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ARTICLES

REVISING VERMONT'S CRIMINAL CODE

Barry Jeffery Stern*

INTRODUCTION

Vermont's criminal code has never been comprehensively revised and the definition of criminal conduct has been left to piecemeal statutory enactment supplemented by case law. Although the legislature has recently been active in revising selected areas of the criminal code,[1] some crimes remain undefined by statute.[2] The consequences of this approach to defining criminal conduct are readily apparent from a brief review of the existing criminal code found in title 13 of the Vermont Statutes Annotated: there is substantial duplication in the coverage of crimes; the structure of the criminal code is unorganized; authorized penalties are sometimes irrational; major areas of the criminal law are left undefined; and the criminal code is difficult to use by the criminal justice community.

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* Professor of Law, Western New England College School of Law. J.D., University of Michigan, 1975; B.A., University of Michigan, 1971.

The author is currently special counsel to the Vermont House and Senate Judiciary Committees in their consideration of the revised criminal code. The House Committee is chaired by Betty A. Nuovo, and the Senate Committee by Senator Mary Just Skinner. This article has not been read by any Committee member prior to publication, and does not necessarily reflect the views of either Committee or any member. Committee decisions discussed in this article are tentative pending completion of the revision project and each Committee's review of the criminal code bill during the 1988 session.

At the time this article was submitted for publication (late October, 1987), the Committees had two meetings remaining before the start of the 1988 session. It is anticipated that the judiciary committees will devote substantial attention to reviewing and amending the proposed criminal code during the 1988 session.

1. *See, e.g.*, VT. STAT. ANN. tit. 13, §§ 1404-1409 (Supp. 1986) (conspiracy); *id.* §§ 3251-3255 (sexual assault).

2. *See, e.g., id.* § 2305 (manslaughter); *id.* § 2601 (lewd and lascivious conduct).

During the closing days of the 1987 legislative session, the legislature adopted a resolution declaring, "the criminal laws of the state of Vermont should be revised in a thorough and comprehensive manner in order to conform them to the current needs and expectations of the people of the state."[3] The Resolution called upon the House and Senate Judiciary Committees (hereinafter the joint committee or the committee) to meet jointly in the interim between the 1987 and 1988 sessions to study existing law and propose a revised criminal code for consideration during the 1988 session.[4] The legislature requested state criminal justice agencies to provide assistance to the joint committee and authorized the committee to retain a consultant to assist in the revision effort.[5]

The joint committee held its first meeting on July 16, 1987, and will have met six times before the start of the 1988 session. At each meeting the committee considered several chapters in the criminal code by reviewing a summary of Vermont's existing law and a draft of a proposed revision prepared by the committee's consultant. To encourage a wide diversity of input into the joint committee's effort, proposed drafts were distributed before the

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3. H.R.J. Res. 23, 59 Leg., 1st Sess. (1987) [hereinafter Resolution]. The resolution cited three reasons why a revision of existing law was required: one, "the criminal law of Vermont is basically the product of the judicial process of another century, amended piecemeal through the legislative process over the years"; two, "because most of our crimes are common-law crimes, the substance of which are defined not by statute but by ancient case law, unreasonable burdens may be placed on law enforcement officers and could lead to injustice to individuals"; three, "the often vague and obsolete definitions of offenses have contributed to an irrational sentencing structure under which persons convicted of less serious crimes may receive more severe sentences than others, and from which comprehensive sentencing guidelines cannot be reasonably fashioned." *Id.*

Not surprisingly, the necessity for a comprehensive revision of the criminal code is not a conclusion shared by everyone. *See, e.g.*, Letter from District Judge Paul F. Hudson to Senator Mary J. Skinner and Representative Betty A. Nuovo (Aug. 31, 1987). In his letter, Judge Hudson argues that the current piecemeal approach to revising the criminal code "seems over the years to have actually benefitted the criminal justice system by permitting its adaptation to new laws or amendments in relatively small doses while continuing the ever-present daily tasks." *Id.* Judge Hudson also expresses concern about the impact of a comprehensive revision on the criminal justice system.

> The impact of broad revisions will also be significant to prosecuting attorneys and defense attorneys who must gain competence in the revisions by the effective date of the law to properly represent their respective clients. . . . Obviously, many new challenges to a revised criminal code can be contemplated in the trial courts and, until the law becomes settled can be predicted to substantially increase the appeals to an already overly busy Vermont Supreme Court.

Id.

4. H.R.J. Res. 23, 59 Leg., 1st Sess. (1987).

5. *Id.*

meetings to key members of the criminal justice community and to other interested persons and agencies.[6] The committee invited recipients of the proposed drafts to submit written comments and to raise their concerns at committee meetings.

Completing a criminal code revision for consideration during the 1988 session is an ambitious but attainable goal. Vermont's criminal code has never been comprehensively revised. However, between 1973 and 1974, former Attorney General Kimberly B. Cheney chaired a committee that undertook a two-year revision project.[7] That committee proposed a revised criminal code and prepared commentary explaining the reasons for the recommended changes, noting differences between the revision and existing law.[8] The Cheney Committee's extensive work provided an extremely useful resource in the current revision effort. Additionally, a number of important provisions in the criminal code have recently been revised.[9] Since the joint committee did not change those sections substantially, it was able to concentrate on the areas in existing law most in need of revision.

The purpose of this article is to contribute to the debate surrounding legislative consideration of the proposed revised criminal code by discussing why Vermont's criminal code should be revised and highlighting some of the major policy issues likely to be raised. Even if the current effort to comprehensively revise the criminal code is unsuccessful, the issues discussed in this article will likely form the basis of continued piecemeal revision of Vermont's criminal law.

I. The Need for Revision

There are several general problems that are common throughout the existing criminal code, each significant enough to establish

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6. The drafts were sent to the Attorney General, Defender General, executive director of state's attorneys, Chief Justice of the Vermont Supreme Court, Governor's legal counsel, Commissioner of Corrections, Court Administrator, Commissioner of Public Safety, Chiefs of Police Association, American Civil Liberties Union, Vermont Bar Association, and to several lawyers who had expressed interest in the revision.

7. The committee was comprised of the Attorney General, the Defender General, and representatives of the Vermont State's Attorney Association and Vermont Bar Association. Committee To Revise The Criminal Code, Proposed Criminal Code For Vermont, at 1 (1975).

8. *See id.*

9. *See* statutes cited *supra* note 1.

the need for a revision. Together, the problems discussed below make the case for revision compelling.

A. Lack of a Coherent Sentencing Structure

Existing Vermont law lacks a coherent sentencing system.[10] Each crime in the existing criminal code contains its own sentencing provision, typically specifying a maximum term of imprisonment and a maximum fine.[11] This atomistic approach to sentencing has resulted in the legislature creating scores of different punishment authorizations.[12] Because sentences are chosen on an *ad hoc* basis, with little or no consideration given to how one sentence compares to another, it is not surprising that widely disparate punishments have been authorized. Indeed, sometimes the criminal code authorizes severe punishment for minor crimes against property, while at the same time it authorizes relatively lenient sentences for serious crimes against persons.

There are numerous examples of this haphazard approach to sentencing: a person who burglarizes an unoccupied dwelling may be sentenced to fifteen-years imprisonment,[13] while the person who possesses burglary tools may be sentenced to twenty-years imprisonment;[14] a person who intentionally points a firearm at another is subject to a maximum fine of $50.00,[15] while the person who alters a peddler's license may be imprisoned for ten years;[16] intentionally burning a crowded movie theater is punishable by a maximum sentence of five years,[17] while intentionally burning an unoccupied

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10. Resolution, *supra* note 3, at ___. In the Resolution requesting the revision of the criminal code, the legislature cited the existence of an "irrational sentencing structure." *Id.*

11. In some statutes, a mandatory minimum sentence is also specified. *See, e.g.*, VT. STAT. ANN. tit. 13, § 505 (Supp. 1986) (mandatory one-year sentence for fourth degree arson); *id.* § 302 (1974) (mandatory five dollar fine for throwing advertisements on public streets).

