Commentary

ARIZONA'S CRIMINAL LAW: THE CRITICAL NEED FOR COMPREHENSIVE REVISION

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A thorough redrafting of all Arizona criminal laws has been accomplished during the past 3 years under the auspices of the Criminal Code Commission.[1] While the proposals for revision of Title 13[2]

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1. ARIZONA CRIMINAL CODE COMM'N, ARIZONA REVISED CRIMINAL CODE (1975) [hereinafter cited as PROPOSED ARIZONA CODE]. In 1972 the Executive Committee of the Legislative Counsel of Arizona authorized a complete revision of the Arizona Criminal Code. *Id.* at v. The subsequently appointed Criminal Code Commission, funded by the United States Law Enforcement Assistance Administration, was chaired by Judge Jack Ogg of the Court of Appeals. Drafts of the proposed criminal code originated with the staff of five lawyers, and then were approved successively by Judge Ogg, a drafting committee, and the Commission as a whole.

Arizona is somewhat behind other states in modernization of the criminal law. The trend in that direction began in the early 1960's with the publication of the Model Penal Code. THE AMERICAN LAW INSTITUTE, MODEL PENAL CODE (Proposed Official Draft, 1962) [hereinafter cited as MODEL PENAL CODE]. Three states enacted substantial criminal law revisions somewhat concurrently with the Model Penal Code. *See* §§ 1-1 to 35-1, [1961] Laws of Ill. 1983 (codified at ILL. ANN. STAT. ch. 38, §§ 1-1 to 1008-6-1 (Smith-Hurd 1972)); ch. 753, art. I, §§ 609.01-.83, [1963] Minn. Sess. Laws 1185 (codified at MINN. STAT. ANN. §§ 609.01 to .83 (1964)); ch. 303, § 1-1 to 30-3, [1963] Laws of N.M. 822 (codified at N.M. STAT. ANN. §§ 40A-1-1 to -28-2 (1972)). Presently all but seven states have adopted or are considering major modifications of their substantive criminal law. Note, *Justification: The Impact of the Model Penal Code on Statutory Reform*, 75 COLUM. L. REV. 914, 914-15 (1975). Revision of the federal criminal law also has been proposed, and several competing bills concurrently are pending before Congress, perhaps the most well-known one being the controversial Senate Bill 1, originally introduced in 1973. The Arizona revision was originally scheduled for legislative attention in January 1976, but the sensitivities of election year prompted the legislature to defer action. January 1977 is the announced target date.

Comprehensive revision of this sort faces serious obstacles, not to mention the years of public discussion and debate which generally precede enactment. Political and special interest pressures in regard to certain provisions also may cause delay and ultimate weakening of the statutory scheme. Drafting problems for the revising jurisdictions, including Arizona, have mainly been three-fold: funding acquisition; time schedules—many revisions take 9-10 years and all require years of public discussion after completion before they can be enacted; and political and special interest pressures for specialized statutes.

2. Arizona's substantive criminal statutes are contained for the most part in Title 13 of the Arizona Revised Statutes.

should generate discussion and debate prior to enactment, of primary importance is public recognition of the need for revision. To that end, this Commentary presents a picture of the confusion, obsolescence, and occasional contradiction in Arizona's substantive criminal law with a view toward promoting improvement, either via the published revision or some alternative proposal.

As in many other jurisdictions, Arizona's criminal laws originated in piecemeal fashion with legislative revisions adding annual accretions to the common law like rings on a tree. Several existing statutes reflect crimes of bygone eras. Such statutory antiques as laws against duelling, train robbery, and committing an offense while wearing a mask,[3] reflect days when gunfighters and Klansmen were principal causes of legislative handwringing.[4] Unlike gunfighters and Klansmen, outdated statutes do not simply fade away. Day-to-day horrors of serious magnitude arise from these and other antiquated statutes, as illustrated by the recent conviction of a ski-masked streaker[5] under a felony statute[6] created over 50 years ago to penalize the Ku Klux Klan. The present patchwork of laws in Title 13 also contains both gaps and overlaps which impede its efficiency for protecting society and dispensing justice.

Because the deficiencies of the present criminal law are widespread yet little understood even by practitioners, this Commentary will offer a tour of some of the rusty antiques in Arizona's criminal law museum in an attempt to point out the need for thorough revision.[7]

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3. *See* ARIZ. REV. STAT. ANN. §§ 13-381 to -385 (1956) (dueling); *id.* §§ 13-981 to -983 (mask wearing); *id.* § 13-644 (Supp. Pamphlet 1973) (train robbery). Other statutes penalize the singing of obscene songs, *id.* § 13-378 (1956), robbery of birds' nests, *id.* § 13-510, slitting another's nose, *id.* § 13-521 (Supp. Pamphlet 1973), and flying red or black flags. *Id.* § 13-1004 (1956).

4. *See* ch. 78, § 3, [1923] Ariz. Sess. Laws 299.

5. *See* State v. Gates, 25 Ariz. App. 241, 542 P.2d 822 (1975) (defendant convicted of wearing a mask during commission of indecent exposure). *See also* State v. Reynolds, 106 Ariz. 47, 470 P.2d 454 (1970) (unlawful wearing of mask during robbery); State v. Crank, 13 Ariz. App. 587, 480 P.2d 8 (1971) (defendant convicted of wearing mask during attempted robbery).

6. ARIZ. REV. STAT. ANN. § 13-981 (1956).

7. This commentary will not attempt a lengthy discussion of the much debated area of decriminalization of "victimless" crimes; however, it is an area which cannot be ignored in revising the criminal law of Arizona. Citing waste of time, manpower, and money, the Federal Bureau of Investigation and the American Bar Association have advocated some degree of decriminalization. *See generally* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968); Kadish, *The Crisis of Over-Criminalization*, 374 ANNALS 157 (1967); Note, *The Right to Decide—Individual Liberty Versus State Police Power*, 18 ARIZ. L. REV. 207 (1976). To date, Arizona's major response to this trend has been the repeal of its public drunkenness statute. *See* Ariz. Rev. Stat. Ann. § 13-991(6) (1956) (repealed 1974). Perhaps more significant candidates for decriminalization are homosexuality, currently punished as the "infamous crime against nature," ARIZ. REV. STAT. ANN. § 13-651 (Supp. Pamphlet 1973), and as "lewd and lascivious" activity, *id.* § 13-652; prostitution, *id.* §§ 13-581 to -593, *as amended*, (Supp. 1975-76); marijuana

