume that loss of life will be curtailed by greater protection for the mother is to ignore the life of the fetus. Every time an abortion is performed, at least one person dies! Since liberalization of the abortion laws would certainly increase the number of abortions performed, the number of women's lives saved would be far surpassed by the number of fetuses killed.²⁴

The above assumes that the fetus is, in fact, a life worth saving. This brings us to the third reason for liberalization, the difference between the "inchoate being" and a fully formed fetus. In the final analysis, this is the question that must be decided. All other considerations are of questionable relevancy until it is determined just what it is that exists in the mother's womb. At the risk of oversimplification, it is submitted that no solution to the problems of justifiable abortion can result until that question is determined, and once it is, few, if any, remain. If the fetus is a human life, it is against all natural justice as recognized by Western civilization to terminate its existence for the reasons provided as exceptions under the Code, with the possible exclusion of preservation of the mother's life. No one

22 TAUSSIG, ABORTION, SPONTANEOUS AND INDUCED 387-88 (1936).

23 *Id.* at 414.

24 Even excluding fetal life, "if all legal restraint on abortion were removed, so that it could be performed under the best conditions, it is possible that the absolute number of abortions might so increase that even with a lower death rate a larger number of deaths would have to be anticipated." MPC § 230.3, comment at 150 (Tent. Draft No. 9, 1959).

would argue, for example, that it is justifiable to kill a one-year-old child, because it is physically or mentally defective, or because it was born through the rape or incestuous intercourse of the mother, or because the mother's health is impaired by reason of her added responsibility. Our culture has not yet reached such a state of disregard for human life. We have yet to accept the definition of murder as propounded by the Marquis De Sade:

[A]nd so that is what murder is: a little matter disorganized, a few combinations changed, some atoms broken and returned to Nature's crucible from whence they will return in a few days in another form; where is the evil in that? Are women or children more precious to Nature than flies or worms? If I take life from the one, I give it to the other; where is the crime in what I do?²⁵

If the fetus is a living person, there is no satisfactory reason why he should not have the same natural rights as a child who has left the mother's womb a year ago.

On the other hand, no problems remain if it is determined that the fetus is not a human life. There is no adverse reaction when a gangrenous arm or leg is amputated to save the rest of the body, or when a part of the body, infested with malignant cancer, is removed to stop its spread. If the fetus is no more than this, it, too, can be prematurely removed. Under this theory, abortion should be justified in any and all cases, not just those provided for in the Code.

The Institute, however, has taken an anomalous position in this respect. It admits only that indiscriminate abortion is a secular evil "since the procedure involves some physical and psychic hazards."²⁶ Further, it states that abortion, at least in early pregnancies, involves considerations different from the killing of a live human being.²⁷ Apparently, the Institute does not regard the fetus as a human life. It appears inconsistent then to limit the justifications to those enumerated in section 230.3. If the United States can achieve the same low death rate as has Russia, to wit: .0001 per cent, the physical and psychic hazards would be negligible. Indeed, abortions would be safer than delivering the baby.²⁸

Whether the fetus is a human life or not has yet to be conclusively settled to the satisfaction of all. Moreover, it is not expected of the Institute that they should resolve the question. But when such sweeping changes in the existing laws are proposed, it is submitted that there is warrant for a more exacting reason than that "there seems to be an obvious difference. . ." Whatever form of life exists before birth should not be treated so cavalierly; it has no ability to determine its ultimate fate.

The child in the womb, against whom no charge is made, is given no defender, no time, no hearing, no specifications to support the demand for his destruction. And the appeal, given as of right by most constitutions? Under section 207.11 (2) (b), the unborn child could have no appeal even could he in some way have a recognized defender, because there would be no record — no allegations and findings — to review.²⁹

B. RAPE

There exists in the United States today a prevailing theory of criminal jurisprudence which, in effect, approaches the civil law recognition of strict liability, *i.e.*, liability imposed on a person through no moral fault of his own. This theory manifests itself in the enforcement of the crime of statutory rape and occasions the punishment of an individual who engages in sexual intercourse with a female who has yet to attain a specified age, notwithstanding her apparent consent or his acting as a reasonable and prudent person. In its paternalistic desire to protect the willing, yet immature female, the law treats as void, any consent she may in

25 GORER, *THE MARQUIS DE SADE* 232 (1934).

26 MPC § 230.3, comment at 150 (Tent. Draft No. 9, 1959).

27 *Ibid.*

28 In the United States, approximately 37.5 of every 100,000 women die while giving natural birth. U. S. DEP'T OF HEALTH, EDUCATION & WELFARE, 1960 VITAL STATISTICS.

29 Quoy, *Justifiable Abortion*, 49 GEO. L. J. 173, 177 (1960).

fact give.³⁰ As a result of this *ad hoc* treatment, acts which would not expose the actor to a prosecution for forcible rape are considered included within the scope of the crime, *i.e.*, statutory rape, and its attendant serious punishment.³¹

The crime of statutory rape, then, by reason of its unique characteristics, involves considerations quite different from those usually entertained in the formulation and administration of the more common penal sanctions.³² The determination of those considerations and their respective importance in this area have been less than unanimous, and, as in most such areas, proposals for reform have been urged. In drafting the Code, the Institute, in section 213 dealing with rape and related offenses, has offered its solution to the alleged problems in this area in a drastically revised form. As mentioned above, the considerations involved in this crime are unique and disputed; therefore, the only way to adequately evaluate the Institute's contribution is to compare the principles they have employed with the policy of the crime and examine the resulting effects.

The interference of the law with acts of such a personal nature stems from the recognition of certain hazards confronting the adolescent "victim" — hazards not necessarily involved nor to such an extent where a mature female is concerned. They may be summarized as: (1) psychological, (2) physical, and (3) ignorance on the part of the female.

Significant psychological dangers are inherent in sexual intercourse involving pre-puberty "victims" of statutory rape. The "vicious association" impression resulting from the rape may be related to a later course of sexual delinquency.³³ Also, evidence exists to show that such intercourse may precipitate a reversion to infantile practice, exhibitionistic drives, or bewilderment and preoccupation.³⁴ Moreover, when a child has been a victim of more than one indecent assault, her moral senses have often been impaired thus becoming a potential danger to other children.³⁵

Despite the studies of a few that seem to result in the finding that adequate and timely treatment can prevent such adverse effects,³⁶ the mere possibility of their occurrence in light of their grave repercussions warrants more than passing consideration.

Serious physical dangers are always present when a female who has not yet reached puberty, engages in mature sexual activities. Besides the ever present dangers of venereal diseases,³⁷ numerous other internal disorders may result, several of which may be fatal.³⁸

Finally, ignorance on the part of the victimized female, while not of itself a harmful end product, can lead to a fatal submission which in turn may result in the above-mentioned evils. It is because of this presumed ignorance and the accompanying danger of immature judgment that the law invalidates her consent.³⁹

30 For a discussion of the reasons for morality statutes, see Lord Devlin, *Law, Democracy, and Morality*, 110 U. PA. L. REV. 635 (1961-62).

31 CLARK & MARSHALL, *CRIMES* § 11.01 (6th ed. Wengersky Rev. 1958).

32 *JAMES v. State*, 246 Ala. 617, 620, 21 So. 2d 847, 849 (1945), ("Protect the innocent and helpless."); *Ledbetter v. State*, 184 Tenn. 396, 400, 199 S.W.2d 112, 113 (1947), ("Protect the purity of young women."); *People v. Verdegreen*, 106 Cal. 211, 213, 29 P. 607, 608 (1895), ("Protecting from violation of the virtue of young and unsophisticated girls."). See generally 19 TENN. L. REV. 978 (1947).

33 KARPMAN, *THE SEXUAL OFFENDER AND HIS OFFENSES* 67 (1954).

34 *Id.* at 68.

35 *Id.* at 67.

36 *Id.* at 67 reporting on Rasmussen's study *Die Bedeutung Sexueller Attentate Auf Kinder Unter 14 Jahren für die Entwicklung von Geisteshrankheiten un Charakteranomalien*. ACT PSYCHAT. ET NEUROL. 9:351, 1934.

37 Karpman, *supra* note 33, at 70.

38 *Id.* at 70.

39 *People v. Boggs*, 107 Cal. App. 492, 494, 290 P. 618, 619 (1930). "The understanding referred to must, of course, be an intelligent understanding and the consequences include more than the mere physical consequences." 62 YALE L. J. 55, 75 (1952-53).

Ignorance on the part of the victim is prevalent throughout the early and middle stages of a female's adolescent development.⁴⁰ As stated by one court, the reason for setting a statutory age below which consent may not be given "is that the victim is without capacity and discretion to have a proper conception of the character of the offense being committed against her person, or to comprehend its consequences fully, or perhaps to possess strength of will to resist the influence and importunities of the ravisher. That is actually so of an idiot and presumptively so of a child."⁴¹

Determining the physical and psychological ramifications to be substantive evils and recognizing the ignorance of adolescence to be a substantial contributing factor, the law has fixed an absolute "age of consent" which, as seen earlier, declares how old a female must be before her consent is given legal recognition. Such age is usually set anywhere between 10⁴² and 18.⁴³

The fixing of a specific age to determine ability to consent raises the most serious criticism to the present law. The critics contend that this criterion for determining the age of consent is completely arbitrary and disregards the individual discrepancies that exist in each person.⁴⁴ More specifically, it is thought that a young girl may well be of sufficient mental maturity to appreciate and understand the nature of the act of intercourse when the age of adolescence is reached and yet the attainment of this age is not used as a factor in arriving at a proper age of consent. Instead of looking into the situation subjectively, the traditional objective and inaccurate test is used.