12. *See, e.g., id.* § 507 (Supp. 1986) (five years maximum imprisonment and/or $500.00 fine for burning forests so as to cause injury to another person); *id.* § 905 (five years maximum imprisonment and/or $1,000.00 fine for injuring building during riot); *id.* § 1804 (Supp. 1986) (fourteen years maximum imprisonment and/or $1,000.00 fine for counterfeiting paper money); *id.* § 1809 (Supp. 1986) (fifteen years maximum imprisonment and/or $1,000.00 fine for counterfeiting coins).

13. *Id.* § 1201(c).

14. *Id.* § 1204.

15. *Id.* § 4011 (1974).

16. *Id.* § 1803.

17. *See id.* § 503 (Supp. 1986).

outhouse is punishable by a maximum sentence of ten years;[18] a person who tortures a police dog may be fined $350.00,[19] while the person who tortures any other animal faces a maximum term of one year;[20] the maximum term of imprisonment for extortion is three years,[21] while the maximum term for embezzlement is ten years.[22]

The revision of the criminal code can eliminate this unreasonable disparity in authorized sentences. Because the revision is comprehensive, all crimes can be classified for punishment at the same time based on the relative seriousness of the conduct. This is accomplished by creating a limited number of classes of felonies and misdemeanors, with each class carrying a maximum term of imprisonment and fine. As proposed at the joint committee's first meeting, all crimes in the revised criminal code with the exception of the most serious felonies, such as murder and kidnapping, would be classified as class A, B, or C felonies or as class A, B, or C misdemeanors.[23] The joint committee did not, however, classify crimes as it reviewed the various chapters in the criminal code, choosing instead to postpone classification issues until all crimes were revised to ensure a meaningful comparison between conduct.

Classifying crimes as part of the criminal code revision may be only the first step in revising Vermont's sentencing system. The maximum terms of imprisonment authorized under the revised criminal code for each class of crime will still leave substantial discretion to the courts in selecting an appropriate sentence. The possibility for disparity in sentencing exists even under a revised criminal code since one judge may view the same conduct very differently than another.

The legislature appears to have anticipated that Vermont's sentencing system would be examined in greater detail following a criminal code revision. In the legislature's resolution requesting the

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18. *See id.* § 502.

19. *Id.* § 403a (Supp. 1986).

20. *Id.* § 403 (1974 & Supp. 1986).

21. *Id.* § 1701 (Supp. 1986).

22. *Id.* § 2531 (1974).

23. Class A felonies would be more serious than class B or C felonies. Class A misdemeanors would be more serious than class B or C misdemeanors. The joint committee also considered whether to create a noncriminal class of offenses called violations, punishable only by a fine. That issue had not been resolved when this article was written.

It will be recommended at the Committee's December meeting that a fourth class of felonies (Class D) be created.

joint committee to revise the criminal code, it noted that under the existing sentencing structure "comprehensive sentencing guidelines cannot be reasonably fashioned."[24] While a sentencing guidelines system is one alternative for guiding judicial sentencing discretion, other alternatives are available, such as mandatory minimum or presumptive sentencing.[25] The criminal code proposed by the committee will not, however, revise Vermont's sentencing system other than by classifying crimes and authorizing maximum sentences. Following enactment of the revised criminal code, the legislature may then consider whether additional sentencing reform is required.

B. Haphazard Approach to Mens Rea

It is a fundamental principle of criminal law that a person cannot ordinarily be convicted of a crime unless the person acts with a certain level of intent, frequently referred to as *mens rea*.[26]

One of the major purposes of a criminal code revision is to provide clarity and uniformity regarding the *mens rea* requirement for criminal liability. Despite the importance of this requirement, there is currently no comprehensive approach to the subject in the Vermont statutes. Instead, at least twenty-six undefined terms are

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24. Resolution, *supra* note 3, at ___.

25. Under presumptive sentencing, a term of imprisonment is set by the legislature, or other body designated by the legislature. That term may be varied by the trial court within a designated range if the presence of aggravating or mitigating factors is established at sentencing. Other features of a presumptive sentencing include: the specification of increasingly severe presumptive terms of imprisonment based on the prior criminal history of the defendant; provisions allowing deviation from the presumptive term of imprisonment in extraordinary and unanticipated circumstances; and significant restrictions on the authority of a parole board or other administrative agency to release a prisoner before the expiration of a sentence. *See generally* TASK FORCE ON CRIMINAL SENTENCING, TWENTIETH CENTURY FUND, FAIR AND CERTAIN PUNISHMENT 19-22 (1976). Some features of presumptive sentencing were used by the legislature in its recent revision of the penalties for murder. *See* VT. STAT. ANN. tit. 13, § 2303 (Supp. 1986).

26. In Morissette v. United States, 342 U.S. 246 (1952), the United States Supreme Court explained the rule as follows:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a subsequent ability and duty of the normal individual to choose between good and evil.

Id. at 250 (footnote omitted).

See also Smith v. California, 361 U.S. 147, 150 (1959) (" 'The existence of *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.' " (quoting Dennis v. United States, 341 U.S. 494, 500 (1951))).

used in the criminal code to designate the *mens rea* requirement.[27] What each term means is left to case law, but in many instances it is impossible to discern any rational distinction among the terms. For example, the statute prohibiting damage to cable television systems requires that a person act "wilfully *or* maliciously,"[28] while the immediately preceding statute, prohibiting damage to street lamps, requires that a person act "wilfully *and* maliciously."[29]

Courts have sometimes applied conflicting definitions to the same *mens rea* term. For example, as used in the statute prohibiting "wilfully and maliciously" killing animals,[30] the term "wilfully" has been interpreted by the Vermont Supreme Court to mean "intentionally and by design."[31] However, in the statute prohibiting wilful neglect of duty by public officers,[32] the court held that:

> [T]he State could not establish the offense charged by simply showing that [the defendant] acted intentionally and by design, but was required to go further and show that he was actuated by a wrongful purpose, a bad purpose, or a design to injure another, or that he acted wantonly and lawlessly.[33]

In some crimes no *mens rea* term is specified[34] and the Vermont Supreme Court is asked to determine whether proof of *mens rea* is nevertheless required. The court's approach to this issue, however, has not been free of ambiguity.

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27. A list of these terms with a citation to one statute using the term follows: "corruptly," VT. STAT. ANN. tit. 13, § 1101 (Supp. 1986); "intent," *id.* § 2 (1974); "knowingly," *id.* § 104 (Supp. 1986); "knowingly and designedly," *id.* § 2013; "knowingly or recklessly," *id.* § 2804(b); "malicious intent," *id.* § 2701 (1974); "maliciously," *id.* § 1701 (Supp. 1986); "negligently," *id.* § 1023(a)(2) (1974); "purpose," *id.* § 1404 (Supp. 1986); "purposely and maliciously," *id.* § 1605 (1974); "purposely, knowingly or recklessly," *id.* § 1023(a)(1); "purposely or knowingly," *id.* § 1024(a)(2); "recklessly," *id.* § 1025; "wilful, deliberate and premeditated," *id.* § 2301 (Supp. 1986); "wilfully," *id.* § 1753 (1974); "wilfully and corruptly," *id.* § 2308; "wilfully and knowingly," *id.* § 903 (Supp. 1986); "wilfully and lewdly," *id.* § 2602 (1974); "wilfully and maliciously," *id.* § 405; "wilfully and with intent," *id.* § 506 (Supp. 1986); "wilfully and wrongfully," *id.* § 3003 (1974); "wilfully or knowingly," *id.* § 1751; "wilfully or maliciously," *id.* § 3786; "wilfully or unjustifiably," *id.* § 2153(6); "with the understanding," *id.* § 1102 (Supp. 1986); "wittingly, falsely and deceitfully," *id.* § 1801.

28. *Id.* § 3786 (1974) (emphasis added).

29. *Id.* § 3785 (Supp. 1986) (emphasis added).

30. *Id.* § 405 (1974).

31. State v. Sylvester, 112 Vt. 202, 206, 22 A.2d 505, 508 (1941).

32. VT. STAT. ANN. tit. 13, § 3006 (1974).

33. State v. Dwyer, 108 Vt. 303, 306, 187 A. 522, 523 (1936).

34. *See, e.g.*, VT. STAT. ANN. tit. 13, § 1308 (1974) (furnishing tobacco to persons under seventeen); *id.* § 3001 (Supp. 1986) (impeding public officers).