MENS REA AND CRIMINAL LIABILITY

A fundamental element of most crimes is the mens rea, or mental state, of the actor.[8] Unfortunately, Arizona's criminal statutes do not specify the requisite mental states with any degree of consistency,[9] thus creating confusion in enforcement and prosecution. A partial list of the diverse mental states randomly scattered throughout existing law illustrates the imprecision, diversity, and inconsistency of mens rea elements: "malice aforethought,"[10] "without malice,"[11] "without due caution and circumspection,"[12] "gross negligence,"[13] "wilfully and mali-

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use, *id.* § 36-1002.05 (1974); and obscenity. *Id.* §§ 13-531 to -533 (1956), *as amended*, (Supp. Pamphlet 1973); *id.* §§ 13-531.01, -534 to -537 (Supp. Pamphlet 1973), *as amended*, (Supp. 1975-76).

8. Arizona law, like that of all other jurisdictions, requires that the prosecution show both an act—actus reus—and some culpable mental state—mens rea. ARIZ. REV. STAT. ANN. § 13-131 (1956); *see* State v. Cutshaw, 7 Ariz. App. 210, 221, 437 P.2d 962, 973 (1968). Certain crimes require only a showing of general intent, which can be presumed from the commission of the act. State v. Jamison, 110 Ariz. 245, 248, 517 P.2d 1241, 1244 (1974) (holding aggravated assault of a police officer to be a crime of general intent); G. DIX & M. SHARLOT, CRIMINAL LAW CASES AND MATERIALS 454-55 (1973). Specific intent, which cannot be presumed but must be proved by the prosecution, is required where the statute defines the crime in terms of a particular mental state, such as "willfully" or "with gross negligence." *See* State v. Jamison, *supra* at 248, 517 P.2d at 1244. Though certain criminologists, notably Lady Barbara Wootton, *see* B. WOOTTON, CRIME AND THE CRIMINAL LAW 48-57 (1963), have advocated the total abolition of mens rea in certain types of cases, such proposals have met with strong opposition. *See e.g.*, Hart, Book Review, 74 YALE L.J. 1325, 1330-31 (1965); Kadish, *The Decline of Innocence*, 26 CAMB. L.J. 273, 273 (1968). There are a number of cogent reasons why mens rea should not be abolished, not the least of which is the phenomenological fact that in the everyday world a person's acts are judged by his mental state. When a person is shoved in a crowd, for instance, his reaction to the shove depends on whether it is interpreted as deliberate or accidental. Similarly, law enforcement and administrative consequences of an automobile accident differ according to whether the accident was caused by recklessness or mechanical defect. Mens rea thus is rooted not so much in legal history as in human history's long-established measures of blameworthy intent.

To abolish mens rea would institute strict liability for all crimes, reducing criminal conduct to mere bodily acts. Tax fraud would receive the same treatment as a mere error in arithmetic, and inchoate crimes like attempt or conspiracy would either disappear or be overextended. Under strict liabiliy, every error would become a crime. Other objections to the abolition of mens rea include massive public outcry which is likely to result, and damage to deeply engrained notions of individual free will. *See* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 104 (1968).

9. *See* PROPOSED ARIZONA CODE, *supra* note 1, § 201, Commentary, at 38; text accompanying notes 10-17 *infra*.

10. ARIZ. REV. STAT. ANN. § 13-451(A) (1956) (homicide); *see* State v. Duke, 110 Ariz. 320, 326, 518 P.2d 570, 576 (1974); State v. Brock, 101 Ariz. 168, 172, 416 P.2d 601, 605 (1966).

11. ARIZ. REV. STAT. ANN. § 13-455 (1956) (manslaughter); *see* State v. McIntyre, 106 Ariz. 439, 445, 477 P.2d 529, 535 (1970); Harding v. State, 26 Ariz. 334, 341, 225 P. 482, 484 (1924).

12. ARIZ. REV. STAT. ANN. § 13-456(A)(2) (Supp. Papmhlet 1973) (involuntary manslaughter); *see* State v. Sorensen, 104 Ariz. 503, 507-08, 455 P.2d 981, 985-86 (1969) (without due caution and circumspection means reckless or grossly negligent); State v. Morf, 80 Ariz. 220, 224, 295 P.2d 842, 844 (1956).

13. ARIZ. REV. STAT. ANN. § 13-456(A)(3)(a) (Supp. Pamphlet 1973) (vehicular manslaughter); *see* State v. Reynolds, 19 Ariz. App. 159, 161, 505 P.2d 1050, 1052 (1973).

ciously,"[14] "feloniously,"[15] "knowingly and designingly,"[16] and "fraudulently."[17]

These diaphanous mental states have hardly evoked literal judicial adherence.[18] The concept of malice has been especially troublesome in this regard.[19] Defined in homicide law as an "intent to kill without justification,"[20] malice[21] is generally known as malice aforethought. It can be either express or implied. Express malice aforethought requires the manifestation of a deliberate and premeditated intention to take life.[22] Malice can be implied, however, either when no considerable provocation appears or when attendant circumstances reveal "an abandoned and malignant heart."[23] The latter term's cardiovascular ring hardly renders it a meaningful legal equivalent for intent to kill. On this less than firm definitional basis, implied malice, like taffy, has been stretched to the point where intent to kill may be presumed from

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14. ARIZ. REV. STAT. ANN. § 13-231 (1956) (arson); *see In re* Anonymous, Juv. Ct. No. 6358-4, 14 Ariz. App. 466, 472, 484 P.2d 235, 241 (1971).

15. ARIZ. REV. STAT. ANN. § 13-661(A)(1) (1956) (theft); *see* State v. Zaragosa, 6 Ariz. App. 80, 82, 430 P.2d 426, 428 (1967).

16. ARIZ. REV. STAT. ANN. § 13-661(A)(3) (1956) (theft); *see* State v. Freeman, 78 Ariz. 286, 289, 279 P.2d 443, 445 (1955); Clark v. State, 53 Ariz. 416, 431, 89 P.2d 1077, 1083 (1939); George v. Williams, 26 Ariz. 91, 93, 222 P. 410, 411 (1924).