Granting that the problems of evidence, proof and administration in general would be created, the authors believe that there is merit in the above contention. When one considers that a female's partner in their illicit adventure is subject to a conviction for rape, it is submitted that the subjective method, if more accurate, warrants considerable attention.

The Code, while making substantial changes in this area, still retains the fixed age of consent. The relevant sections provide:

(1) Rape. A male who has sexual intercourse with a female not his wife is guilty of rape if:

(d) the female is less than 10 years old.⁴⁵

(1) Offense Defined. A male who has sexual intercourse with a female not his wife . . . is guilty of an offense if:

(a) the other person is less than (16) years old and the actor is at least (4) years older than the other person.⁴⁶

The more significant changes are, of course, the specification of the age of 10 years as the "age of consent," and the provision for discrepancy in age between the victim and the alleged corruptor. While these changes are a departure from the prevailing law today,⁴⁷ the fundamental principle of liability on the part of the male, irrespective of the female's ability to in fact understand the nature of the act, remains unaltered. It is unfortunate that the Institute did not take the opportunity to change this principle. As mentioned above, by refusing to consider the mental capacity of the victim, to wit, her ability to appreciate the significance of the act and its ramifications, the law fails to recognize crucial facts and imposes liability in many cases on the basis of nothing more than a legal fiction. In discussing legally effective consent, Puttkammer indicates that the determining factor

40 MPC § 207.4, comment at 252 (Tent. Draft No. 4, 1955).

41 *Golden v. Commonwealth*, 289 Ky. 379, 383, 158 S.W.2d 967, 969 (1942).

42 See, e.g., FLA. STAT. ANN. § 794.01 (1944); WASH. REV. CODE § 9.79.010. Delaware has set the age of consent at seven years. DEL. CODE ANN., tit. 11, § 781 (1953).

43 See, e.g., MONT. REV. CODES ANN. § 94-4101 (1947); N.D. CENT. CODE ANN. § 12-30-01 (1960).

44 62 YALE L.J. 55 (1952-53).

45 MPC § 213.1.

46 MPC § 213.3(1).

47 MPC comment, *supra* note 40, at 252.

in ascertaining consent is whether the victim had a certain minimum of intelligent understanding of the true facts which surrounded her.⁴⁸

If the minimum of intelligent understanding was not attained, it is generally said that there was no consent on her part. . . . In other words, we are asking whether the victim's mind was sufficiently enlightened by the facts to make her consent the act of a reasoning being. It follows that a mere failure to have any comprehension may be as significant as an active misunderstanding of the situation.⁴⁹

It must be conceded that any time the mental state of either the accused or victim of a crime is put in issue, inherent problems of proof exist which are not present in the determination of an objective fact. However, our present laws recognize the state of mind of the alleged criminal. This attitude is retained in the Code. For example, section 4.01 of the Code provides that a person is not responsible for criminal conduct if he lacks substantial capacity either to appreciate the criminality of his act, or to conform to the required legal standard. If the mental factor of the accused, despite whatever problems may arise, is to be recognized in all crimes, it would seem that, if relevant, it should be a criterion for determining the responsibility for consent. Or, more specifically, there is little, if any, reason to consider the alleged rapist's state of mind and ignore that of his victim. Moreover, whatever the physical age of the female, her consent may be vitiated by lack of mental capacity and understanding.⁵⁰ To consider mental capability elsewhere in the criminal law and not in the case where consent has actually been given is inconsistent and has little to recommend it.

Since the Code has not accepted this principle, its adoption would be of doubtful benefit in this area. In using 10 years as the age of consent,⁵¹ the Institute admits that this is the lowest possible age to be considered in light of the normal age for reaching puberty.⁵² It is submitted that while this age may possibly be considered, ultimately it is too low. The Institute recognizes, as it must, the situation of a pre-puberty victim with a considerable probability of aberration in the male aggressor, and has provided a severe penalty therefor.⁵³ Moreover, although the Institute recognizes that most young girls do not reach the age of puberty until 12 years,⁵⁴ the Code does not provide for this. When one considers the grave potential physical and psychic hazards⁵⁵ in the act of intercourse which involves a pre-puberty child, and the high probability of inability on her part to appreciate the nature of the act, the very evils which the laws of statutory rape are designed to prevent, are not in fact covered.

This does not mean, of course, that a child over 10 years may be molested with impunity; for as seen earlier, a person who is four or more years older than the girl he molests will be guilty of corruption of minors⁵⁶ if she is under sixteen. This provision has merit in that it prevents the prosecution of young boys at the curious age who are as ignorant as the girl and of the teen-ager whose misadventured date gets out of hand through circumstances which do not impart culpability to the male. In effect, this provision tends to negative any disadvantage by reason on the part of the girl of her immaturity.

While the "four-year rule" would be a beneficial supplement to presently exist-

48 Puttkammer, *Consent in Rape*, 19 ILL. L. REV. 410 (1924-25).

49 *Id.* at 411.

50 See note 39 *supra*. It should be noted also that the Code departs from the strict test by providing for prior promiscuity of the complainant as a defense to Corruption of Minors in sec. 213.6(4). While this is not in fact a subjective test, it is a recognition on the part of the Institute that factors other than the age of the parties are relevant. This seems to be in accord with the prevailing view. See, e.g., *Ledbetter v. State*, 184 Tenn. 396, 199 S.W.2d 112 (1947).

51 MPC § 213.3(1).

52 MPC comment, *supra* note 40, at 252.

53 MPC comment, *supra* note 40, at 251-52.

54 MPC comment, *supra* note 40, at 252.

55 Karpman, *supra* notes 34-39.

56 MPC § 213.3(1).

ing laws, the adoption of sections 213.0 and 213.3 in their entirety would be difficult to justify as an improvement. Although there will certainly continue to be some unjust convictions under those laws which set a high statutory age, the authors submit that the harmful consequences of a pre-puberty child engaging in such activity outweigh such injustice. It is unfortunate, however, that the lesser of two evils must be chosen when the subjective test could, in large measure, eliminate both.

C. ARSON

The Model Penal Code also attempts to make significant changes in the law of "Arson and Related Offenses." Rather than providing for degrees of arson, the drafters, in article 220, have distinguished three separate offenses: "Arson," "Reckless Burning or Exploding," and "Failure to Control or Report Dangerous Fire."⁵⁷

"Arson," as defined in the Code, is the intended destruction either by fire or by explosion of a building or occupied structure of another, or of personal property for insurance if a building or person is put in danger.⁵⁸ This violation constitutes a felony of the second degree.⁵⁹

A person is guilty of "Reckless Burning or Exploding," a felony of the third degree by recklessly placing another or a building in danger from a fire which the former purposely started.⁶⁰

"Failure to Control or Report Dangerous Fire" is treated as the least serious of the offenses related to arson and thus constitutes simply a misdemeanor.⁶¹ One becomes liable only if this failure is a neglect of an affirmative duty as provided in subsections (a) and (b).⁶²

"Arson at common law is the willful and malicious burning of the dwelling house of another either by night or day."⁶³ In recognizing the two characteristics of a dwelling house, the common law distinguished between its respective features as a place of habitation and as merely another piece of property. The law's primary concern was with the former, the crime constituting an offense against the security of the personal habitation rather than against the property.⁶⁴

The offense of arson is well recognized in the United States today. Most jurisdictions follow the common law insofar as they require a "willful and malicious" burning to constitute the offense.⁶⁵ There has, however, been some noteworthy legislative action in this area. One of the more significant changes in the law appears to be that the crime of arson has been enlarged to incorporate the view that it is also a crime against the property interests,⁶⁶ the prevention of economic waste being recognized as a substantial social interest.⁶⁷ Justification for this view may be derived from the theory that the state itself has a property interest in the real estate belonging to an individual.⁶⁸ An even more significant change proscribes the burning of one's own property if it is insured.⁶⁹ A New Jersey court, interpreting the state legislation and extending the proscription still further, punished the willful and malicious burning of one's own property even if it is not insured or subject to a security interest.⁷⁰

Nevertheless, despite such piecemeal attempts at change, the law of arson

57 MPC § 220.1.

58 MPC § 220.1(1).

59 *Ibid.*

60 MPC § 220.1(2).

61 MPC § 220.1(3).

62 MPC § 220.1(3)(a) & (b).

63 CLARK & MARSHALL, *CRIMES* § 13.09 (6th ed. Wengersky Rev. 1958).

64 *The Crime of Arson*, 41 J. CRIM. L. & C. 290, 291 (1950-51).

65 25 MICH. L. REV. 450-52 (1926-27).