In *State v. Kerr*,[35] the court considered whether the statute prohibiting carrying "a dangerous or deadly weapon, openly or concealed, while committing a felony"[36] required proof that the defendant knew he was carrying the weapon.[37] The court held that since the statute did not specify a knowledge requirement, and because another statute prohibiting the possession of drugs required a "knowing" possession, proof of knowledge was not required.[38] To read a knowledge element into the crime, the court observed, "would constitute judicial legislation."[39] The holding in *Kerr*, however, conflicted with *dicta* in *State v. Doucette*,[40] an opinion filed the same day as *Kerr*. In *Doucette*, the court cited with approval

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35. 143 Vt. 597, 470 A.2d 670 (1983).

36. VT. STAT. ANN. tit. 13, § 4005 (1974).

37. *Kerr*, 143 Vt. 604-05, 470 A.2d at 673-74. In *Kerr*, a border patrol agent arrested defendant after discovering narcotics and a handgun concealed in a bag allegedly possessed by defendant. The defendant denied both possession and knowledge of the bag's contents. *Id.* at 602, 470 A.2d at 672.

38. *Id.* at 604-05, 470 A.2d at 673-74. In relying on the language of the drug possession statute in interpreting the gun possession statute, the court applied the rule of statutory construction of *in pari materia*. The assumptions underlying the *in pari materia* doctrine are of questionable validity. *See* Hetzel, *Instilling Legislative Interpretation Skills in the Classroom and the Courtroom*, 48 U. PITT. L. REV. 663, 683 (1987).

39. *Kerr*, 143 Vt. at 605, 470 A.2d at 674. Missing from the court's opinion was any discussion of whether a knowledge requirement could constitutionally be absent from the statute. In Morissette v. United States, 342 U.S. 246 (1952), the United States Supreme Court recognized that a legislature could dispense with the *mens rea* requirement for only a limited category of crimes, referred to as public welfare offenses. *Id.* at 252-60. The Court made the following general observations about public welfare offenses:

> These cases do not fit neatly into any of such accepted classifications of common-law offenses, such as those against the state, the person, property, or public morals. Many of these offenses are not in the nature of positive aggressions or invasions, with which the common law so often dealt, but are in the nature of neglect where the law requires care, or inaction where it imposes a duty. Many violations of such regulations result in no direct or immediate injury to person or property but merely create the danger or probability of it which the law seeks to minimize. While such offenses do not threaten the security of the state in the manner of treason, they may be regarded as offenses against its authority, for their occurrence impairs the efficiency of controls deemed essential to the social order as presently constituted. In this respect, whatever the intent of the violator, the injury is the same, and the consequences are injurious or not according to fortuity. Hence, legislation applicable to such offenses, as a matter of policy, does not specify intent as a necessary element. The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably exact from one who assumed his responsibilities. Also, penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation.

Id. at 255-56.

40. 143 Vt. 573, 470 A.2d 676 (1983).

the United States Supreme Court's observation in *Morissette v. United States* that " '[t]he contention that an injury can amount to a crime only when inflicted by intention . . . is as universal and persistent in mature systems of law as belief in freedom of the human will and consequent ability and duty of the normal individual to choose between good and evil.' "[41] Moreover, one year before *Kerr* and *Doucette*, the Vermont Supreme Court in *State v. Hanson*,[42] noted that "[u]nless *expressly* provided otherwise by the legislature . . . a crime is composed of an act and an intent"[43] and in *State v. Peters*[44] had read a *mens rea* element into a crime that did not specify an intent requirement.[45]

Thus, there are two major areas of confusion concerning the *mens rea* requirement in existing law. The first arises from the use of numerous undefined *mens rea* terms throughout title 13.[46] The legislature has lacked a unified approach to the *mens rea* requirement, and in defining crimes has selected *mens rea* terms with little consideration as to how one differs from another.[47] The second area of confusion arises from the legislature's failure to include *mens rea* terms in some crimes followed by judicial interpretation of whether a *mens rea* term is nevertheless required. In instances where no *mens rea* term is specified, does the legislature nevertheless intend that a *mens rea* element be judicially inferred as suggested in *Hanson*,[48] or does it intend to dispense with the *mens rea* element, as held in *Kerr*?[49] Further, if a *mens rea* element is to be read into a crime, what should that element be?[50]

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41. *Id.* at 580-81, 470 A.2d 681 (*quoting* Morissette v. United States, 342 U.S. 246, 250 (1952)).

42. 141 Vt. 228, 446 A.2d 372 (1982).

43. *Id.* at 232, 446 A.2d at 374 (emphasis added).

44. 141 Vt. 341, 450 A.2d 332 (1982).

45. *Id.* at 348, 450 A.2d at 336. The statute in dispute in *Peters* imposes mandatory sentences for a defendant "convicted of a simple or aggravated assault against a law enforcement officer . . . ." VT. STAT. ANN. tit. 13, § 1028(a) (Supp. 1986). The court held that the statute applies to a person "who assaults a law enforcement officer in the performance of an official duty, *knowing or having good reason to believe* that the person is in fact such an officer." *Peters*, 141 Vt. at 348, 450 A.2d at 336 (emphasis added).

46. *See supra* note 27.

47. Legislative failure to consider how one statute relates to another is also a problem in the authorization of punishment. *See supra* text accompanying notes 13-22.

48. *See supra* text accompanying notes 42-43.

49. *See supra* text accompanying notes 35-39.

50. For example, why should the statute reviewed in *Peters* require the defendant to *know or have good reason to believe* that the person assaulted is a law enforcement officer? *See supra* note 45. Should not absolute knowledge or criminal negligence be required?

The revised code attempts to eliminate the confusion surrounding the *mens rea* requirement by following the approach of the Model Penal Code[51] and by using only four culpable mental states to specify the *mens rea* requirement.[52] In addition to defining the terms, the revised code includes rules of construction on how the mental states should be applied.[53] The proposed revised

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51. *See* MODEL PENAL CODE § 2.02 (Official Draft and Explanatory Notes 1985). The four terms used in the Model Penal Code are "purposely," "knowingly," "recklessly," and "negligently."

52. The four terms used in the revised code are "intentionally," "knowingly," "recklessly," and "criminal negligence." As proposed to the July 16, 1987, meeting of the joint committee, the terms would be defined in the following manner:

> (1) A person acts "intentionally" with respect to a result described by a provision of law defining an offense when the person's conscious objective is to cause that result;
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> (2) A person's acts "knowingly" with respect to conduct or to a circumstance described by a provision of law defining an offense when the person is aware that the conduct is of that nature or that the circumstance exists; when knowledge of the existence of a particular fact is an element of an offense, that knowledge is established if a person is aware of a substantial probability of its existence, unless the person actually believes it does not exist;
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> (3) A person acts "recklessly" with respect to a result or to a circumstance described by a provision of law defining an offense when the person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists; the risk must be of such a nature and degree that disregard of it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation; a person who is unaware of a risk of which the person would have been aware had that person not been intoxicated acts recklessly with respect to that risk;
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> (4) A person acts with "criminal negligence" with respect to a result or to a circumstance described by a provision of law defining an offense when the person fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists; the risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

VERMONT HOUSE AND SENATE JUDICIARY COMMITTEES, PROPOSED VERMONT REVISED CRIMINAL CODE, TENTATIVE DRAFT (July 16, 1987) [hereinafter *Tentative Draft, Part I*] (General Principles of Criminal Liability § 1).

53. The relevant sections appear in *Tentative Draft, Part I*:

> 2. GENERAL REQUIREMENTS OF CULPABILITY
>
> (a) The minimal requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform an act which the person is capable of performing
>
> (b) A person is not guilty of an offense unless the person acts with a culpable mental state with respect to each element of an offense, except that no culpable mental state must be proved if
>
> (1) the description of the offense does not specify a culpable mental state and the offense is a violation; or
>
> (2) a legislative intent to dispense with the culpable mental state requirement is present.

criminal code also addresses the issue raised by *Kerr*,[54] by providing that even if no *mens rea* term is used in a statute, one will be judicially inferred unless an intent to dispense with the *mens rea* requirement is apparent.[55]

C. Organizational Defects

Mens rea and sentencing problems in existing law are examples of fundamental substantive deficiencies in the definition of crimes and the authorization of punishment. The final problem reviewed in this section is organizational deficiencies in the structure of the criminal code that make the law difficult to interpret and apply.