17. ARIZ. REV. STAT. ANN. § 13-682(A)(1) (Supp. Pamphlet 1973) (embezzlement); *see* State v. McCormick, 7 Ariz. App. 576, 584, 442 P.2d 134, 142, *vacated on other grounds*, 104 Ariz. 18, 448 P.2d 74 (1968).

18. Not surprisingly, Arizona courts have been unable to find substantive correlates for all the varied descriptions of mental states. In fact, appellate opinions display far fewer mental states than do the statutes. Not only does the statutory language fail to define clearly the mental elements of various crimes, *see* text & notes 24-39 *infra*, but also there is no discernible rationale to explain why one crime requires one mental state and another crime another mental state, or indeed any mental state at all.

19. *See, e.g.*, State v. Drury, 110 Ariz. App. 447, 456-58, 520 P.2d 495, 504-05 (1974); State v. Chalmers, 100 Ariz. 70, 76, 411 P.2d 448, 452 (1966).

20. State v. Brock, 101 Ariz. 168, 172, 416 P.2d 601, 605 (1966).

21. *See* ARIZ. REV. STAT. ANN. § 13-451 (1956). Although the Arizona statute uses the term "malice aforethought," the term has been applied by courts as synonymous with malice. *Cf.* State v. Kabinto, 106 Ariz. 575, 576-77, 480 P.2d 1, 2-3 (1971); State v. McIntyre, 106 Ariz. 439, 442-43, 477 P.2d 529, 532-33 (1970).

22. ARIZ. REV. STAT. ANN. § 13-451(B) (1956). A murder which is perpetrated by means of poison, lying in wait, or torture will automatically be considered willful, deliberate, or premeditated in Arizona. *Id.* § 13-452 (Supp. Pamphlet 1973). The only Arizona case outlining the treatment of murder by poison is a masterpiece of circular reasoning: the statute implying malice aforethought from poisonings was construed to apply only where poison is used to commit a murder. Where poison perpetrates a killing which is not murder—that is, a killing without malice—the statute does not operate, and thus the poisoning defendant can be guilty of manslaughter despite the clear language of section 13-452(A). Eytinge v. Territory, 12 Ariz. 131, 141-42, 100 P. 443, 446 (1909).

23. ARIZ. REV. STAT. ANN. § 13-451(B) (1956). An abandoned and malignant heart has been defined as "conduct by the use of a weapon or other appliance likely to produce death, and by the brutal and bloodthirsty use of such instrumentality." State v. Chalmers, 100 Ariz. 70, 76, 411 P.2d 448, 452 (1966). As such, the phrase appears to be a quasi-medical circumlocution for the use of a deadly weapon. The latter act, however, is sufficient of itself to support a finding of malice. *See* State v. Harwood, 110 Ariz. 375, 378-79, 519 P.2d 177, 180-81 (1974).

a blow of the hand,[24] from killing a woman,[25] from any "unjustified" killing,[26] or merely from failure to seek medical attention for the victim.[27] Since malice cannot be implied from negligence,[28] these cases logically require that the foregoing acts are never negligently performed. In reality, of course, such acts are sometimes negligently performed without malice. When they are so performed, however, the implication of malice can readily overcome the factual negligence.[29] Confusion is compounded by the fact that malice is generically defined in Arizona's general statutory definitional section as importing "a wish to vex, annoy or injure another person, or an intent to do a wrongful act,"[30] a definition excluding implied malice and not wholly harmonious with the judicial concept of express malice. Thus, the word "malice" takes on chameleon-like colors, depending upon which statutes and crimes are involved. It is little wonder that juries submit repeated questions during deliberations about the meaning of such terms.[31]

Other mens rea concepts are equally inconsistent and sometimes deceptive as well. For example, "unlawfully"[32] and "feloniously"[33] are not truly mental states but rather legally masked descriptions of criminal conduct. Another type of problem lies in the redundant use of bona fide mens rea terms. "Wilfully and maliciously," for instance, as used in defining four degrees of arson,[34] mean the same thing because criminal intent permits the implication of malice.[35] Occasionally, mental states describing differing degrees of culpability coexist in one offense, an identical sentence being imposed for both behaviors as though the culpability were identical, although identical culpability clearly is not the case. An example is the locomotive engineer who is equally culpable whether his action causing a passenger's death in a collision is willful or negligent.[36]

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24. State v. Mendell, 111 Ariz. 51, 54, 523 P.2d 79, 82 (1974).
25. State v. Harwood, 110 Ariz. 375, 379, 519 P.2d 177, 181 (1974).
26. State v. Mendell, 111 Ariz. 51, 55, 523 P.2d 79, 83 (1974).
27. Drury v. Barr, 107 Ariz. 124, 126, 483 P.2d 539, 541 (1971). *But cf.* State v. Chalmers, 100 Ariz. 70, 76-77, 411 P.2d 448, 452 (1966) (criminal negligence replaces intent only when legislature expressly provides).
28. State v. Chalmers, 100 Ariz. 70, 75-76, 411 P.2d 448, 452 (1966).
29. *See* State v. Mendell, 111 Ariz, 51, 54, 523 P.2d 79, 82 (1974).
30. ARIZ. REV. STAT. ANN. § 1-215(15) (1974); *see* PROPOSED ARIZONA CODE, *supra* note 1, § 201, Commentary.
31. *See* State v. Tinghitella, 108 Ariz. 1, 5, 491 P.2d 834, 838 (1971).
32. ARIZ. REV. STAT. ANN. § 13-241(B) (Supp. Pamphlet 1973); *see* State v. Brock, 101 Ariz. 168, 171-72, 416 P.2d 601, 604-05 (1966); *In re* Anonymous, Juv. Ct. No. 6358-4, 14 Ariz. App. 466, 484 P.2d 235 (1971).
33. ARIZ. REV. STAT. ANN. § 13-661(A)(1) (1956); *see* State v. Harris, 73 Ariz. 138, 140-41, 238 P.2d 957, 958 (1952). Defining theft generically as a felonious taking causes particular definitional problems where petty theft is involved, since the latter is not a felony. *See* ARIZ. REV. STAT. ANN. § 13-663(B) (Supp. Pamphlet 1973).
34. ARIZ. REV. STAT. ANN. §§ 13-231 to -234 (1956).
35. *See id.* § 1-215(15) (1974).
36. *See id.* § 13-459 (1956). Similarly, the Arizona supreme court treats death by