66 *Id.* at 450-51.

67 *Id.* at 451.

68 *Id.* at 452.

69 Braun, *Legal Aspects of Arson*, 43 J. CRIM. L., C. & P.S. 53, 54-55 (1952-53).

70 *State v. Katz*, 7 N.J. Misc. 524, 146 Atl. 351 (1929).

remains virtually the same as it existed at common law. As a result, traditional weaknesses continue to plague present-day formulation and administration of arson law. One major difficulty arises from the fact that a single act, which is technically arson, may be prosecuted as any one of a large variety of statutory offenses.⁷¹ Since convictions under the different statutes carry with them various degrees of punishment and guilt, the choice of statutory offense with which the offender is charged may be of great significance when it comes to considering such things as the felony-murder rule or recidivists statutes.⁷²

A suggested solution to this problem is to delineate the meaning of "arson" and to redesignate other situations involving destruction by fire.⁷³ The Code specifically adopts this solution. As indicated above, the Code distinguishes between "intentional" destruction by fire and situations involving the reckless placing of another person, or the building of another person, in danger from a fire which the offender "purposely" started.⁷⁴ Moreover, a further distinction is made in treating as a separate liability for a misdemeanor one's failure to control or promptly report a fire which he started or which he has an affirmative duty to control.⁷⁵ This grading of "Arson and Related Offenses" by the degree of culpability is significant when one considers that the "felony-murder" rule, codified in 210.2 (b) specifically includes only "arson" and not its "related offenses." Considering the serious consequences attendant with the application of this rule, the distinction appears to be a sound one.

Another problem area involves the possibility of a property owner's being convicted for burning or consenting to the burning of his own property.⁷⁶ Following the suggestion⁷⁷ that this possibility be corrected, the Code permits one to burn his own property except in cases where it is done to collect insurance while thereby recklessly placing another or the building of another in danger.⁷⁸

Perhaps the most basic defect in the present law of arson is the retention of the traditional distinctions between the respective characteristics of real property. Although this distinction was valid in the light of sixteenth century environment,⁷⁹ modern critics suggest that this distinction is no longer valid in determining the essential characteristics of the offense. It is contended that neither "the specific listing of types of property subject to arson"⁸⁰ nor the "ineffective distinction between arson of a dwelling and arson of a structure not a dwelling"⁸¹ should be used as the sole criterion of the offense, but rather that the controlling factor should be the endangering of human life. Although not apparent on its face, the Code would seem to be in substantial accord with these contentions. For example, even though the specific listing under the definition of an "occupied structure"⁸² seems to sanction this alleged defect, a closer examination will disclose that the listing is necessary, as a matter of practical drafting, to include all of the places besides buildings where fire or explosion would normally tend to endanger human life. The necessity of this practical solution to a drafting problem would seem to outweigh any tendency to entrench a past defect in the provisions of the Code.

Moreover, the Code's concern for the protection of human life is further evi-

71 For a discussion of what happens under the various California statutes see 35 So. CAL. L. REV. 375, 375-76 (1961-62).

72 Bolton, *Arson In California: Part II*, 35 So. CAL. L. REV. 375, 378 (1961-62).

73 Bolton, *Arson In California*, 22 So. CAL. L. REV. 221, 237 (1948-49).

74 MPC §§ 220.1(1) & (2).

75 MPC § 220.1(3)(a) & (b).

76 1955 WIS. L. REV. 511, 518-19.

77 *Id.* at 519.

78 MPC §§ 220.1(1) & (2).

79 *Supra* note 64.

80 *Supra* note 76, at 519.

81 *Ibid.*

82 MPC § 220.1(4).

denced by the elimination of the distinction between a dwelling and a nondwelling place. The Institute recognizes the high probability that any building might contain human beings and, therefore, makes it the potential object of arson in order to protect the people potentially within the building.⁸³ In this manner, the Code has implemented the Institute's policy of protecting the occupants of a structure by proscribing its destruction by fire even though no human life is actually endangered at the time of the burning. If one recognizes that any building is a possible shelter of human life, all buildings clearly become the proper object of protection by way of the arson laws.

Reverting for the moment, to the problem of the burning of one's own property, it is significant to note the consistency with which the Institute applied this overriding concept of the protection of human life to all the major changes made by the arson provision of the Code. Regardless of the fact that one might be guilty of another offense, unless there is a danger to human life, he does not become subject to a conviction for arson when he burns his own property.⁸⁴ The commentators specifically note that ". . . the heavy penalties of arson are not intended for behavior which, while objectionable as part of a fraudulent scheme, has no element of general or personal danger."⁸⁵

It thus appears that the approach taken by the Code is a good one — logically sound and consistent in its high regard for human life. Although it has been urged that the Code has failed to adequately correct some of the more striking deficiencies caused by the broad use of the term "arson,"⁸⁶ it is submitted that the Code's treatment is not so vague as to threaten inequities. On the contrary, while retaining the corpus delicti of the offense,⁸⁷ the Code draws a few simple distinctions which serve to highlight the truly crucial considerations in this area and to focus attention upon the fundamental evil sought to be prevented by the law of arson — the unreasonable and unjustifiable threat to human life.

D. THEFT

By consolidating the different "larceny" offenses in its provision on "theft"⁸⁸ the Code seeks to solve an old and troublesome problem, one which dates back to the common law. The problem arises from the distinctions made between the different methods of "theft." As the commentators to the Code say: "The traditional distinctions are explicable in terms of a long history of expansion of the role of the criminal law in protecting property."⁸⁹ There seems to be some dispute

83 MPC § 220.1 comment at 39 (Tent. Draft No. 11, 1960).

84 MPC § 220.1(1).

85 MPC comment, *supra* note 83, at 40-41.

86 *Supra* note 72, at 389.

87 *Supra* note 69, at 55-56. To establish the corpus delicti of arson two elements are essential. First, a building must have been burned. Second, the burning must be shown to be the result of the intentional criminal act of some person.

88 MPC § 223.1 CONSOLIDATION OF THEFT OFFENSES; GRADING; PROVISIONS APPLICABLE TO THEFT GENERALLY.

(1) Consolidation of Theft Offenses.

Conduct denominated theft in this article constitutes a single offense.* An accusation of theft may be supported by evidence that it was committed in any manner that would be theft under this Article, notwithstanding the specification of a different manner in the indictment or information, subject only to the power of the court to ensure fair trial by granting continuance or other appropriate relief where the conduct of the defense would be prejudiced by lack of fair notice or by surprise.

* In the original Final Proposed Draft (1962), the first sentence continued after "offense" to read: "embracing the separate offenses heretofore known as larceny, embezzlement, false pretense, extortion, blackmail, fraudulent conversion, receiving stolen property, and the like." But now the commentators feel that this information should be included in the official comments rather than in the statute itself.

89 MPC § 206.1, comment at Appendix A (Tent. Draft No. 1, 1953).

with respect to the original reasoning which forged the definition of larceny. It has been said to have begun with "a concern for crimes of violence,"⁹⁰ with certain concepts of trespass,⁹¹ or with depriving another of his property "by force or by stealth."⁹² These origins and basic common law distinctions are matters beyond the scope of the immediate consideration which is concerned only with their end result.

The Institute in drafting this section has attempted to correct the administrative difficulties caused by "hair splitting" distinctions through consolidating all of the separate offenses under the single heading of "Theft." Rather than ignoring the many recognized specific offenses, the Code has included them all under the one consideration of "Theft." The framers simply provide that, regardless of which offense is proved, the offender will be guilty of "Theft." They also provide for the procedural safeguards that if the specifications in the indictment are not sufficient to inform the defendant of the offense to be proven the judge may use a "continuance or other appropriate relief" to insure a fair trial.⁹³

In the past legislative initiative has expanded the law of theft to the point of punishing such things as embezzlement when the conduct involved would not constitute the common law of larceny.⁹⁴ However, this has served to increase the number of distinctions and to make the dividing lines more rigid and inflexible. In over half of the states these distinctions still are in substantial effect as formulated in their respective statutory provisions.

Present day observance of these distinctions, merely the result of historical accident, often compels a judge to make hair-splitting distinctions between various types of wrongful appropriations. The result may be to enable the accused to easily escape prosecution in many instances.⁹⁵ This is especially true in cases turning on the distinctions between larceny and embezzlement. When the courts are indulging in ethereal refinements the administrative difficulties often nullify these statutes.⁹⁶

A prime example of the results brought about by such distinctions is found in the case of *Nolan v. State*.⁹⁷ Here an office manager was held not to be guilty of embezzlement because before taking the money he had received for his employer, he placed it in the company's cash drawer. The money constructively came into the company's possession. In his concurring opinion, Judge Prescott emphasized the fact that the majority opinion merely serves to again establish many of the "tenuous niceties" between these different offenses and to "embarrass many future prosecutions."⁹⁸ He continues by indicating the logical corollary to this decision. When a man is in complete charge of an office, he is guilty of larceny if he puts the employer's money in the cash drawer, over which he has complete control, and then later takes it. However, if the same man steals the money by pocketing it directly, he is guilty of embezzlement.⁹⁹

The above case and its resulting complications are thoroughly discussed elsewhere.¹⁰⁰ As a result of these distinctions between actual or constructive possession, an obvious procedural dilemma has arisen. Whichever offense is charged, the accused inevitably grasps the opportunity of urging that he should have been

90 *Ibid.*

91 23 GA. B. J. 461, 482 (1960-61); 18 MD. L. REV. 237, 238 (1958).