Consider, for example, a police officer or prosecutor making a charging decision in an assault case. A review of the chapter index to the criminal code reveals that assaults are covered by chapter thirteen,[56] but the chapter's history note states that the former assault statutes were repealed in 1972 and that assaults are now covered by section 608 in chapter 13.[57] That reference is incorrect. Section 608 does not define assault crimes but instead defines the crime of robbery.[58] What the history note *should* have said was that assault crimes are now defined in chapter 19 of the criminal code, entitled "Breach of the Peace; Disturbances."[59]

> 3. CONSTRUCTION OF STATUTES WITH RESPECT TO CULPABILITY
>
> (a) Except as provided in subsection (b) of section 2 of this chapter, if a particular element of an offense does not prescribe a culpable mental state, the culpable mental state that must be proved with respect to
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> (1) conduct is "knowingly"; and
>
> (2) a circumstance or a result is "recklessly."
>
> (b) When a provision of law provides that criminal negligence suffices to establish an element of an offense, that element is also established if a person acts intentionally, knowingly, or recklessly. If acting recklessly suffices to establish an element, that element also is established if a person acts intentionally or knowingly. If acting knowingly suffices to establish an element, that element is also established if a person acts intentionally.

Id. at §§ 2-3.

54. *See supra* text accompanying notes 35-39.

55. *Tentative Draft, Part I, supra* note 52 (General Principles of Criminal Liability § 2(b)(2)).

56. VT. STAT. ANN. tit. 13, (1974) (Table of Contents).

57. *Id.* §§ 601-607 history (repealed 1972).

58. *See id.* § 608. The crime, however, is captioned "Assault and robbery," and the caption may partially account for the reference.

59. *See id.* §§ 1021, 1023-25, 1028 (1974 & Supp. 1986).

At first glance, chapter 19 appears to contain a comprehensive listing of assault offenses by defining the crimes of simple assault,[60] aggravated assault,[61] and recklessly endangering another person.[62] However, if the police officer or prosecutor makes a charging decision after consulting only those statutes, several other important assault crimes defined outside chapter 19 will have been overlooked, including the crime of maiming defined in chapter 61,[63] and the crime of aiming a gun at another defined in chapter 85.[64] Moreover, if the assault was accomplished by means of a "slung shot, blackjack, brass knuckles or similar weapon,"[65] by explosives,[66] or by tampering with a railroad,[67] separate crimes defined outside of chapter 19 would be applicable.

In the revised criminal code, all crimes related to the same general conduct will be defined in a single chapter, which will eliminate the problem of overlapping statutes in scattered sections throughout the criminal code. If a general statute can be drafted to adequately cover the conduct now described in a specific statute, the latter will be repealed. However, if the specific statute defines conduct that should be punished more seriously than would otherwise be authorized by the general statute, the specific statute will be retained. This approach makes the law easier to use and apply, and removes from litigation issues of whether a specific statute regulating conduct takes precedence when a general provision is also applicable.[68]

II. The Proposed Revised Code: Some Changes from Existing Law

The joint committee had reviewed approximately three-quarters of the topics in the proposed revised criminal code (here-

60. *Id.* § 1023.
61. *Id.* § 1024 (1974).
62. *Id.* § 1025.
63. *Id.* § 2701.
64. *Id.* § 4011.
65. *Id.* § 4001.
66. *Id.* § 1605.
67. *Id.* § 3102 (Supp. 1986).
68. Consider, for example, a defendant who intentionally points a firearm at another person. Is that conduct prohibited by the general simple assault statute, in which case it is a misdemeanor punishable by a maximum sentence of one year imprisonment, Vt. Stat. Ann. tit. 13, § 1023 (1974 & Supp. 1986), or by the specific statute that prohibits intentionally pointing a gun at another, in which the defendant may be fined a maximum of $100.00, Vt. Stat. Ann. tit. 13, § 4011 (1974)?

inafter "proposed code") when this article was submitted for publication.[69] This section surveys five of those topics and discusses how and why the committee's proposals differ from existing law.

A. Assault

Assault crimes were partially revised in 1971 with the enactment of the Model Penal Code approach to defining assault.[70] The proposed code substantially restates existing law and includes conduct now covered by the crime of maiming as a form of felony assault.[71] Assault crimes defined outside chapter 9 of title 13 are repealed[72] since the proscribed conduct can be covered under the three degrees of assault in the proposed code.

Under the proposed code, conduct now defined as aggravated assault is classified as either assault in the first or second degree,[73]

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69. At each committee meeting, a tentative draft of selected topics was reviewed. Tentative Draft, Part I, distributed for the July 16, 1987, meeting, contained the following topics: classification of offenses; general principles of criminal liability; assault; kidnapping; robbery; arson; perjury; attempt, solicitation and conspiracy; and parties to crime. Tentative Draft, Part II, distributed for the August 6, 1987, meeting, contained second drafts of perjury, arson, and robbery. Tentative Draft, Part II also contained first drafts of: burglary and criminal trespass; escape; prostitution; forgery; weapons and explosives; and criminal mischief. Tentative Draft, Part III, distributed for the September 15, 1987, meeting, contained second drafts on: attempt, solicitation and conspiracy; parties to crime; burglary and criminal trespass; escape; weapons and explosives; and prostitution. Tentative Draft, Part III also contained first drafts on: sexual offenses; bribery and kickbacks; riot and disorderly conduct; and cruelty to animals. Tentative Draft, Part IV, distributed for the October 15, 1987, meeting, contained first drafts on general provisions; obstruction of public administration; gambling and coercion. Tentative Draft, Part IV also contained second drafts on: kidnapping; sexual offenses; disorderly conduct offenses; and assault. Tentative Draft, Part V distributed for the November 5, 1987, meeting, contained first drafts on homicide; theft; business and commercial offenses; family offenses; judicial offenses; and general principles of justification and excuse.

70. *Compare* VT. STAT. ANN. tit. 13, §§ 1023-1025 (1974 & Supp. 1986) *with* MODEL PENAL CODE §§ 211.1-.2 (Official Draft and Explanatory Notes 1985). That revision, however, was not comprehensive and several assault offenses in existing law were not changed. *See supra* text accompanying notes 63-67.

71. The existing crime of maiming authorizes a maximum life sentence for a person "who shall cut out or maim the tongue, put out or destroy an eye, cut or tear off an ear, cut, slit or mutilate the nose or lip, or cut or disable a limb or member of another person . . . ." VT. STAT. ANN. tit. 13, § 2701 (1974). Under the proposed code, a person who intentionally causes serious bodily injury commits the most serious assault crime, assault in the first degree. *See Tentative Draft, Part I* (Assault § 1(a)(3)).

72. *See supra* text accompanying notes 63-67.

73. The crime of aggravated assault provides two different maximum authorized terms of imprisonment depending on which of the four subdivisions of the statute is violated. VT. STAT. ANN. tit. 13, § 1024 (1974). The proposed code follows this penalty structure in defining the crimes of Assault in the first and second degrees. *Compare* VT. STAT. ANN. tit. 13, §

conduct currently defined as simple assault is classified as assault in the third degree,[74] and the existing crime of recklessly endangering another person is restated without change.[75] The committee also discussed whether or not to retain the existing mandatory sentences for assaulting a law enforcement officer.[76] Although no final decision has been reached on this issue when this article was written, the committee appeared to favor a repeal of the mandatory sentences.