The mens rea landscape is further muddied by the gratuitous presumption that "a person intends the natural and probable consequences of his actions."[37] While this presumption is regularly idolized as a handy prosecutorial tool, it squares poorly, if at all, with the requirement that the state prove all elements of a crime, particularly the element of specific intent in some crimes.[38] The major flaw in this fiction is the factual one that a person does not necessarily intend any or all of the natural or probable consequences of his acts: should putative Mrs. O'Leary, for example, be criminally liable for every fiber destroyed in the Chicago fire?[39]

The purpose of mens rea, at least in part, is to classify offenders by degree of moral guilt in proportion to the severity of their intent rather than by the effects of their purely bodily movements. The present proliferation of ill-defined mental states confounds that goal. The Model Penal Code[40] and other modern criminal codes[41] offer a workable solution in an all-embracing four-tiered framework of precisely defined mental states which identify discernible levels of blameworthiness without the archaic jargon described above. The Model Penal Code, for example, divides mens rea into four degrees of culpability: purposely, knowingly, recklessly, and negligently.[42] Such a system re-

arson as first-degree murder, whether the death occurs via premeditation or merely by accident. *In re* Anonymous, Juv. Ct. No. 6358-4, 14 Ariz. App. 466, 472, 484 P.2d 235, 241 (1971).

37. *See* State v. Preis, 89 Ariz. 336, 339-40, 362 P.2d 660, 662 (1961); State v. Dykes, Cr. 82009 (Super. Ct., Maricopa Co., Ariz., Sept. 13, 1974).

38. *See* Mullaney v. Wilbur, 421 U.S. 684 (1975); State v. Jamison, 110 Ariz. 245, 248, 517 P.2d 1241, 1244 (1974). *See also* State v. Daniels, 106 Ariz. 497, 502, 478 P.2d 522, 527 (1970), *noted in* 13 ARIZ. L. REV. 454 (1971).

39. *See* State v. Chalmers, 100 Ariz. 70, 411 P.2d 448 (1966). In *Chalmers* the court avoided using this presumption in a case of vehicular manslaughter on the ground that death was not the direct causal result of the intended act of speeding. *Id.* at 75-77, 411 P.2d at 452. The presumption seemingly dictates a contrary holding; vehicular manslaughter, therefore, appears to be an arbitrary exception to the presumption of natural and probable consequences. For a further critique of this presumption, see Carter v. State, 297 So. 2d 175 (Fla. 1975).

40. MODEL PENAL CODE § 2.02; *see id.*, Comments, at 123-29 (Tent. Draft No. 4, 1955).

41. *See, e.g.*, ILL. ANN. STAT., ch. 38, §§ 4.4-.7 (Smith-Hurd 1962); N.Y. PENAL LAW §§ 15.05-.15 (McKinney 1967); TEX. PENAL CODE ANN. §§ 6.02-.03 (1974).

42. A person acts purposely if his actions reflect a conscious objective to cause the result or engage in the conduct. MODEL PENAL CODE § 2.02(2)(a)(i). He also acts purposely where there are attendant circumstances that will cause his actions to create a given result and he is aware of such circumstances or believes or hopes that they exist. *Id.* § 2.02(2)(a)(ii). A person acts knowingly when he is aware that his conduct is practically certain to cause the result. *Id.* § 2.02(2)(b)(ii). Recklessly defines situations where the actor consciously disregards the existence of a substantial and unjustifiable risk that his conduct is likely to cause the result. *Id.* § 2.02(2)(c). "The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation." *Id.* A person acts negligently, on the other hand, when he should have been aware of a substantial and unjustifiable risk that would result from his conduct. *Id.* § 2.02(2)(d). The risk must be of such nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances

solves the mens rea problem by making crime and punishment fit the mental state of the actor more accurately than does the terminology of malice aforethought, abandoned and malignant heart, and other verbal mirages in present law.

CRIMES AGAINST PERSONS

Homicide

Existing Arizona homicide statutes incorporate many of the confusing mens rea concepts outlined above; they also reveal imprecise degree distinctions and an unnecessary separation of first and second-degree murder. Most of these problems can be traced directly to the English common law, from which Arizona's homicide statutes derive. Common law murder, for instance, originally required a specific mental intent denominated "malice aforethought," meaning a design contemplated in advance of the fatal act.[43] Eventually the common law interpreted "aforethought" to mean that the killing must not be simply an afterthought. As a result, the aforethought language gradually became synonymous with deliberate, which was read as meaning intentional.[44] Thus the malice originally sought to be defined was gradually permitted to be implied from evidence of intent.[45]

In part because of this mens rea confusion, homicide categories are historically ill-defined. Manslaughter early was defined as an unlawful homicide committed without malice aforethought.[46] All homicides committed neither with malice aforethought nor under circumstances of justification were dealt with as manslaughter. Manslaughter then branched into three ill-defined categories: voluntary, involuntary, and vehicular. The classic "heat of passion" homicide was placed in a special category of voluntary manslaughter,[47] thus leaving involuntary

known to him, involves a gross deviation from the standard of care that would be exercised by a reasonable man in his situation. *Id.* Negligence will be regarded as the exceptional basis for liability, however, and must be so designated expressly in the statute in order to supply the mens rea element for any crime or portion thereof. *See id.* § 2.02(3). The Arizona Criminal Code Commission in turn has adopted this four-tiered mens rea hierarchy in the proposed Arizona Revised Criminal Code. PROPOSED ARIZONA CODE, *supra* note 1, §§ 201, 203(b). The analogous Arizona criminal provisions are virtually identical with one exception. In the proposed Arizona version, the term "purposely" is replaced by "intentionally," and the meaning changed so that the highest degree of culpability no longer involves knowledge, belief, or hope that certain circumstances exist that will cause a result. *Compare* PROPOSED ARIZONA CODE, *supra* note 1, § 201(a) *with* MODEL PENAL CODE § 2.02(2)(a).

43. R. PERKINS, CRIMINAL LAW 34-35 (2d ed. 1969).

44. *See* S. KADISH & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 203-04 (3d ed. 1975).

45. See text accompanying notes 23-29 *supra.*

46. *See* R. PERKINS, *supra* note 43, at 51; W. LAFAVE & A. SCOTT, JR., CRIMINAL LAW 571 (1972).