92 PERKINS, CRIMINAL LAW 187 (1957).

93 MPG § 223.1.

94 *The Procedural Problems Resulting From the Distinction Between Larceny and Embezzlement*, 18 MD. L. REV. 237, 238-39 (1958).

95 Goodhart, *The Obsolescent Law of Larceny*, 16 WASH. & LEE L. REV. 42 (1959).

96 *Komito v. State*, 90 Ohio St. 352, 107 N.E. 762 (1914).

97 213 Md. 298, 131 A.2d 851 (1957).

98 *Id.* at 860.

99 *Id.* at 862.

100 18 MD. L. REV. 237 (1958).

charged with the other.¹⁰¹ Alluding to such cases as this, Perkins has said that: "The result is a patchwork of offenses. The intricacies of this patchwork pattern are interesting as a matter of history but embarrassing as a matter of law-enforcement."¹⁰²

Several arguments have been expressed on behalf of these distinctions. Among the more amusing are those which have been urged by critics with tongue in cheek. Characteristic of the attitude is the summary treatment given by Goodhart.¹⁰³ The first argument is that it "gives the ingenious but dishonest rogue a sporting chance to get away." The second argument is "that it gives the teacher of law an excellent means by which to test the memory of his students." The third argument is that it gives "critics of the legal profession, . . . an obvious example of their allegation that lawyers are too strongly wedded to the past. . . ."¹⁰⁴

Returning to the more serious, however, the Code commentators themselves concede that history is not "the whole explanation of the existence of the distinctive theft crimes."¹⁰⁵ They go on to explain that "[H]istory has its own logic."¹⁰⁶ This conclusion seems to be based on the real differences between such offenses as those perpetrated by trespass-thieves and embezzlers.¹⁰⁷

Nevertheless, there is an obvious need to correct existing problems in this area.¹⁰⁸ To meet this exigency the drafters advocate unification of the offenses. The real purpose here seems to be "[T]o identify certain action as the type which society wishes to discourage by exacting certain penalties when one commits such an act."¹⁰⁹ In order to achieve this goal society must concentrate upon the very essential elements of the conduct which are considered antisocial rather than upon mere technicalities.¹¹⁰ The essence of this particular type of antisocial conduct appears to be the conscious and intentional appropriation to one's own use of something which rightfully belongs to another, who does not consent to this appropriation.¹¹¹ Perkins says that the essence of this conduct is "[T]he wrongful appropriation of another's money or chattels, with the willful intent to deprive the other thereof permanently."¹¹² Since it appears that there seems to be a general consensus that there is a need for reformation of the law of "theft," all that remains is to find the best method for bringing about this unification.

Many jurisdictions have attempted legislative reform of their law of theft. The several approaches may be summarized in the following ways.¹¹³ (1) When the indictment charges one with a specific crime which falls within the broad area of larceny and such related offenses as embezzlement or obtaining by false pretenses, the jury may find the defendant guilty of any one of these offenses even though not the same offense stated in the indictment so long as the crime is proved by the evidence. (2) When the various offenses are defined, provide that one who is found guilty of any of these "shall be," or "shall be deemed" to be guilty of larceny. (3) When reforming the present law consolidate the various offenses under a general definition.

All three of these solutions have been tried to some extent. England and some American jurisdictions have attempted to use the first of these proposed solutions

101 *Id.* at 241.

102 PERKINS, *op. cit. supra* note 92, at 189.

103 Goodhart, *supra* note 95, at 42.

104 *Ibid.*

105 MPC comment, *supra* note 89, at 103.

106 MPC comment, *supra* note 89, at 104.

107 *Needed — A Consolidated Theft Statute In Georgia*, 23 GA. B. J. 461, 462-63 (1960-61).

108 Goodhart, *supra* note 95.

109 MPC § 206, comment at 58 (Tent. Draft No. 2, 1954).

110 *Supra* note 107, at 473.

111 *Ibid.*

112 PERKINS, *op. cit. supra* note 92, at 189.

113 *Supra* note 107, at 473-76.

to a limited degree.¹¹⁴ Nevertheless the basic problem still seems to remain. Either the prosecutor, the court, or the jury must specify for which crime the defendant has been convicted. Therefore on appeal the court becomes entangled in the traditional "hair-splitting" distinctions.

The second solution has also been tried to some degree by at least two states.¹¹⁵ Again, this solution is merely procedural with respect to indictment. The distinctions are not abolished; and since the specific statute to be proceeded under must be given, the defendant is still being charged with one specific common law crime.

Massachusetts has what is perhaps the oldest statute using the third approach to the problem.¹¹⁶ Other states have since followed this example.¹¹⁷ Usually the only procedural difficulty remaining is that of adequately informing the accused of the crime with which he is being charged. In at least one state the constitutionality of such a redefinition of the offenses involved was upheld.¹¹⁸ Perkins advocates this approach to the solution of the problem and alludes to the desirability of using a term such as "theft" which has no common law definition, thus eliminating any possible confusion between common law and statutory use of a single term.¹¹⁹ However care must be used in drafting such a provision in order to prevent any possible divergent interpretations of the term selected so that the uniform nature of the statutory treatment is preserved in fact as well as theory.

There are sufficient instances in which such an approach has been adopted to indicate the success which might be achieved. The Dyer Act,¹²⁰ for example, incorporates a legislative consolidation which has proven to be effective. Congress used the word "stolen" in providing that interstate transportation of "stolen" vehicles is a federal offense. Although at first the federal courts were divided over the meaning of "stolen,"¹²¹ the current trend is to construe it to encompass not only larceny but other theft crimes as well, such as obtaining by false pretenses and

114 See, e.g., ENGLISH LARCENY ACT OF 1916, 6 & 7 Geo. V., c. 50 Sec. 44(2), (3) & (4); KAN. GEN. STAT. ANN. § 21-553 (1949); and N.C. STAT. ANN. § 14-100 (1953).

115 See, e.g., VA. CODE ANN. §§ 18.1-109, 18.1-118 (1960); and W.VA. CODE ANN. §§ 5961-5965 (1955).

116 LARCENY: GENERAL PROVISIONS AND PENALTIES

"(1) Whoever steals, or with intent to defraud obtains by false pretenses, or whoever unlawfully, and with intent to steal or embezzle, converts or secretes with intent to convert, the property of another as defined in this section, whether such property is or is not in his possession at the time of such conversion or secreting, shall be guilty of larceny. . . ."

MASS. GEN. LAWS ANN. c. 266, § 30 (1956).

117 CAL. PEN. CODE § 484; FLA. STAT. ANN. § 811.021 (1962); LA. STAT. ANN. § 14:67 (1950); MINN. STAT. ANN. § 622.01 (1945); MONT. REV. CODES ANN. § 94-2701 (1949); and WIS. STAT. ANN. §§ 943.20, 955.31 (1958). See generally 23 GA. B.J. 461, 476-77 (1960-61).

118 Louisiana adopted a criminal code proposed by the American Law Institute and this was tested as to the constitutionality and as to the meaning of "theft." In its decision the court said:

"Clearly the legislature could define such crimes as were intended to be covered by the Criminal Code and, in so defining them, could group all offenses of the same character in a single article, as was done by defining the crime of "theft" in Article 67. By such definition the legislature sought to denounce under the single heading of "theft" all of the crimes that it considered constituted the culpable taking of anything of value belonging to another, whether such taking was without the consent of the owner, commonly known as larceny, or taking with his consent, as is the case in confidence games, embezzlement, or false pretenses. This is in accordance with the modern trend, followed in numerous states, of simplifying the law by discarding ancient and outmoded forms and redefining offenses to prevent confusion and injustice."

State v. Pete, 206 La. 1078, 1089, 20 So. 2d 368, 372 (1944).

119 PERKINS, *op. cit. supra* note 92, at 272.

120 18 U.S.C. § 2312 (1952).

121 57 COLUM. L. REV. 130, 131 (1957).

embezzlement.¹²² In a graphic example of this current trend, the Fourth Circuit Court of Appeals said:

Of course, a contrary intent not appearing, a Federal criminal statute using a word known to the common law borrows the common law sense of the term. . . . But while "stolen" is constantly identified with larceny, the term was never at common law equated or exclusively dedicated to larceny. . . . Nor in law is "steal" or "stolen" a word of art. . . . But regardless of what significance the common law, the courts, or the lexicologists have ascribed to "stolen," decisive here is the meaning that Congress attributed to it.¹²³

Congress also used this approach when it wrote Article 121 of the Uniform Code of Military Justice 1951.¹²⁴ Herein all the common law crimes are classified under two headings: Larceny — with intent to permanently deprive.¹²⁵ Wrongful Appropriation¹²⁶ — with intent to temporarily deprive. This is probably the most extreme attempt at consolidation but it has been upheld and judicially applied by the United States Court of Military Appeals.¹²⁷ The successful application of this act "has shown that a simple definition of theft which includes all the old crimes can be handled without any startling or demoralizing innovations."¹²⁸

Having completed this brief review of the degree and the success with which these three attempts to simplify the technical distinctions regarding theft offense have been applied, it is necessary to compare the approach adopted in the Code. The drafters have attempted a variation of the third approach by consolidating the offense under the terms of "theft."¹²⁹ They then go on to set out exactly which offenses are to be included¹³⁰ and specific definitions of these offenses. The commentators state that the real offense here is the actor's appropriation of the victim's property either without his consent or with his consent which has been obtained by fraud or coercion.