The only substantive change to assault crimes considered by the committee was whether or not intentionally placing a person in fear of imminent serious bodily injury by means of a deadly weapon should be a felony.[77] Incident to this issue, the committee discussed whether the existing definition of deadly weapon should be revised to include unloaded and inoperable firearms.[78] Under existing law, intentionally placing another in fear of imminent serious bodily injury by means of a deadly weapon, including a loaded operable firearm, is prohibited by three misdemeanor crimes.[79] After substantial discussion, the committee rejected a felony classification. Instead, the committee classified placing a person in fear of imminent serious bodily injury by means of a firearm as the most aggravated form of the misdemeanor crime of assault in the third degree.[80] Additionally, the committee defined firearm for purposes of that crime as including unloaded and inoperable firearms.[81]

B. Robbery

The joint committee had a lively debate on how to define the crime of robbery. The debate centered on the factors that make one robbery more aggravated than another, and whether or not an

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1024 (1974) *with Tentative Draft, Part I* (Assault §§ 2-3).

74. *Compare* VT. STAT. ANN. tit. 13, § 1023 (1974 & Supp. 1986) *with Tentative Draft, Part I* (Assault § 3).

75. *Compare* VT. STAT. ANN. tit. 13, § 1025 (1974) *with Tentative Draft, Part I* (Assault § 4).

76. VT. STAT. ANN. tit. 13, § 1028 (Supp. 1986).

77. *See Tentative Draft, Part I* (Assault § 2(a)(1)).

78. The existing definition appears in VT. STAT. ANN. tit. 13, § 1021(3) (1974).

79. *See* VT. STAT. ANN. tit. 13, § 1023(a)(3) (1974 & Supp. 1986) (simple assault); *id.* § 1025 (1974) (recklessly endangering another person); *id.* § 4011 (1974) (aiming gun at another).

80. VERMONT HOUSE AND SENATE JUDICIARY COMMITTEES, PROPOSED VERMONT REVISED CRIMINAL CODE, TENTATIVE DRAFT (Oct. 15, 1987) [hereinafter *Tentative Draft, Part IV*] (Assault § 4(b)(2)).

81. *Id.*

attempted robbery should be treated the same as a completed robbery.

Under existing law, robbery generally requires that the defendant take property from the victim.[82] If the robbery fails because the defendant is arrested before property is transferred or because the victim had no property, the defendant can usually only be charged with attempted robbery.[83] If robbery is viewed primarily as a crime against the person, rather than as a crime against property, the issue of whether property is obtained during the crime should be irrelevant.[84] The joint committee decided to emphasize the danger to personal safety created by any forcible demand for property by defining robbery as including an unsuccessful attempt to obtain property which involves a physical confrontation between the defendant and the victim.[85]

After defining the basic offense of robbery, the committee considered which factors aggravate the crime. Under existing law, being armed with a dangerous weapon or causing bodily injury turns an ordinary robbery into a more serious crime.[86] These aggravating factors are retained in the proposed code and expanded to include a false representation by the defendant of being armed with a deadly weapon.[87] Additionally, a defendant is automatically held accountable for the more serious robbery offense if an aggravating

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82. *See* VT. STAT. ANN. tit. 13, § 608 (1974). If bodily injury is caused during an attempted robbery, the defendant can be convicted of robbery even though no property is taken. *See id.* at § 608(c). *Cf. id.* § 2503 (crime of larceny from the person covers attempts to steal property).

83. An unarmed robbery not resulting in bodily injury is punishable by a maximum sentence of ten-years imprisonment. *See id.* § 608(a). Under the existing attempt statute, an attempt to commit a felony punishable by a maximum sentence of ten years is punishable by the same maximum sentence as the completed crime. *See id.* § 9.

84. The Model Penal Code formulation does not require that property be obtained and many recently revised criminal codes follow a similar approach. *See* MODEL PENAL CODE § 222.1 (Official Draft and Explanatory Notes 1985); MODEL PENAL CODE § 222.1 comment at 100-01 (Official Draft and Revised Comments 1980).

85. The attempt must include "an act designed to accomplish an intended theft that includes a demand for property." VERMONT HOUSE AND SENATE JUDICIARY COMMITTEES, PROPOSED VERMONT REVISED CRIMINAL CODE, TENTATIVE DRAFT (Aug. 6, 1987) [hereinafter *Tentative Draft, Part II* (Robbery § 2(b)(2)). Under this formulation, all other forms of attempted robbery could be prosecuted under the proposed code's attempt statute. *See infra* text accompanying notes 161-76.

86. *See* VT. STAT. ANN. tit. 13, § 608(b), (c) (1974). For purposes of the existing robbery statute, the term dangerous weapon includes an unloaded firearm. *See* State v. Parker, 139 Vt. 179, 183, 423 A.2d 851, 853 (1980).

87. *Tentative Draft, Part II* (Robbery § 1(a)(2)).

factor is committed by another participant in the crime.[88]

C. Sexual Offenses

Vermont's rape laws were substantially revised in 1977[89] and then amended in 1985.[90] As part of the 1977 revision, the crimes of rape by a person over sixteen[91] and rape by a person under sixteen[92] were repealed and replaced by the crimes of sexual assault[93] and aggravated sexual assault.[94] The revision also defined key terms used in the sexual assault statutes[95] and restricted the defendant's ability to introduce evidence of the victim's past sexual conduct.[96]

The 1977 revision was a significant improvement over then existing law in several important respects: it clearly defined the conduct that constitutes sexual assault and broadly described the sexual acts that support a prosecution;[97] it created an aggravated offense triggered by the infliction of serious bodily injury;[98] it defined both crimes without reference to the gender of the defendant or victim;[99] and it provided that proof of resistance is not required to establish that an assault occurs without the victim's consent.[100] Nevertheless, the 1977 revision was not a comprehensive reform of all sexual offenses,[101] and some provisions of the revised statutes are themselves in need of clarification.[102]

The draft of sexual offenses discussed by the committee at its September meeting proposed three degrees of the crime of sexual assault:[103] the first degree crime being identical to the existing

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88. *Tentative Draft, Part I* (Robbery § 1(a)(2)).
89. 1977 Vt. Laws 51.
90. 1985 Vt. Laws 83.
91. VT. STAT. ANN. tit. 13, § 3201 (repealed 1977).
92. *Id.* § 3202 (repealed 1977).
93. *Id.*
94. *Id.* § 3253 (Supp. 1986).
95. *Id.* §§ 3251, 3254.
96. *Id.* § 3255.
97. *See id.* §§ 3251(a), 3252.
98. *Id.* § 3253.
99. *See id.* §§ 3252-3253.
100. *Id.* § 3254(1).
101. *See infra* text accompanying notes 107-14.
102. For a critique of the problems with existing law, see Note, *Distinguishing Rape: A Definitive Approach to Sexual Assault*, 10 VT. L. REV. 353 (1985).
103. VERMONT HOUSE AND SENATE JUDICIARY COMMITTEES, PROPOSED VERMONT REVISED CRIMINAL CODE, TENTATIVE DRAFT (Sept. 16, 1987) [hereinafter *Tentative Draft, Part III*]

crime of aggravated sexual assault;[104] the second degree crime substantially restating the existing crime of sexual assault, but making several changes to clarify and strengthen the law;[105] and the third degree crime being identical to the second degree crime, but proscribing assaults involving sexual contact rather than sexual acts.[106]

1. Sexual Assault in the Third Degree: Sexual Assaults Involving Sexual Contact

One area not addressed by the 1977 revision was sexual assaults not involving sexual acts. "Sexual act" is defined in existing law as "contact between the penis and the vulva, the penis and the anus, the mouth and the penis, the mouth and the vulva, or any intrusion, however slight, by any part of a person's body or any object into the genital or anal opening of another."[107] Thus, mere digital contact with, as opposed to digital penetration of, the genital area cannot now be prosecuted as a sexual assault since that crime requires the performance of a sexual act.[108] Digital contact, however, can be prosecuted under three existing crimes.

The first is the felony of lewd and lascivious conduct which requires the defendant to engage in "open and gross lewdness and lascivious behavior."[109] There are no reported cases defining the precise conduct that violates the statute. Although the language of the statute suggests it only proscribes public exposure, the crime has apparently been applied to prosecute forcible sexual assaults that do not involve sexual acts.[110]

A sexual assault that does not involve a sexual act can also be prosecuted as an attempted sexual assault[111] or ordinary assault.[112]

(Sexual Offenses §§ 1-3).

104. *Compare Tentative Draft, Part III* (Sexual Offenses § 1) *with* VT. STAT. ANN. tit. 13, § 3253 (Supp. 1986).