47. *See* ARIZ. REV. STAT. ANN. § 13-456(A)(1) (Supp. Pamphlet 1973). If adequate provocation exists and the killing occurs before the passions cool, the mens rea

manslaughter as the catchall for all otherwise unclassified homicides, including the broad field of homicide by criminal negligence.[48] Another exception arose from the involuntary manslaughter catchall when Arizona, with a number of other states, adopted a vehicular manslaughter statute for homicides caused by a motor vehicle.[49]

Arizona's homicide law is in sore need of legislative surgery to eliminate the unnecessary proliferation of crimes. It should be relieved, first, of the troublesome distinctions between degrees of murder. Proponents of multiple degrees historically have maintained that the degree format serves two functions. First, the degrees are thought to guard against the overzealous application of the death penalty.[50] The rarity of capital punishment in recent times, however, appears to reflect moral and constitutional qualms rather than the degree format. A second similar rationale, not significantly more persuasive, views second-degree murder as a vehicle of mercy permitting a lesser sentence where mitigating factors appear.[51] Since mercy is a matter of sentencing, however, it should be incorporated in sentencing statutes, not within the definition of the offense itself.[52]

A further reason for abandoning a two-tiered degree format is its inflexibility for the multi-faceted array of circumstances, methods, motives, and mental states that may go into the crime of murder. The simple fact is that homicidal behavior defies elementary classification.[53] To the extent that compartmentalization by blameworthiness is possible, premeditation and planning do not provide the distinguishing key. In practice, it is simply not true that all those who premeditate their

required for murder is mitigated, reducing the crime to voluntary manslaughter. *See* Wiley v. State, 19 Ariz. 346, 356, 170 P. 869, 873 (1918); State v. Davis, 50 S.C. 405, 422-24, 27 S.E. 905, 911 (1897); R. PERKINS, *supra* note 43, at 52-69; Note, *Manslaughter and the Adequacy of Provocation: The Reasonableness of the Reasonable Man*, 106 U. PA. L. REV. 1021, 1022-24 (1958). *See also* Mullaney v. Wilbur, 421 U.S. 684 (1975) (requiring the state rather than the accused to prove the "heat of passion" element).

48. *See* R. PERKINS, *supra* note 43, at 70-71; *cf.* State v. Dixon, 107 Ariz. 415, 489 P.2d 225 (1971); Harding v. State, 26 Ariz. 334, 225 P. 482 (1924). Mere negligent homicide—negligence slightly below the grade of manslaughter—was not considered homicide under the common law, but fell within the law of torts. The common law treatment of careless killings was inadequate because of the ill-defined recklessness test used to bring grossly negligent homicide within the criminal law. Since the law never agreed on precise meanings for the terms "reckless" or "grossly negligent," identical negligent homicides could be litigated criminally, civilly, or both. *See* R. PERKINS, *supra* at 71-73.

49. ARIZ. REV. STAT. ANN. § 13-456(A)(3) (Supp. Pamphlet 1973). See discussion note 63 *infra* for the rationale behind this separate treatment.

50. *See* Sellin, *The Death Penalty* in MODEL PENAL CODE 1, 73 (Tent. Draft No. 9, 1959).

51. *See* Act 9, § 701, [1972] Hawaii Sess. Laws 86; KY. REV. STAT. ANN. § 507.020 (1975).

52. See 65 COLUM. L. REV. 1496, 1499 (1965).

53. "[T]here are not in fact two classes of murder but an infinite variety of offenses which shade off by degrees from the most atrocious to the most excusable . . . ." REPORT OF THE ROYAL COMMISSION ON CAPITAL PUNISHMENT 38 (1949).

actions are the most blameworthy of criminals. Euthanasia, infanticide in response to birth defects, and suicide pacts typically involve prolonged contemplation, and yet these homicides lack the depravity associated with deliberate first-degree murder. These examples would seem not only to illustrate the numerous pitfalls in the present premeditation-deliberation standard,[54] but also to foreshadow a similar development for any redefined categories based on the same conceptual foundation.

The degree format and the premeditation index also are sources of disparity in jury verdicts. Under present law, juries may return a capital or noncapital verdict upon the same evidence, finding or declining to find the evanescent elements of premeditation, deliberation, or malice according to their desired sentencing goal. This observation does not impugn the integrity of jurors so much as to recognize their human nature. Legal terms of art spelling the difference between life and death in a degree format opaque to human understanding encourage the exercise of subjective, disparate, and discretionary judgments open to the play of unconscious prejudices. Long ago, Justice (then Chief Judge) Cardozo recognized that the obscure distinctions between capital and noncapital grades of homicide, and in particular the concepts of premeditation and deliberation, grant to juries an indirect "dispensing power" of mercy:

> the distinction is much too vague to be continued in our law. . . . What we have is merely a privilege offered to the jury to find the lesser degree when the suddenness of the intent, the vehemence of the passion, seems to call irresistibly for the exercise of mercy. I have no objection to giving them this dispensing power, but it should be given to them directly and not in a mystifying cloud of words. The present distinction [between first and second-degree murder] is so obscure that no jury hearing it for the first time can fairly be expected to understand it. I am not at all sure that I understand it myself after trying to apply it for many years and after diligent study of what has been written in the books. Upon the basis of this fine distinction with its obscure and mystifying psychology, scores of men have gone to their death.[55]

In short, the premeditation formula is a confusing oversimplification at best and at worst an inaccurate index of the blameworthiness supposedly separating first from second-degree murder.

54. Premeditation in Arizona means more—or less—than simply "thinking before acting;" it refers to any thought process accompanying the fatal act, even if only instantaneous. *See, e.g.*, State v. Duke, 110 Ariz. 320, 325, 518 P.2d 570, 575 (1974); State v. Moore, 109 Ariz. 111, 115, 506 P.2d 242, 246 (1973); Macias v. State, 36 Ariz. 140, 149-50, 283 P. 711, 715 (1929).