The commentators indicate that "the purpose of consolidation is to prevent procedural difficulties resulting from the fact that the boundaries between the traditional offenses are obscure and from the rule that a defendant who is charged with one offense cannot be convicted by proving another."¹³¹ They further indicate that the proposed consolidation is logically consistent with our present lack of moral differentiation between the swindler and other thieves.¹³² Thus eliminating irrelevant distinctions, they broadly recognize the "involuntary transfer of property" as the "unifying conception."¹³³ However there are two cautionary ideas which must be kept in mind in drafting and applying such a consolidated statute. First, careful drafting is required to properly define the actions of each of the offenses now to be included under the common criminal title. Second, specific delineation of the methods of criminal appropriation of property is still necessary.¹³⁴ As a result, the unified offense of "theft" is described and limited in a series of separate sections of the Code, some of which resemble the earlier technical offenses.¹³⁵

Since the term "theft" had no common law definition there should be no great obstacle in its being interpreted in accordance with the meaning desired by the draftsmen. The most common place where the problem of defining theft has arisen are the cases interpreting theft policies of insurance companies. While rec-

122 *Ibid.*

123 *Boone v. United States*, 235 F.2d 939, 940-41 (4th Cir. 1956).

124 10 U.S.C. § 921 (1958).

125 10 U.S.C. § 921(a) (1) (1958).

126 10 U.S.C. § 921(a) (2) (1958).

127 *Supra* note 91, at 478-80.

128 *Id.* at 480.

129 MPC § 223.1.

130 *Ibid.*

131 MPC comment, *supra* note 89, at 105.

132 *Ibid.*

133 MPC comment, *supra* note 89, at 101.

134 MPC comment, *supra* note 89, at 106.

135 MPC comment, *supra* note 109, at 59.

ognizing the essential identity of "theft" and "larceny" in this area, Judge Cardozo concluded that the former is broader in scope and not always equivalent to the latter.¹³⁶ In commenting on this decision it has been noted: "The crime must be larceny *which is regarded as theft in the common speech of men*. The standard of recourse is not the statute defining larceny; nor is it the common law definition of larceny."¹³⁷ Furthermore, it is suggested that if the courts employ the same rationale that was used to determine the meaning of "stolen" in the Dyer Act, *i.e.*, giving a word the meaning clearly attributed to it by the legislature¹³⁸ — the fact that the Institute has defined "theft" should preclude any problem respecting interpretation of the term used.

By thus concentrating upon the essentials of "theft,"¹³⁹ the drafters have avoided the difficulties which occur in states¹⁴⁰ where the courts have been able to so interpret theft amendments that they hold that "no elements of the former crimes have been changed by the addition or subtraction" of the amendment of the revision.¹⁴¹ The drafters were careful to redefine and give the old common law offenses a meaning new and distinct. This precludes the courts from becoming entangled in the fine distinctions between the separate offenses. The commentators state that these definitions in the proposed Code are necessary because "The scope of the consolidated offense of theft cannot conveniently be defined in a single comprehensive section."¹⁴² Their attitude is that there is a difference in the permanent benefits intended when different methods of theft are involved.

Because of the broad area covered by the Code "theft" provisions, it might be contended that there remains the problem of informing the defendant of which specific violation he stands accused. However, Louisiana, having adopted a code drafted by the Institute as a part of the Code, found no problem in this area.¹⁴³ Furthermore, as indicated above,¹⁴⁴ this problem of notification has been found to be nonexistent under the Dyer Act.¹⁴⁵ Above and beyond this record of success, the Code has provided a safety device in this area. It allows the judge discretion to provide protection when needed while simultaneously insuring against a sacrifice of justice. The Code merely provides for a "continuance or other appropriate relief."¹⁴⁶ In the event of an inaccurate indictment, there would be no dismissal of the case as often has been the result previously.

In conclusion, although the Code has adopted the most progressive method of solving this dilemma, it has done it carefully and completely. It has used the requisite drafting care to provide the fullest coverage with the least procedural difficulties. It has also carefully drafted an adequate and completely effective safeguard. Therefore, strong contention can be made that this section of the Code should be adopted even by those states which have previously attempted other schemes in an effort to solve the problems inherent in the traditional distinctions between technically different types of theft.

E. DISORDERLY CONDUCT

Section 250.2 of the Model Penal Code covers those activities which would generally be treated as statutory disorderly conduct or as common law breach of the peace. That section provides as follows:

136 *Van Vechten v. American Eagle Fire Ins. Co.*, 239 N.Y. 303, 146 N.E. 432 (1925).

137 5 BROOK. L. REV. 319, 319-20 (1936).

138 *Supra* note 123.

139 MPC § 223.1.

140 *See, e.g.*, CAL. PEN. CODE ANN. § 484.

141 *People v. Myers*, 206 Cal. 480, 275 P. 219 (1929).

142 MPC comment, *supra* note 109, at 58-59.

143 *Supra* note 118.

144 *Supra* note 123.

145 43 IOWA L. REV. 137, 141 (1957-58).

146 MPC § 223.1.

Offense Defined. A person is guilty of disorderly conduct if, with purpose to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:

(a) engages in fighting or threatening, or in violent or tumultuous behavior, or

(b) makes unreasonable noise or offensively coarse utterance, gesture or display, or addresses abusive language to any person present, or

(c) creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor.¹⁴⁷

As can be readily seen, subsection (a) is typical of the statutory pattern throughout the United States dealing with the most common types of public nuisance. In subsections (b) and (c), however, the Institute departs from the provisions in this area, and directs its attention to those activities whose sanctions could arguably raise constitutional issues, particularly in the areas where freedom of speech conflicts with the public peace and tranquility. It is clear from the drafters' comments to the Code that they were dissatisfied with the alleged encroachments upon personal freedoms in the name of public order, and, as a result, have drafted a provision with the primary purpose of anticipating constitutional ramifications and achieving a satisfactory balance of competing social interests. Whether a satisfactory balance has in fact been attained is questionable.

Two general types of misbehavior are covered in subsection (b): unreasonable noises and coarse or abusive language, both of which may be proscribed without offending constitutional principles. In the case of *Kovacs v. Cooper*,¹⁴⁸ a Trenton ordinance made it unlawful for sound trucks or similar amplifying devices emitting "loud and raucous" noises to be operated on the public streets. The case arose out of the operation of a sound truck in that city for the purpose of commenting on a local labor dispute. Determining that the ordinance was not violative of the 14th amendment as a contravention of the right to communicate information and opinions to others, the Supreme Court went on to say:

It is an extravagant extension of due process to say that because of it a city cannot forbid talking on the streets through a loud speaker in a loud and raucous tone. . . . To enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself. . . . We think that the need for reasonable protection in the homes or business houses from the distracting noises of vehicles equipped with such sound amplifying devices justifies the ordinance.¹⁴⁹

This concept of the right to privacy in public as a superior interest to the limited restraint on freedom of speech has apparently been accepted by the Institute in subsection (2) (b).

The second type of misbehavior covered by subsection (2) (b), *i.e.*, the use of coarse or abusive language, has always been considered a proper subject of legislative proscription.

There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.¹⁵⁰

The Code has apparently followed the Supreme Court decisions in this area, carefully wording subsection (b) so as not to transgress upon individual rights and yet retain for the public the protection from those who would make themselves public nuisances. The substantive law set out is not new; such provisions can be found in many jurisdictions already. As pointed out in the comments, however,

147 MPC § 250.2.

148 336 U.S. 77 (1949).

149 *Kovacs v. Cooper*, 336 U.S. 77, 87-89 (1949).

150 *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

where the Code will be a welcome improvement is in those states where common law breach of the peace or disorderly conduct is proscribed without being defined.¹⁵¹ Where but one provision is used to cover the myriad varieties of activity which are detrimental and annoying to the public, it is impossible to specifically provide for each one. It is suggested, however, that a commendable amount of specificity has been achieved by the Code, subsection (b) incorporating the better substantive law and phraseology in this area.