105. *Compare Tentative Draft, Part III* (Sexual Offenses § 2) *with* VT. STAT. ANN. tit. 13, § 3252 (Supp. 1986).

106. *Compare Tentative Draft, Part III* (Sexual Offenses § 2) *with Tentative Draft, Part III* (Sexual Offenses § 3).

107. VT. STAT. ANN. tit. 13, § 3251(1) (Supp. 1986). Prior to the 1985 amendments, this definition specifically excluded digital penetration of the genital or anal opening.

108. *See id.* § 3252.

109. *Id.* § 2601.

110. *See* Note, *supra* note 102, at 361. *But see* State v. Franzoni, 100 Vt. 373, 137 A. 465 (1927) (statute does not apply to private conduct).

111. *See* VT. STAT. ANN. tit. 13, § 9 (1974).

If the conduct is prosecuted as an attempt, the defendant must have the intent to engage in a sexual act.[113] If the conduct is prosecuted as an assault, the defendant can only be convicted of a misdemeanor unless a weapon is used or serious bodily injury is inflicted.[114]

Rather than rely solely on the crimes of lewd and lascivious conduct,[115] or the general attempt or assault statutes to cover sexual assaults not involving sexual acts, the September draft recommended the creation of a new crime, sexual assault in the third degree, which proscribes sexual assaults involving "sexual contact."[116] The type of conduct constituting the third degree crime was proposed to be identical to the conduct prohibited by the second degree crime discussed in the next subsection, with one exception: the second degree crime requires that the defendant perform a sexual act, while the third degree crime requires that the defendant engage in sexual contact. "Sexual contact" occurs when a defendant "intentionally touches, directly or through clothing, the victim's vulva, penis, anus or female breast."[117] Sexual contact also occurs if the defendant "intentionally causes the victim to touch the defendant's or victim's vulva, penis, anus or female breast."[118]

At its September meeting, the committee took no final action on the crime of sexual assault in the third degree. Committee discussion focused primarily on the section of the crime prohibiting a person from engaging in sexual contact with a person under sixteen.[119] Several members questioned whether the section was too broad by covering sexual contact between juveniles, while others suggested that sexual conduct with children more appropriately should be addressed as part of a separate chapter in the proposed code prohibiting other sexual assaults of minors. Alternative approaches addressing both concerns were left to be considered at the November committee meeting.

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112. *See id.* §§ 1023-1024 (1974 & Supp. 1986).

113. *See id.* § 9 (1974).

114. *See id.* §§ 1023-1024 (1974 & Supp. 1986).

115. At its November meeting, the Committee voted to retain a version of the existing crime prohibiting lewd and lascivious conduct with children under sixteen (VT. STAT. ANN. tit. 13, § 2602 (1974)) and to adopt another crime covering the same conduct when it occurs without the consent of a person sixteen or older.

116. *Tentative Draft, Part III* (Sexual Offenses § 3).

117. *Id.* (Sexual Offenses § 6(2)(1)).

118. *Id.* at § 6(2)(ii).

119. *Id.* (Sexual Offenses § 3(a)(4)).

2. *Sexual Assault in the Second Degree: Changes from the Existing Crime of Sexual Assault*

The existing crime of sexual assault can be committed three different ways: by compelling a person to engage in a sexual act;[120] by engaging in a sexual act after using drugs or intoxicants to impair the other person's ability to appraise conduct;[121] or by engaging in a sexual act with a person under sixteen.[122] The draft discussed at the September meeting proposed several changes to the first form of sexual assault which provides that the crime occurs if a person

> (1) Compels the other person to participate in a sexual act:
>
> (A) Without the consent of the other person; or
>
> (B) By threatening or coercing the other person; or
>
> (C) By placing the other person in fear that any person will be harmed imminently . . . .[123]

Under subdivision (1)(A) of the existing crime of sexual assault, the elements of compulsion and without consent sometimes appear inconsistent. For example, under existing law a defendant acts without the consent of a victim if the defendant knows that the victim is mentally incapable of understanding the nature of the sexual act.[124] Under this circumstance, the statute's reference to compelling the victim seems misplaced. Subdivision (1)(A) proscribes engaging in a sexual act without the victim's consent;[125] whether or not the victim is compelled to engage in the sexual act should be irrelevant since the definition of without consent does not always require the presence of compulsion. Consequently, the

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120. VT. STAT. ANN. tit. 13, § 3252(1) (Supp. 1986).

121. *Id.* § 3252(2).

122. *Id.* § 3252(3). The prohibition does not apply "where the persons are married to each other and the sexual act is consensual." *Id.*

123. *Id.* § 3252(1).

124. *Id.* § 3254(2) provides as follows:

> A person shall be deemed to have acted without the consent of the other person where the actor:
>
> (A) Knows that the other person is mentally incapable of understanding the nature of the sexual act; or
>
> (B) Knows that the other person is not physically capable of resisting, or declining consent to, the sexual act; or
>
> (C) Knows that the other person is unaware that a sexual act is being committed.

125. *See* State v. Nash, 144 Vt. 427, 432-33, 479 A.2d 757, 760 (1984).

proposed crime of sexual assault in the second degree requires that the defendant engage in the sexual act without the consent of the victim, but does not also require that the victim be compelled to do so.[126]

Under existing law, two statutes define when a sexual act is without consent: the first defines consent as "words or actions by the person indicating a voluntary agreement to engage in a sexual act,"[127] while the second eliminates the resistance requirement and specifies three circumstances in which a sexual act occurs without consent.[128] The draft considered at the September meeting consolidates these provisions by adopting a single definition of without consent.[129] The definition restates existing law, but reduces the *mens rea* requirement on the issue of whether or not the defendant is aware of the condition that makes the sexual act "without consent."[130] Under the existing statute, the defendant must know that the condition exists. For example, the defendant must be aware that the victim is not physically capable of resisting.[131] Under the proposed revision, this *mens rea* requirement is reduced to recklessness.[132]

The second and third ways of committing sexual assault under subsection (1) are by compelling the victim to engage in a sexual act by threat or coercion, or by placing the victim in fear that any

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126. *Compare Tentative Draft, Part III* (Sexual Offenses § 2(a)(2)) *with* VT. STAT. ANN. tit. 13, § 3252(1)(A) (Supp. 1986). *See supra* text accompanying note 123.

127. VT. STAT. ANN. tit. 13, § 3251(4) (Supp. 1986).

128. *Id.* § 3254. *See supra* text accompanying note 124.

129. *Tentative Draft, Part III* (Sexual Offenses § 6(5)), defines "without consent" as

> the absence of words or conduct by a person indicating a voluntary agreement to engage in a sexual act or sexual contact and includes, but is not limited to, a defendant engaging in a sexual act or sexual contact with another person with reckless disregard that the other person
>
> (i) is mentally incapable of understanding the nature of the sexual act or sexual contact; or
>
> (ii) is physically incapable of resisting or declining consent to a sexual act or sexual contact; or
>
> (iii) is unaware that a sexual act or sexual contact is being committed.

130. The proposal also eliminates the resistance requirement in sexual assault prosecutions. *Tentative Draft, Part III* (Sexual Offenses § 4).

131. *See* VT. STAT. ANN. tit. 13, § 3254(2) (Supp. 1986).

132. *See Tentative Draft, Part III* (Sexual Offenses § 6(5)). This change was recommended in Note, *supra* note 102, at 358-59. Under the proposed code, a person acts recklessly if the person is aware of and disregards a substantial and unjustifiable risk that the victim has the condition specified in the definition of without consent. *See supra* note 52 and accompanying text.

person will be imminently harmed.[133] Existing law does not, however, define the type of acts that constitute threats or coercion for purposes of the statute. Under the draft considered at the September meeting, coercion can occur by the use of force against person or property or by the express or implied threat of death, bodily injury, or kidnapping to be inflicted upon anyone.[134] At the September meeting, the committee voted to expand the type of threats that constitute coercion under the sexual assault chapter, and a revised definition of coercion was left for consideration at the November meeting.[135]

D. Burglary and Criminal Trespass

Under existing law, a person commits burglary by entering "any building or structure knowing that he is not licensed or privileged to do so, with the intent to commit a felony, petit larceny, simple assault, or unlawful mischief."[136] Burglary is punishable by a maximum sentence of fifteen-years imprisonment unless the building burglarized is an occupied dwelling, in which case the maximum sentence is twenty-five years.[137] Existing law also prohibits the possession of burglary tools and, inexplicably, authorizes a higher maximum sentence for that crime than for a burglary of an unoccupied dwelling.[138]

The proposed code retains the existing definition of burglary and, like existing law, classifies burglaries of occupied dwellings as the most serious offense.[139] There are three degrees of burglary in the proposed code: the first degree offense covers the burglary of an occupied dwelling;[140] the second degree offense, the burglary of

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133. VT. STAT. ANN. tit. 13, § 3252(1)(B), (C) (Supp. 1986). *See supra* text accompanying note 123.