55. B. CARDOZO, LAW AND LITERATURE 99-101 (1931).

The ideal course should be statutory recognition of only one degree of murder.[56] Premeditation and deliberation as well as their disreputable cousin, malice aforethought, would thereby disappear happily from the murder statute. A single degree of murder could readily include both homicides achieved by conscious objective and those achieved by recklessness manifesting extreme indifference to human life.[57] Reducing murder to a single degree, however, will not completely eradicate the problems inherent in Arizona's homicide statutes. Equally serious problems appear in the manslaughter statute. While retention of manslaughter for less willful homicides is desirable, problems abound with Arizona's present categorization of manslaughter offenses.[58] The "without due caution" language defining involuntary manslaughter is initially troublesome.[59] Such language provides no basis for distinguishing between the criminal negligence on which criminal prosecution must be based and lesser degrees of negligence which remain in the province of tort law.[60]

A particularly cloudy area in Arizona law of criminal negligence is that of causation, in which Arizona appears to be a lonely exception to the rule that the test of causation for homicide is more restrictive than that applied in tort actions.[61] These problems could be remedied

56. *See, e.g.*, Act 9, § 701, [1972] Hawaii Sess. Laws 86; KY. REV. STAT. ANN. § 507.020 (1975); MODEL PENAL CODE § 210.2(2); NATIONAL COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS, PROPOSED NEW FEDERAL CRIMINAL CODE § 1601 (Final Rep. 1971) [hereinafter cited as PROPOSED FED. CRIM. CODE]. The proposed Arizona Revised Criminal Code maintains the first and second-degree murder dichotomy. *See* PROPOSED ARIZONA CODE, *supra* note 1, §§ 1103-1104.

57. The drafters of the Model Penal Code indicated that if the definition of murder were altered in this manner, the various degrees of murder served no valid purpose in establishing gradations of prison sentences. See MODEL PENAL CODE § 201.2, Comments, at 28-29 (Tent. Draft No. 9, 1959). See text & note 56 *supra*.

58. ARIZ. REV. STAT. ANN. § 13-456 (Supp. Pamphlet 1973). Manslaughter is divided into voluntary manslaughter, committed in the heat of passion; involuntary manslaughter, committed without due caution and circumspection; and vehicular manslaughter.

59. *Id.* § 13-456(A)(2).

60. For a discussion of negligence in the tort context, see W. PROSSER, HANDBOOK OF THE LAW OF TORTS §§ 30-32 (4th ed. 1971).

61. Arizona's approach to causation was best enunciated in State v. Hitchcock, 87 Ariz. 277, 350 P.2d 681 (1960), *cert. denied*, 365 U.S. 609 (1961). The *Hitchcock* court quoted with approval a Pennsylvania court's statement on the causation problem:

> Our decision in the Moyer-Byron case was an application of the long established principle that he whose felonious act is the *proximate* cause of another's death is *criminally* responsible for that death and must answer to society for it exactly as he who is *negligently* the *proximate cause* of another's death is *civilly* responsible for that death and must answer in damages for it. . . . Professor Joseph H. Beale of Harvard Law School in an article entitled 'The Proximate Consequences of an Act,' 33 Harvard L.R. 633, 646, said: 'Though there is an active force intervening after defendant's act, *the result will nevertheless be proximate if the defendant's act actively caused the intervening force.* In such a case the defendant's force is really continuing in active operation, *by means of the force it stimulated into activity.* . . . Defendant may by his conduct so affect a person or an animal as to stir him to action; the result of such action is chargeable to defendant.'

Id. at 281, 350 P.2d at 683-84 (emphasis in original), *quoting* Commonwealth v.

by demarcating a separate offense of criminally negligent homicide, newly defined so as to be clearly separate from tort law.[62] Further, a generic manslaughter statute could dispense with specialized mention of vehicular homicide, consistent with the concept that mental state rather than instrumentality should determine culpability.[63]

An additional problem results from use of the meaningless and possibly self-contradictory phrase "commission of a lawful act which might produce death in an unlawful manner," to define one of the categories of involuntary manslaughter.[64] With reference to the heat-of-passion test for voluntary manslaughter,[65] mitigation should not be restricted to objective circumstances alone[66] since it is possible for any event, including mere words, to arouse extreme mental or emotional disturbance. The present test needs a subjective element to match the objective test of "reasonable explanation or excuse," allowing the trier of fact to assess reasonableness based on circumstances as the defendant viewed them at the time of the crime. The question in the end should be whether the actor's loss of self-control can be rationally understood in terms arousing enough sympathy to reduce murder to manslaughter.[67]

Almeida, 362 Pa. 596, 603-04, 68 A.2d 595, 599 (1949). In the same sentence, the court uses the term "proximate cause" for both criminal responsibility and civil tort liability without making a distinction between the two concepts.

The Arizona supreme court has since cited *Hitchcock* without revision, adding only that "as long as one's act directly causes or accelerates the death of another he will be held to account for his criminal act." State v. Contreras, 107 Ariz. 68, 70, 481 P.2d 861, 863 (1971). Later, the Arizona supreme court added to the definition of causation the idea that the accused is not relieved of homicidal responsibility merely because other causes contribute to the death, so long as the other causes are not the proximate cause of the death. Responsibility will be attributed so long as the other causes act indirectly through a chain of natural effects and causes unchanged by human action. Drury v. Burr, 107 Ariz. 124, 126, 483 P.2d 539, 541 (1971).

62. *See, e.g.*, MODEL PENAL CODE § 210.4; PROPOSED ARIZONA CODE, *supra* note 1, § 1101; PROPOSED FED. CRIM. CODE, *supra* note 56, § 1603.

63. The motor-vehicle manslaughter provision singles out motorists for special treatment based on the means with which the homicide is committed rather than on the mental state of the actor. *See* ARIZ. REV. STAT. ANN. § 13-456(A)(3) (Supp. Pamphlet 1973). The traditional rationale for vehicular manslaughter statutes is that it is difficult to convict the negligent motorist of manslaughter. Jury reluctance to convict has prompted many states to enact special statutes dealing with vehicular homicide, reducing the grade of the offense and the possible sentence on conviction below levels otherwise obtainable for manslaughter by negligence. Such a vehicular manslaughter statute should be unnecessary in a system treating all negligent homicide as a distinct offense of a lower grade.

64. *Id.* § 13-456(A)(3)(a).

65. *Id.* § 13-456(A)(1) (1956).

66. A frequent problem in the area of heat-of-passion homicide has been determining whether an objective or subjective test should be used in judging whether the homicide occurred in the heat of passion. Arizona presently requires that both subjective and objective tests be met: there must be sufficient provocation to place a reasonable man in a heat of passion, and the defendant must in fact have been so provoked. State v. Douglas, 2 Ariz. App. 178, 180, 407 P.2d 117, 119 (1965); *see* State v. Michael, 103 Ariz. 46, 51, 436 P.2d 595, 600 (1968).