Where the Code would have its greatest impact is in subsection (c). Basically a catchall provision, it adds that one who creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor, is guilty of an offense. While not apparent on its face, according to the Institute, the purpose of this subsection is twofold: first, as mentioned above, to encompass those activities not covered by subsections (a) and (b),¹⁵² and secondly, to preclude criminal liability for speech which by reason of its provocative nature, creates a danger of disorderly response.¹⁵³ With this second purpose, the Institute differs with the Supreme Court determinations of the allowable limits of free speech; for, as will be seen, the Court has held that a speaker is not deprived of his constitutional rights by reason of police intervention because of anticipated unlawful response.¹⁵⁴

The key to subsection (c) is its exemption; to wit, the subsection does not apply if the act serves some "legitimate purpose of the actor." "Legitimate" has been defined generally as "that which is lawful, legal, recognized by law, or according to law."¹⁵⁵ The Supreme Court of Appeals of Virginia had occasion to define this term in deciding *Dickerson v. Commonwealth*.¹⁵⁶ In that case, the defendant, who was convicted of illegally transporting liquor through the state of Virginia, contested the Alcoholic Beverage Commission Board's power to regulate such transportation to confine to legitimate purposes. Rejecting defendant's argument that the word "legitimate" was indefinite, the court stated: "In its usual and common acceptance, as defined in Webster's New International Dictionary, Second Edition, Unabridged, it means 'accordant with law or with established legal forms and requirements' or 'lawful.' In this case, its meaning is so clear that . . . the consignee of the liquor in question, is unlawful consignee. A transportation to an unlawful consignee is a transportation not in 'accord with law' or for a 'lawful' purpose."¹⁵⁷

While this seems to be the generally accepted interpretation of the term "legitimate" and would clarify subsection (c), such an approach has apparently not been accepted by the Institute. In giving examples of the operation of this subsection, the commentators note that "the maintenance of a tannery, dump, or other odorous business might create public discomfort or violate the zoning laws, but it would not be punishable as disorderly conduct since clause (c) expressly excludes acts which serve a legitimate purpose of the actor."¹⁵⁸ Apparently the legitimate purpose here is making money, and the unlawful nature of it does not change this legitimacy. The purpose is considered in a vacuum. Clearly, this does not square with the definition of "legitimate" given in the *Dickerson* case. The "legitimate purpose" of the Code thus takes on a new and much more expanded meaning.

Consider, for example, the time-honored illustration of a person shouting "fire" in a crowded theater. Such conduct has always been conceded to be out-

151 MPC § 250.2, comment at 7-8 (Tent. Draft No. 13, 1961).

152 *Id.* at 7.

153 *Id.* at 9.

154 *Feiner v. New York*, 340 U.S. 315 (1951).

155 BLACK, LAW DICTIONARY (4th ed. 1951).

156 181 Va. 313, 24 S.E.2d 550 (1943).

157 *Dickerson v. Commonwealth*, 181 Va. 313, 322, 24 S.E.2d 550, 555 (1943).

158 MPC § 250.2, comment at 8 (Tent. Draft No. 13, 1961).

side the spectrum of protected free speech.¹⁵⁹ It would appear that a sociologist, endeavoring to determine the reactions of people in a crisis, could spread such a rumor in a theater despite the chaotic results.

"Section 250.1 penalizes only behavior which is itself disorderly; no orderly behavior is made criminal merely because others react or might react in a disorderly fashion, even if the actor knows that such reactions are likely."¹⁶⁰

If the purpose of making money is a "legitimate" purpose, surely the advancement of the social sciences is also and, if the sociologist in our illustration is guilty of no disorderly conduct by reason of a "legitimate purpose," he cannot be punished. Certainly such a result seems incredible yet it is not impossible under subsection (c). The difficulty, of course, is the interpretation to be given to "legitimate purpose." In endeavoring to protect orderly speech that provokes disorder, the Institute has, perhaps unwittingly, allowed for noncoverage in other areas of disorderly conduct. If a legitimate purpose will offset the most violent results, or, it may be argued, if one legitimate purpose will protect an act which has several illegitimate purposes also, the local officials will be hard pressed to keep the public peace.

The case of *Feiner v. New York*¹⁶¹ serves as a graphic example to illustrate the effect of the Code. Feiner, a university student, made a soapbox speech on a New York street corner. Speaking in a loud high-pitched voice, he called high-ranking public officials "bums," called the American Legion a "Nazi Gestapo," and further stated that the Negroes should rise up and fight for their rights. The record reveals that angry mutterings were heard in the crowd of about 75 people which began shoving and milling around. One man told two officers who had arrived on the scene that if they did not take that "son-of-a-bitch" off the box, he would. Feiner was then asked twice by one of the officers to stop his speech. When this failed, the officer demanded that he get down off the box, telling him that he was under arrest. Feiner was ultimately charged and convicted of disorderly conduct.

Upon review, the Supreme Court upheld the conviction in a 6-3 decision. Chief Justice Vinson, writing for the majority concluded that:

Petitioner was thus neither arrested nor convicted for the making or the content of his speech. Rather, it was the reaction which it actually engendered. . . .

The findings of the New York courts as to the condition of the crowd and the refusal of petitioner to obey police requests, supported as they are by the record in this case, are persuasive that the conviction of petitioner for violation of public peace, order and authority does not exceed the bounds of proper state police action. This Court respects, as it must, the interest of the community in maintaining peace and order on its streets. . . . We cannot say that the preservation of that interest here encroaches on the constitutional rights of the petitioner.¹⁶²

Justices Black, Douglas, and Minton dissented, principally on two grounds: (1) the record indicated no likelihood of a riot, and (2) the police officers shirked their duty in failing to attempt to quell the crowd rather than simply stopping Feiner.

In upholding the conviction, the majority approved the principle that speech, though not intrinsically unlawful, may nevertheless be curtailed to prevent serious public disorder. This principle has not been accepted by the Institute. In the comments to this section, it is stated that "Feiner could not have been convicted under section 250.1 since there was no evidence of any behavior defined as disorderly by this section."¹⁶³

The Institute has adopted the attitude of Black whose dissent in Feiner evi-

159 *Schenk v. United States*, 249 U.S. 47 (1919).

160 MPC comment, *supra* note 158.

161 340 U.S. 315 (1951).

162 *Feiner v. New York*, 340 U.S. 315, 319-20 (1951).

163 MPC § 250.2, comment at 13 (Tent. Draft No. 13, 1961).

dences a great concern over unjustified police suppression of public speech. However, even Justice Black seems to admit that freedom of speech is not absolute in a situation such as that in the *Feiner* case when he says, that, "The police, of course, have power to prevent breaches of the peace. But if, in the name of preserving order, they ever can interfere with a lawful public speaker, they first must make all reasonable efforts to protect him."¹⁶⁴ Thus, while unreasonable police censorship, in Justice Black's opinion would invalidate a conviction, he implies that the basic premise, to wit, that freedom of speech is not absolute, is valid. However, the Code admits of no such exception to criminal immunity for speech which is not in itself unlawful. As clearly stated by the Institute, "the fact alone that the speaker knows that his ideas will be distasteful, or even that their expression creates a 'clear and present danger' of disorderly response will not make the speech criminal."¹⁶⁵

There are two reasons for the Institutes' absolutist position. First, as mentioned above, the danger of self-imposed censorship by prejudiced police officers is always present. There is, to be sure, merit in this contention. Indeed, if an individual officer should take it upon himself to impose his own prejudices and convictions upon the public by restraining free expression of opinion that does not agree with his own, freedom of speech could become meaningless. At the risk of being naive, however, these writers suggest that such police suppression is hardly a justification for discarding preventative measures established in the public interest, so long as one assumes those interests to be paramount. The police have been known to use the "third-degree," to arrest merely on suspicion, and to use other methods incompatible with the American concept of ordered liberty. However, it has never been suggested that we ignore all confessions, invalidate all arrests, or eliminate law enforcement agencies. As discussed earlier in the consideration of the crime of vagrancy, these problems are real and disconcerting; nevertheless, the remedy is not to be found in discarding the entire concept to alleviate specific problems.

The second reason for the Institutes approach is without doubt the most important. The Institute implies that even if it were guaranteed that law enforcement agencies would act objectively, freedom of speech is a paramount obligation of the public when compared to peace and tranquility. Regardless of the impending danger to the public peace, speech is not to be curtailed. The authors submit that while the expression of opinion is not to be silenced at the slightest public inconvenience, there is a point where the prevention of bloodshed or mob violence outweighs the social value of the communication of ideas. Society has a very definite interest in public peace and order. "The liberties of the First Amendment are themselves the legally enforceable guarantees of an organized society in which violence and force are controlled or eliminated, and in the absence of such a society, the rights of speech, press, and assembly would have no legal status."¹⁶⁶

Further, as Justice Jackson stated in *Terminiello v. Chicago*,¹⁶⁷ "The choice is not between order and liberty, it is between liberty with order and anarchy without either."¹⁶⁸

It is curious to note that, as mentioned above, the Code permits the suppression of speech when it is unreasonably loud but not when it might threaten mob violence. Granted, ambulatory loud speakers such as used in the *Kovacs* case can be annoying, but can it seriously be contended that such an annoyance is of greater public harm than bodily injury and property damage which may result from public rioting? Again, the magnitude of each must be considered in light of the individual fact situations; but to clothe that type of speech which may or does in fact

164 *Supra* note 162, at 326.