134. *Tentative Draft, Part III* (Sexual Offenses §§ 2(a)(1), 3(a)(1)).

135. The revised definition of coercion will include the type of threats specified in the September draft, but will be expanded to include some of the threats that will constitute the separate crime of coercion.

136. VT. STAT. ANN. tit. 13, § 1201 (a) (Supp. 1986).

137. *Id.* § 1201(c).

138. The crime of possession of burglary tools carries a maximum twenty-year sentence. *Id.* § 1204 (1974). The maximum penalty for burglarizing an unoccupied dwelling is fifteen years. *See id.* § 1201(c) (Supp. 1986).

139. *Tentative Draft, Part III* (Burglary and Criminal Trespass §§ 1-3).

140. *Id.* (Burglary and Criminal Trespass § 1). The proposed code clarifies a potential ambiguity in existing law by providing that strict liability applies concerning the defendant's awareness that the dwelling is occupied. *Id.* (Burglary and Criminal Trespass § 7(c)). The code defines dwelling as "any building, motor home, trailer, camperbody or other struc-

an unoccupied dwelling or occupied building;[141] and the third degree offense, the burglary of an unoccupied building or structure.[142] However, the proposed code does not include a statute prohibiting the possession of burglary tools. Instead, the committee decided that conduct now covered by that crime should be prosecuted as an attempted burglary.[143]

The general trespass statute in existing law prohibits three forms of illegal entry onto land and buildings.[144] Trespass upon land is punishable by a maximum term of imprisonment of three months, provided that notice against trespass is given by the owner, the owner's agent, a law enforcement officer, or by "signs or placards so designed and situated as to give reasonable notice."[145] Trespass into a building other than a residence whose normal access is locked, or trespass into a residence in violation of a court order is punishable by a maximum sentence of one-year imprisonment.[146] Finally, a person who trespasses in a dwelling, knowing that he or she is not licensed or privileged to do so, commits a felony punishable by a maximum sentence of three years.[147]

The proposed code makes three important changes to the crime of criminal trespass. First, the code reflects the committee's view that an unauthorized entry of a dwelling without an intent to commit a crime should never be classified as a felony. Consequently, only misdemeanor penalties are authorized for criminal trespass.[148] Second, the code classifies a trespass in a dwelling in violation of a court order as seriously as all other dwelling tres-

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ture or vehicle, though moveable or temporary, which is adapted for overnight accommodation of persons, whether or not a person is actually present." *Id.* (Burglary and Criminal Trespass § 9).

141. *Id.* (Burglary and Criminal Trespass § 2). At the joint committee's September meeting it voted not to apply strict liability to the defendant's awareness that the building was occupied. Instead, the culpable mental state of recklessness will apply to that element.

142. *Id.* (Burglary and Criminal Trespass § 3).

143. *See infra* text accompanying notes 161-76 for a discussion of the treatment of attempt in the proposed code.

144. VT. STAT. ANN. tit. 13, § 3705 (Supp. 1986). In addition to this statute, trespass on land by the use of a motor vehicle is prohibited. *Id.* § 3738 (1974). Furthermore, trespass of a motor vehicle on state land is prohibited. *Id.* § 3739. The coverage of both crimes prohibiting motor vehicle trespasses is restated in the proposed code. *See Tentative Draft, Part III* (Burglary and Criminal Trespass § 6).

145. VT. STAT. ANN. tit. 13, § 3705(a) (1974 & Supp. 1986).

146. *Id.* § 3705(c).

147. *Id.* § 3705(d).

148. *See Tentative Draft, Part III* (Burglary and Criminal Trespass §§ 4(b), 5(c)).

passes.[149] Under existing law, a trespass in violation of a court order is treated less seriously than a trespass that occurs in the absence of a court order.[150] Third, the code expands existing law by prohibiting trespasses in motor vehicles and by classifying that conduct as seriously as trespasses of dwellings.[151]

E. Attempt, Solicitation, and Conspiracy

1. Attempt

Under existing law, "[a] person who attempts to commit an offense and does an act toward the commission thereof, but by reason of being interrupted or prevented fails in the execution of the same" commits the crime of attempt.[152] An attempt to commit a crime is punishable by the same maximum term of imprisonment as the crime attempted. First, if the crime attempted is punishable by more than ten-years imprisonment, the punishment for an attempt cannot exceed ten years.[153] Second, attempts to commit misdemeanors are punishable by one-half the maximum penalty for the misdemeanor.[154]

Defining the precise act necessary to constitute an attempt has always been a difficult issue for the courts.[155] In *State v. Hurley*,[156] the Vermont Supreme Court described the act requirement for attempt as follows:

> Some acts toward the commission of the crime are too remote for the law to notice. The act need not be the one next preceding that needed to complete the crime. Preparations made at a distance from the place where the offense is to be committed are ordinarily too remote to satisfy the requirement. The preparation must be such as would be likely to end, if not extraneously interrupted, in the consummation of the crime intended. The act must be of such a character as to advance the conduct of the actor beyond the sphere of mere intent. It must reach far enough towards the accomplishment

149. *Id.* (Burglary and Criminal Trespass § 4).
150. *See* VT. STAT. ANN. tit. 13, § 3705(c), (d) (Supp. 1986).
151. *Tentative Draft, Part III* (Burglary and Criminal Trespass § 6).
152. VT. STAT. ANN. tit. 13, § 9 (1974).
153. *Id.*
154. *Id.*
155. *See generally* MODEL PENAL CODE AND COMMENTARIES § 5.01 Commentary at 321-29 (Official Draft and Revised Comments 1985).
156. 79 Vt. 28, 64 A. 78 (1906).

> of the desired result to amount to the commencement of the consummation. But after all that has been said, the application is difficult.[157]

In *Hurley*, the court held that a prisoner's procuring of escape tools was not an attempted escape since the prisoner was arrested immediately after receiving the tools.[158] In a more recent case,[159] the court held that an attempt could be established by the performance of an act which is part of a series of events which could lead to the intended result if not interrupted.[160]

a. The Substantial Step Requirement

To be guilty of an attempt under the proposed code, a person must act with an intent to commit a crime.[161] Acting with that intent, the person must engage in conduct constituting a "substantial step" toward the commission of the attempted crime that is strongly corroborative of criminal intent.[162] Although the substantial step requirement is new to existing law, it is used in the Model Penal Code[163] and has been adopted in many recent state criminal code revisions.[164] While it is impossible to define the precise conduct that constitutes a substantial step, the commentary accompanying the attempt statute includes examples from the Model Penal Code of the type of substantial steps that can sustain an attempt prosecution.[165]

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157. *Id.* at 31, 64 A. at 78 (citations omitted).

158. *Id.* at 33, 64 A. at 79.

159. State v. Morse, 130 Vt. 92, 286 A.2d 286 (1971).

160. *Id.* at 94, 286 A.2d at 287. In *Morse*, a prisoner was convicted of attempted escape after being found in a barrel in a garbage truck that was at the last pickup station before leaving the prison.

161. *Tentative Draft, Part III* (Attempt, Solicitation and Conspiracy § 1(a)).

162. *Id.*

163. MODEL PENAL CODE § 5.01(1)(c) (Official Draft and Revised Comments 1985).

164. MODEL PENAL CODE AND COMMENTARIES § 5.01 Commentary at 320 n.95, 331 n.130 (Official Draft and Revised Comments 1985).