67. *Cf.* State v. Michael, 103 Ariz. 46, 51, 436 P.2d 595, 600 (1968) (requiring "adequate provocation"). *See generally* S. KADISH & M. PAULSEN, *supra* note 44, at 225-26.

Finally, the misdemeanor-manslaughter rule imbedded in the involuntary manslaughter offense[68] should be abandoned. That rule characterizes as manslaughter death resulting from the commission of any misdemeanor—a highly inequitable result if the misdemeanor is merely an overparked car, a mere trespass, or a discarded refrigerator.[69] Such "ordinary" negligence is no reason for homicidal sanctions. Due to the potential severity of the rule, California has judicially limited the applicability of its misdemeanor-manslaughter rule to misdemeanors that are inherently dangerous.[70] A similar change in the law is needed in Arizona.

Problems exist also with the first cousin of the misdemeanor-manslaughter principle, the felony-murder rule. The difficulties here do not stem from the rule's applicability to too wide a range of crimes, since it operates only in regard to enumerated felonies felt to be inherently dangerous: arson, first-degree rape, robbery, burglary, kidnapping, mayhem, or sexual molestation of a child.[71] Rather, it is the effect of the rule within the criminal justice system and the broad scope of felony-related deaths to which the rule has been applied that prove the source of criticism. Under the felony-murder rule, proof of homicidal premeditation for a killing that occurs during the perpetration of an enumerated felony is obviated.[72] The felonious actions of the accused presumably are proof enough of an intent to commit murder. The felony murder rule thus imputes the mens rea essential to first-degree murder to one who may not in fact have had that mental state.[73]

Whether explained by the usual reference to agency, proximate

68. *See* ARIZ. REV. STAT. ANN. § 13-456(A)(2) (Supp. Pamphlet 1973).

69. *See* R. PERKINS, *supra* note 43, at 73-79. A recent case in point is State v. Powers, CR 91765 (Super. Ct., Maricopa County, Ariz., June 23, 1976), wherein a barroom brawler, likely guilty of a simple assault at most, was convicted of involuntary manslaughter when he and his sparring partner ran into the street and his partner was killed by a passing vehicle.

70. *See* People v. Williams, 13 Cal. 3d 559, 562, 531 P.2d 778, 780, 119 Cal. Rptr. 210, 212 (1975).

71. ARIZ. REV. STAT. ANN. § 13-452 (Supp. Pamphlet 1973). Attempted perpetration as well as the completed crime is covered by this rule. *Id. See generally* State v. Hitchcock, 87 Ariz. 277, 282, 350 P.2d 681, 684 (1960), *cert. denied*, 365 U.S. 609 (1961); *In re* Anonymous, Juv. Ct. No. 6358-4, 14 Ariz. App. 466, 484 P.2d 235 (1971). There apparently is no felony-murder rule in Arizona classifying as second-degree murder killings occurring during nonenumerated felonies, although case law is inconsistent on this point. *Compare* State v. Dixon, 109 Ariz. 441, 442-43, 511 P.2d 623, 624-25 (1973), *with* State v. Jones, 95 Ariz. 4, 7, 385 P.2d 1019, 1021 (1963), *and* Wiley v. State, 19 Ariz. 346, 356-57, 170 P. 869, 873-74 (1918).

72. *In re* Anonymous, Juv. Ct. No. 6358-4, 14 Ariz. App. 466, 472, 484 P.2d 235, 241 (1971).

73. *See* State v. Howes, 109 Ariz. 255, 257, 508 P.2d 331, 333 (1973); R. PERKINS, *supra* note 43, at 42. This rule has been perpetuated in the proposed Arizona Revised Criminal Code. Felony murder "requires no specific mental state other than what is required for the commission of the enumerated felonies." PROPOSED ARIZONA CODE, *supra* note 1, § 1104(b). *See generally* "Felony Murder and Merger in Arizona," 17 ARIZ. L. REV. 639, 791 (1975).

cause, or vicarious liability,[74] the rule has an extensive history of thoughtful condemnation. Since 1834, when His Majesty's Commissioners on Criminal Law found the rule to be "totally incongruous with the general principles of our jurisprudence,"[75] the rule has been condemned by numerous writers and scholars as an end run around mens rea motivated by pure vengeance.[76] An additional source of criticism is the sometimes bizarre results of the rule's application: it has been used to support murder convictions where one victim of a robbery accidentally shoots another victim,[77] where a robber kills his partner during a robbery,[78] where one police officer shoots another officer,[79] where one of two felons is killed by police,[80] and where a bar patron dies of fright during a holdup.[81]

Because of these deficiencies in the felony-murder rule, state legislatures and courts have sought to limit its scope.[82] Some recently en-

74. Comment, *California Rewrites Felony Murder Rule*, 18 STAN. L. REV. 690, 694 (1966).

75. First Report of His Majesty's Commissioners on Criminal Law 29 (1834).

76. *E.g.*, MODEL PENAL CODE § 201.2(1)(b), Comment 4 (Tent. Draft No. 9, 1959); S. KADISH & M. PAULSEN, *supra* note 44, at 278-81; R. PERKINS, *supra* note 43, at 44-45; Prevezer, *The English Homicide Act*, 57 COLUM. L. REV. 624, 633-36 (1957).

77. People v. Harrison, 176 Cal. App. 2d 330, 345, 1 Cal. Rptr. 414, 425 (Dist. Ct. App. 1959).

78. *See* People v. Cabaltero, 31 Cal. App. 2d 52, 58, 87 P.2d 364, 367 (Dist. Ct. App. 1939).

79. People v. Hickman, 59 Ill. 89, 95, 297 N.E.2d 582, 586 (1974). While *Hickman* adopted the tort concept of proximate cause to invoke criminal liability for the felon, the consistent trend in other jurisdictions has been to restrict the use of the felony-murder rule to its common law application, imposing liability only when the homicidal act is committed by a felon or cofelon in furtherance of the felony. *See* discussion note 82 *infra*. An approach proposed by the American Law Institute in its Model Penal Code would avoid the harsh effect of the felony-murder doctrine in a *Hickman* situation without abolishing the doctrine itself. The Code suggests that the felony-murder rule be modified to raise only a rebuttable presumption of the mens rea required for murder rather than the conclusive presumption that is now operative. *See* MODEL PENAL CODE § 210.2. See text accompanying notes 89-90 *infra*. Such a presumption seemingly could have been successfully rebutted by the defendants in *Hickman*. A statute limiting the rule in this manner would more properly balance the relationship between criminal liability and moral culpability than does the existing—or proposed—felony-murder concept.