165 MPC § 250.2, comment at 9 (Tent. Draft No. 13, 1961).

166 JACOBS, FRANKFURTER AND CIVIL LIBERTIES 95 (1961).

167 337 U.S. 1 (1949).

168 *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949).

precipitate the evils of mob violence with absolute immunity seems inconsistent with common sense.

Perhaps the proper solution to the problem has been given by Justice Frankfurter, concurring in *Niemotko v. Maryland*.¹⁶⁹ "[U]ncontrolled official suppression of the speaker 'cannot be made a substitute for the duty to maintain order'. . . . Where conduct is within the allowable limits of free speech, the police are peace officers for the speaker as well as for his hearers. But the power effectively to preserve order cannot be displaced by giving a speaker complete immunity. . . . It is not a constitutional principle that, in acting to preserve order, the police must proceed against the crowd, whatever its size and temper, and not against the speaker."¹⁷⁰

Granted, the balancing of interests by Justice Frankfurter, lacks a clear-cut line of separation. In the area of constitutional law, however, few principles may be so developed, particularly where competing social interests are involved.

The significance of section 250.6 of the Code lies not in the substantive law set out but, rather, in what is omitted. After providing for a violation for a person who loiters or prowls "under circumstances that warrant alarm for the safety of persons or property,"¹⁷¹ the Institute, in the comments following, states that this is all that remains of the law of vagrancy in the Code.¹⁷² In effect, the traditional vagrancy concept has been discarded. The Code would have a marked impact in this area for the offense of vagrancy now exists in almost all jurisdictions.¹⁷³ While numerical majority is not of itself a conclusive reason for following a legal principle, such a unanimity as exists here would certainly give rise to an inference that there is merit in its existence. Can the Institute, therefore, overcome this inference with cogent reasoning of its own for the abolition of the vagrancy laws? It is submitted that reasons relied upon by the drafters fail to support an affirmative answer to the question.

The cogent reasoning offered by the Institute is limited. As a matter of fact, all that can be found in the comments in justification of its position is the statement that "the most noteworthy aspect of the vagrancy legislation is its effect to create a 'status' of criminality based on past behavior,"¹⁷⁴ followed by the conclusion that "the vagrancy statutes offer the astounding spectacle of criminality

169 340 U.S. 268.

170 *Niemotko v. Maryland*, 340 U.S. 268, 288-89 (1951).

171 MPC § 250.6.

172 See MPC § 250.6, comment at 60 (Tent. Draft No. 13, 1961).

173 ALA. CODE tit. 14, § 437 (1958); ALASKA STAT. ANN. § 11.60.210 (1962); ARIZ. REV. STAT. ANN. § 13-991-993 (1956); ARK. STAT. ANN. § 41-4301 (1947), § 41-4303 (Supp. 1963); CAL. PEN. CODE § 647; COLO. REV. STAT. ANN. § 40-8-20 (1953); CONN. GEN. STAT. REV. § 53-340 (1958); DEL. CODE ANN., tit. 11, § 881-94 (1953); FLA. STAT. § 856.02 (1944); GA. CODE ANN. § 26-7001 (1953); HAWAII REV. LAWS § 314-1-7 (1955); IDAHO CODE ANN. § 18-7101 (1948); IND. ANN. STAT. § 10-4602 (1956); IOWA CODE § 746.1-2 (1950); KAN. GEN. STAT. ANN. § 21-2409 (1949); KY. REV. STAT. § 436.520 (1963); LA. REV. STAT. § 14.107 (Supp. 1963); ME. REV. STAT. ANN. ch. 137 § 33 (Supp. 1963); MD. ANN. CODE art. 27, § 490 (1957); MASS. GEN. LAWS ANN., c. 272, §§ 7, 8, 24, 53, 59, 63, 66, 68 (1956); MICH. STAT. ANN. § 28.364 (1962); MINN. STAT. ANN. §§ 614.57 (1947), 609.725 (Supp. 1963); MISS. CODE ANN. § 2666 (1957); MO. REV. STAT. § 563.340 (1949); MONT. REV. CODES ANN. § 94-35-248 (1947); NEB. REV. STAT. § 28-1119 (1956); NEV. REV. STAT. § 207.030 (1961); N.H. REV. STAT. ANN. § 570:25 (Supp. 1963); N.J. REV. STAT. ANN. § 2A:170 (1953); N.M. STAT. ANN. § 40A-20-5 (1964); N.Y. CODE CRIM. PROC. §§ 887, 899; N.C. GEN. STAT. § 14-336-341 (1953); N.D. CENT. CODE § 12-42-04 (1960); OHIO REV. CODE ANN. § 2923.28 (1953); OKLA. STAT. tit. 21, § 1141 (1958); ORE. REV. STAT. § 166.060 (1961); PA. STAT. ANN. tit. 18, § 2032 (1963); R.I. GEN. LAWS ANN. § 11-45-1 (1956); S.C. CODE § 16-565 (1962); S.D. CODE § 13.1424 (1939); TENN. CODE ANN. § 39-4701 (1955); TEX. PEN. CODE, c. 4, art. 607 (1952); UTAH CODE ANN. §§ 76-19-10, 61-1 (1953); VT. STAT. ANN. tit. 13, § 3901 (1958); VA. CODE ANN. § 63-337-338 (1950); WASH. REV. CODE § 987.010 (1961); WIS. STAT. § 947.02 (1958); WYO. STAT. ANN. § 6-221 (1959).

174 MPC § 250.6 comment at 62 (Tent. Draft No. 13, 1961).

with no misbehavior at all!"¹⁷⁵ Although such a conclusion does not necessarily follow, it can reasonably be inferred, by reason of the absence of other assertions in justification, that the Institute is basing its disapproval of the vagrancy concept upon the following argument: "Vagrancy laws punish a man for being a particular kind of person, rather than for what he has done; the criminal law has historically punished only acts or omissions"¹⁷⁶ and to punish one for his personal condition, or, as it were, for his status in life, would be inconsistent with the conventional criminal theory of crime and resultant punishment."

If this is the Institute's position, it is not alone. Indeed, many legal scholars¹⁷⁷ and courts¹⁷⁸ have taken precisely the same view. Such a view, however, is not unanimous¹⁷⁹ and, it would seem, that the reasoning of its opponents is much stronger. In considering the merits of either position, it would be well to distinguish between the purpose of the vagrancy sanctions, the elements of the offense, and the reason for punishing the individual.

In the United States today, it is generally accepted that the logic behind the vagrancy statutes is the prevention of future crime.¹⁸⁰ A vagrant is considered to be a probable criminal and the purpose of the statute is to prevent crimes which may likely flow from his mode of life.

It is clear that the purpose of the legislature in enacting these sections was not only to lessen the possibility of citizens becoming public burdens and charges, but also to cut out, at the roots, breeding places of many crimes offensive to the personal well-being of many citizens, which endanger private property, and threaten the peace of the Commonwealth. It is well known that much crime is the direct result of the consortion of persons who have no lawful income with gamblers, bootleggers, prostitutes and other habitual violators of the law.¹⁸¹

Assuming, then, this causal relationship between future criminality and present conditions of certain kinds of persons, to wit vagrants, to be the accepted purpose of the laws, those concerned with the semantics of the problem are quite correct in using the term "status" to describe the activity proscribed. At this point, however, there is no departure from the accepted criminal theory of punishment for criminal misconduct, *i.e.*, acts or omissions. To be remembered is the fact that while the condition of the defendant may be the object of concern, it is not the reason for his punishment. To equate the two would result in strict liability, a theory which criminal jurisprudence has not yet accepted and one which the vagrancy laws do not propose.

Moving now to the core of the offense, that is, its constituent elements, a distinction must again be kept in mind. Using a typical vagrancy provision for illustrative purposes, it may be said that the gist of the offense is the living in idleness without employment and having no visible means of support.¹⁸² It is this status, *i.e.*, this state of idleness without means, that both constitutes the crime and represents the object of sanction. But the reason for punishing the vagrant,

175 *Id.* at 63.

176 "A crime is any act or omission prohibited by public law for the protection of the public, and made punishable by the state in a judicial proceeding in its own name." CLARK & MARSHALL, *CRIMES* 79 (6th ed. Wengersky Rev. 1958).

177 "[T]here are in our legal system several crimes the essential element of which consists not in proscribed action or inaction, but in the accused's having a certain personal condition or being a person of a specified character." Lacey, *Vagrancy and Other Crimes of Personal Condition*, 66 HARV. L. REV. 1203 (1953); Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1 (1960).

178 *People v. Allington*, 103 Cal. App.2d 911, 229 P.2d 495 (1951); *People v. Craig*, 152 Cal. 42, 91 Pac. 997 (1907); *Commonwealth v. O'Brien*, 179 Mass. 533, 61 N.E. 213 (1901).

179 *Perkins, The Vagrancy Concept*, 9 HASTINGS L.J. 237 (1958).

180 *State v. Salerno*, 27 N.J. 289, 142 A.2d 636 (1958); *People v. Belcastro*, 256 Ill. 144, 190 N.E. 301 (1934).

181 *Morgan v. Commonwealth*, 168 Va. 731, 191 S.E. 791-793 (1937).