165. The examples are as follows:

> (a) lying in wait, searching for or following the contemplated victim of the crime;
>
> (b) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission;
>
> (c) reconnoitering the place contemplated for the commission of the crime;
>
> (d) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed;
>
> (e) possession of materials to be employed in the commission of the

Adoption of the substantial step requirement will allow some convictions for attempt that would be impossible under existing law. For example, the defendant in *Hurley*[166] could be convicted of attempted escape if the jury found that his possession of the escape tools was strongly corroborative of a plan to escape. However, expansion of attempt liability is appropriate when considered along with the requirement that the substantial step be strongly corroborative of criminal purpose.

b. No Requirement that Attempt Fail

The proposed code does not require that the target offense of the attempt fail as a prerequisite to conviction for attempt.[167] The existing requirement of proving beyond a reasonable doubt that an attempt was unsuccessful may place an unnecessary and unjustifiable burden upon the prosecution. For example, in a burglary prosecution, there may be a reasonable doubt whether the defendant actually entered a building. In this instance, the state should be allowed to prosecute for the crime of attempted burglary without being required to prove beyond a reasonable doubt that there was no entry, and hence no completed crime.

c. Factual and Legal Impossibility

The proposed code provides that neither factual nor legal impossibility is a defense to attempt.[168] There is no Vermont case law stating whether legal or factual impossibility is a defense to attempt. The classic example of factual impossibility is an attempt to pick an empty pocket, and this form of impossibility is uni-

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> crime, which are specially designed for such unlawful use or which can serve no lawful purpose of the actor under the circumstances;
>
> (f) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, where such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances . . . .

MODEL PENAL CODE § 5.01(2) (Official Draft and Revised Comments 1985).

It should be noted that the committee did not include paragraph (g) of the Model Penal Code list in its commentary. That paragraph provides that "soliciting an innocent agent to engage in conduct constituting an element of the crime" is a sufficient substantial step to support an attempt prosecution. *Id.* The committee deleted paragraph (g) since soliciting an innocent agent to engage in a crime would constitute the crime of solicitation and should be prosecuted as such.

166. *See supra* text accompanying notes 156-58.

167. *Tentative Draft, Part III* (Attempt, Solicitation and Conspiracy § 1(a)).

168. *See id.* (Attempt, Solicitation and Conspiracy § 1(b)).

formly held not to be a defense to attempt.[169]

Legal impossibility has been recognized as a defense to attempt in a number of jurisdictions.[170] For example, the defense of legal impossibility provides that a person who receives goods which the person mistakenly believed to be stolen is not guilty of an attempt to receive stolen goods.[171] The competing arguments on whether this form of impossibility should be a defense are concisely summarized in the commentary to the Model Penal Code.

> The primary rationale of [decisions recognizing the defense of legal impossibility] is that, judging the actor's conduct in the light of the actual facts, what he intended to do did not amount to a crime. This approach, however, is unsound in that it seeks to evaluate a mental attitude—"intent" or "purpose"—not by looking to the actor's mental frame of reference, but to a situation wholly at variance with the actor's beliefs. In so doing, the courts exonerate defendants in situations where attempt liability most certainly should be imposed. In all of these cases the actor's criminal purpose has been clearly demonstrated; he went as far as he could in implementing that purpose; and, as a result, his "dangerousness" is plainly manifested.[172]

d. Renunciation Defense

Under the proposed code, a voluntary and complete renunciation of criminal intent which prevents the attempted crime is a defense to attempt.[173] Although there is no Vermont statute or

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169. *See* MODEL PENAL CODE AND COMMENTARIES § 5.01 Commentary at 309-10 (Official Draft and Revised Comments 1985).

170. *See id.* § 5.01 commentary at 307-08.

171. People v. Jaffe, 185 N.Y. 497, 78 N.E. 169 (1906). Under existing Vermont law, this conduct may be prosecuted as the crime of receiving stolen property if the defendant is a "dealer in property." *See* VT. STAT. ANN. tit. 13, § 2561(a) (Supp. 1986).

172. MODEL PENAL CODE § 5.01 Commentary at 308-09 (Official Draft and Revised Comments 1985) (footnote omitted).

173. The proposed code provides:

> (c) In a prosecution under this section, it is a defense that, under circumstances manifesting a voluntary and complete renunciation of criminal intent, the defendant avoided the commission of the crime attempted by abandoning the defendant's criminal effort, and, if mere abandonment was insufficient to accomplish such avoidance, by taking further and affirmative steps which prevented the commission of the crime attempted.
>
> (d) A renunciation is not "voluntary and complete" within the meaning of subsection (c) of this section if it is motivated in whole or in part by
>
> (1) a belief that a circumstance exists which increases the probability of

case law recognizing a renunciation defense to attempt, versions of the defense have been adopted in numerous recent criminal code revisions.[174] Enactment of a renunciation defense to attempt would be consistent with the legislature's decision in 1985 to adopt a renunciation defense in conspiracy prosecutions.[175]

e. Punishment

The proposed code grades attempt one level below the substantive crime. For example, an attempt to commit a class A felony is a class B felony.[176]

2. *Solicitation*

Inciting another to commit a felony is now punishable by a maximum sentence of five-years imprisonment.[177] In the proposed code, the crime of solicitation requires that a person act with the "intent of causing another to engage in specific conduct constituting a felony."[178] Acting with that intent, the person must "solicit the other to engage in specific conduct that would constitute the felony under circumstances strongly corroborative of the person's intent."[179] The requirement that "specific conduct" be solicited excludes mere advocacy of general forms of unlawful conduct from the scope of the solicitation statute. The requirement that the solicitation be made "under circumstances strongly corroborative of the person's intent" ensures that compelling evidence of the firmness of the defendant's criminal intent is required to establish the crime of solicitation.

Similar to its treatment of attempt, the proposed code recognizes renunciation as a defense to solicitation[180] and provides the

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detection or apprehension of the defendant or another participant in the crime, or which makes more difficult the completion of the crime; or

(2) a decision to postpone the criminal conduct until another time or to substitute another victim or another but similar objective.

Tentative Draft, Part III (Attempt, Solicitation and Conspiracy § 1(c), (d)).

174. MODEL PENAL CODE § 5.01 commentary at 360 & n.279 (Official Draft and Revised Comments 1985).

175. *See* VT. STAT. ANN. tit. 13, § 1406 (Supp. 1986).

176. *See Tentative Draft, Part III* (Attempt, Solicitation and Conspiracy § 1 (e)).

177. VT. STAT. ANN. tit. 13, § 7 (1974).

178. *Tentative Draft, Part III* (Attempt, Solicitation and Conspiracy § 2(a)).

179. *Id.*

180. The proposed code provides:

(2) it is a defense that the defendant, after soliciting another person to

same punishment for solicitation to commit felonies as it does for attempts to commit felonies.[181] While existing law generally punishes solicitation less severely than attempt, the code reflects the judgment that solicitation of a felony presents as much danger as an attempted felony and should be treated similarly for sentencing purposes.

3. Conspiracy

The conspiracy statutes were comprehensively revised in 1985.[182] The proposed code restates existing law with only one substantive change: the crime of aggravated murder, enacted in 1987, is added to the list of crimes that may be a target offense of a conspiracy.[183]

Conclusion

The sections of the proposed code summarized in this article are only a small portion of the criminal code revision. Many of the issues raised by the revision will be controversial and it cannot be expected that anyone will agree with all of the policy decisions made by the joint committee. Nevertheless, considering the fundamental and numerous problems with existing title 13, enactment of a criminal code revision based on the committee's proposal will represent a significant improvement over existing law.

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engage in conduct constituting a crime, renounced his or her criminal intent by preventing the commission of the crime or by giving timely notice to a law enforcement official of the solicitation.

Tentative Draft, Part III (Attempt, Solicitation and Conspiracy § 2(b)(2)).

181. *Id.* (Attempt, Solicitation and Conspiracy § 2(c)).

182. Vt. Stat. Ann. tit. 13, §§ 1404-1409 (Supp. 1986).

183. *Tentative Draft, Part III* (Attempt, Solicitation and Conspiracy § 3(3)(1)).