182 . . . "all able bodied male persons over the age of eighteen years who are without means of support and remain in idleness, shall be deemed vagrants. . ." FLA. STAT. § 856.02 (1959).

while certainly to ultimately alleviate such a status, has a sounder and deeper basis, one in perfect conformity with the touchstone of criminal liability. It has as its basis the misconduct of the vagrant — an act or omission on his part. To illustrate this misconduct, it is helpful to analogize to the crime of conspiracy. A conspiracy is generally defined as “the combining by and of two or more persons to accomplish a criminal or unlawful objective or purpose; or to accomplish a purpose and objective not in itself criminal or unlawful by criminal or unlawful means.”¹⁸³ Although it is not apparent in the definition, in deciding cases involving this crime, the courts have continually espoused principles which smack of a crime of status, just as vagrancy is alleged to be.

Holmes once said: “A conspiracy is constituted by an agreement, it is true, but it is the result of the agreement, rather than the agreement itself, just as a partnership, although instituted by a contract, is not the contract but is a result of it. The contract is instantaneous, the partnership may endure as one and the same partnership for years.”¹⁸⁴

It has been repeated many times that the “gist” of a conspiracy is the combination which is formed. Thus, while the agreement of the conspirators is an essential element of the crime, the crime, itself, consists of something else. This is borne out by the following propositions. (1) The statute of limitations begins to toll at the termination of the conspiracy rather than at its inception,¹⁸⁵ and (2) a conspiracy formed before a statute has been enacted making the purpose of the conspiracy unlawful is nevertheless punishable.¹⁸⁶

The Code, Section 5.03, dealing with conspiracy, states that conspiracy is a continuing course of conduct which terminates when the object is achieved or abandoned.¹⁸⁷ Moreover, an overt act is not necessary for conviction of conspiracy to commit a felony of the first or second degree.¹⁸⁸ Finally, the Code retains the principle that the statute of limitations begins to run from the time of termination.¹⁸⁹ If the act of agreement is not the essence of the crime, it could conceivably be suggested that conspirators are punished not for any misbehavior, but only because they have achieved the status of conspirators. It is submitted that such a conclusion is just as plausible as that arrived at by the Institute in calling vagrancy a crime of status. While not discussed in the comment, the Institute apparently had no difficulty distinguishing the two offenses. However, merely calling one offense a “continuing course of conduct” and another a “status” is making a distinction without a difference, and does not remove the basic inconsistency.

The claim that a conspirator is punished for his status has never seriously been made, nor could it be. It is well recognized that there is something more to the problem than that. Ultimately, the misconduct which removes conspiracy from the classification of a status crime is the same as that of vagrancy, to wit, negative action. A defendant guilty of either crime has omitted a legal duty which he is required to perform. Perkins gives, perhaps, the best explanation:

Conspiracies are punished because of the increased danger involved in group offenses. One who otherwise might abandon a criminal design may feel bound to carry on because it is a “partnership,” rather than an individual plan. Hence, each conspirator has a legal duty to withdraw and to give effective notice of his withdrawal to his confederate or confederates, in

183 CLARK & MARSHALL, CRIMES 489 (6th ed. Wengersky Rev. 1958).

184 *United States v. Kissell*, 218 U.S. 601, 608 (1910).

185 *United States v. Kissell*, 218 U.S. 601 (1910); *People v. Hines*, 284 N.Y. 93, 29 N.E.2d 483 (1940).

186 *Christianson v. United States*, 226 F.2d 646 (8th Cir. 1955); Also, if the punishment for the offense has been increased since the initial agreement, the increased punishment may be imposed. *State v. Hayes*, 127 Conn. 543, 18 A.2d 895 (1945).

187 MPC § 5.03(7).

188 MPC § 5.503(5).

189 MPC § 5.503, comment at 146 (Tent. Draft 10).

order that his "membership" may not induce the perpetration of the contemplated crime. His failure to withdraw and to give effective notice thereof is an "act of omission" on his part which continues until this duty is performed or the conspiracy is terminated in some other way.¹⁹⁰

Comparing this omission to that of vagrancy, he continues: "One without other means of support has a legal duty to provide for his subsistence by some lawful activity, if able to do so, and if he does not he is punished because his failure of this legally-required performance is an 'act of omission.'"¹⁹¹

If this failure to act is recognized, the requirement of misbehavior is satisfied in accordance with the prevailing view of criminal punishment. The distinction between the purpose of the offense, its elements, and the reason for punishment is valid and necessary. To disparage the vagrancy concept as an "astounding spectacle" or crime of "status" is only to substitute adjectives for argument and, ultimately, is not persuasive enough to jettison the crime from the Code.

This does not mean that vagrancy laws represent the perfection of criminal jurisprudence. Indeed, vagrancy is probably the most abused offense in existence as concerns its administration. More specifically, these laws, quite in conflict with their intended purpose, have proven to be effective weapons of the police to arrest on suspicion and to harass certain "undesirables" whose conduct is not otherwise unlawful.¹⁹² Be that as it may, administration of the law, while related, is a different matter. In any penal system, there is opportunity for abuse and, concomitantly, there are always some who will take advantage of it. This problem cannot be gainsaid. However, assuming a social benefit to be derived from the laws, such problems must be accepted as distinct and solved in themselves accordingly. Discarding the entire vagrancy concept is less than an adequate solution.

CONCLUSION

The authors did not approach this study with the specific intent of evaluating the Code in the light of any single criterion. Nevertheless, when treating an area so vast, it is inevitable that one attempt to reconcile the particular areas treated. Though not a perfect catalyst — perhaps, not even one explicitly considered by the Institute — the present writers submit that each of the Code's proposals noted above may be considered with a view to the degree of respect which they reflect for human life and the sanctity of the person involved.

Possibly the clearest example of the drafters concern for one's welfare and integrity is its extensive revision of the law of abortion. By enlarging the areas allowing for justifiable abortions, the Code has protected the woman in danger of health or in danger of bringing into life a being unwanted because of the circumstances resulting in its conception. It is ironic, however, that in thus endeavoring to protect one life, that of the mother, the Code has sanctioned the taking of another life, *i.e.*, that of the unborn child. What appears at first blush to be a concern for human life, on second glance is seen to be no more than a selection of which of two lives is the more worthy of protection.

Furthermore, it would appear that in lowering the age of consent in the area of rape, the Institute has indicated a degree of disregard for the protection of a young woman's inviolability. Surely, it would seem that most still consider a 10-year-old girl's virtue important enough to protect her immature "consent" from

190 Perkins, *The Vagrancy Concept*, 9 HASTINGS L.J. 237, 257 (1958); ". . . the sound doctrine is undoubtedly that vagrancy and criminal idleness do not constitute in the eye of the law a social status to be dealt with by police control, but criminal acts to be punished by the criminal courts." FREUND, *POLICE POWER* 99 (1904).

191 Perkins, *The Vagrancy Concept*, 9 HASTINGS L.J. 237, 257 (1958).

192 Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1 (1960); Hall, *The Law of Arrest in Relation to Contemporary Social Problems*, 3 U. CHI. L. REV. 345 (1936); Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603 (1956).

being operative to excuse her attackers from a prosecution for rape, and to thereby encourage future perpetration of such assaults on the young.

It might be thought also that by the removal of the technical distinctions in the areas of arson and theft, the Institute has neglected individual well-being by placing a higher premium on the welfare of the citizenry to the detriment of the accused. However, the writers submit that, in contrast with the attitude assumed in the areas of rape and abortion, in these areas, the Code has properly protected the public while not minimizing the rights of the individual accused. For example, the old common law distinction of a dwelling house as opposed to other structures recognized the inherent dangers of the occupied structure. The Institute has retained this principle, but has codified it so as to reflect more accurately these dangers as they are present today in our more mobile and transient society. Thus, the law should not recognize, nor would the Code purport to recognize, any distinction which does not in fact reflect accurately the possible consequences of a wrongful incendiary act. This is not to say that the rights of the accused are in any way prejudiced. Whether the object of his act has been an individual's home or other structure in which he might happen to be present, the essential guilt of the actor is the same.

Similarly, the distinction between larceny, embezzlement, and obtaining money by false pretenses — crimes generally involving the same degree of culpability — should not prevent the prosecution of the perpetrator of such acts. The only dangers which might arise from a consolidation of such offenses is a possible failure to notify the accused of the crime for which he is being prosecuted. However, by reason of the specific provisions in the Code, the possibility of such danger is slight. Fair trial of the accused is insured by the provision empowering the court to grant a continuance or other appropriate relief where substantial prejudice might result from the possible effects of consolidation. In light of this provision, the substantive and administrative benefits derived should far outweigh any imagined prejudices.

The rights involved in the discussion of vagrancy and disorderly conduct, of course, derive their validity from the Constitution. The Institute was obviously cautious in its drafting of these sections so as not to transgress upon them. However, the authors suggest that the recognition of these rights, fundamental to any penal code, must be kept in perspective. If not, the individual conduct will be protected only at the expense of the public welfare. It is doubtful if the Code has reached a proper balance between these two competing interests.

E. Mike Miller
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