80. *See* State v. Burton, 130 N.J. Super. 174, 179-81, 325 A.2d 856, 859-60 (L. Div. 1974); Commonwealth *ex rel.* Smith v. Meyers, 438 Pa. 218, 261 A.2d 550 (1970). *But see* State v. Suit, 129 N.J. Super. 336, 350, 323 A.2d 541, 549 (L. Div. 1974).

81. *See* State v. McKeiver, 89 N.J. Super. 52, 56, 213 A.2d 320, 322 (L. Div. 1965).

82. For example, in a series of well-known decisions, the Pennsylvania courts have restricted their felony-murder rule. The trend began with Commonwealth v. Redline, 391 Pa. 486, 137 A.2d 472 (1958), where the Pennsylvania supreme court overturned the felony-murder conviction of a felon who, fleeing from an armed robbery, initiated a fusillade of bullets that resulted in the death of a cofelon. In reaching its decision, the court distinguished Commonwealth v. Almeida, 362 Pa. 596, 68 A.2d 595 (1949), which had upheld the defendant's felony-murder conviction for the accidental shooting of a bystander by police during the defendant's armed robbery. *Redline* was distinguished from *Almeida* because it involved a case of justifiable homicide—the police officer's shooting of the cofelon—while *Almeida* had concerned a situation of excusable homicide—the accidental killing of a bystander by a police officer; only in the latter instance, according to the court, could the cofelon be held liable under the felony-murder doctrine. This tenuous distinction was ended in Commonwealth *ex rel.* Smith v. Meyers, 438 Pa. 218, 261 A.2d 550 (1970), where the court overruled *Almeida*.

acted statutes excuse the defendant if he can show that he reasonably did not foresee the possibility of harm,[83] did not himself do the murderous act,[84] was not himself armed with a deadly weapon,[85] and did not reasonably believe that any other participants were so armed.[86] Colorado has placed strict judicial limitations on the felony-murder rule.[87] California courts, on the other hand, have engaged in a perplexing game of "two steps forward, one step back," leaving uncertain their attempts to reform the rule.[88] The Model Penal Code also has reacted to the criticism of felony murder, changing the rule from an issue of substantive law to one of evidence.[89] Under this change there is no separate felony-murder rule, but the recklessness necessary for a murder conviction is presumed where the actor participates in a crime included in the usual first-degree felony-murder enumeration or was an accomplice in such a crime.[90]

Yet even in such limited formulations the felony-murder rule remains objectionable. It is not consistent with the rationale of mens rea to convert an accidental, negligent, or reckless killing into murder simply because it falls within the temporal parameters of another crime. As Holmes stated in *The Common Law*,

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83. *See* CONN. GEN. STAT. ANN. § 53a-54c(D) (Supp. 1976); N.Y. PENAL LAW § 125.25(3)(d) (McKinney 1975).

84. *See* CONN. GEN. STAT. ANN. § 53a-54c(A) (Supp. 1976); N.Y. PENAL LAW § 125.25(3)(a) (McKinney 1975).

85. *See* CONN. GEN. STAT. ANN. § 53a-54c(B) (Supp. 1976); N.Y. PENAL LAW § 125.25(3)(b) (McKinney 1975).

86. *See* CONN. GEN. STAT. ANN. § 53a-54c(C) (Supp. 1976); N.Y. PENAL LAW § 125.25(3)(c) (McKinney 1975).

87. *See* Alvarez v. District Court, 186 Colo. 37, 41-42, 525 P.2d 1131, 1133 (1974) (felony-murder limited to killings by one of the felons).

88. In People v. Washington, 62 Cal. 2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965), the California court appeared substantially to restrict the scope of the felony-murder rule in overturning the conviction of a felon based on the fatal shooting of his accomplice by the victim of their armed robbery. The *Washington* opinion concluded that the rule's requirement that the killing be committed in perpetration of the robbery limited its applicability to killings committed by the felon himself or by his accomplice, consistent with accepted principles governing the liability of one person for the criminal acts of another. *Id.* at 781, 462 P.2d at 133, 44 Cal. Rptr. at 445. The *Washington* court indicated, however, that a felon who initiates a gun battle may be found guilty of murder if his victim resists and kills another, but on the basis that such action showed a reckless disregard for life rather than under the felony-murder doctrine. *Id.* at 782, 402 P.2d at 134, 44 Cal. Rptr. at 446.

In Taylor v. Superior Court, 3 Cal. 3d 578, 477 P.2d 131, 91 Cal. Rptr. 27 (1970), the California supreme court severely limited the potential implications of *Washington* by holding that the recklessness standard enunciated in *Washington* as a basis for quasi-vicarious liability was met where defendant's cofelon threatened robbery victims with execution if they did not cooperate. One of the frightened victims shot the cofelon, and defendant was held liable for the murder. *See generally* Note, *Limitations on the Applicability of the Felony-Murder Rule in California*, 22 HASTINGS L.J. 1327 (1971); Comment, *Merger and the California Felony-Murder Rule*, 20 U.C.L.A.L. REV. 250 (1972); 18 STAN. L. REV. 690 (1966).

89. *See* MODEL PENAL CODE § 201.2(1)(b), Comment, at 33 (Tent. Draft No. 9, 1959).

90. *Id.* See discussion note 79 *supra*.

> If the object of the rule is to prevent such accidents [as the killing of a man in a hen-house by an unwitting chicken thief], it should make accidental killing with firearms murder, not accidental killing in the effort to steal; while, if its object is to prevent stealing, it would do better to hang one thief in every thousand by lot.[91]

Engaging in prohibited behavior, of course, may show recklessness or a practical certainty of death sufficient to establish manslaughter, but such a finding is an independent determination resting on the mental state of the individual offender and, as such, needs no statutory mandate. Since abuses proliferate under the rule, it is more consistent with mens rea doctrine to abolish it completely, as England,[92] Hawaii,[93] and Kentucky[94] have done, and to reinstate a more than token adherence to the precise meanings of mens rea in lieu of the arbitrary attribution of mental states where they do not exist. Both logic and fairness mandate the rule's demise[95] to avoid such situations as a robber's homicide liability where his intended victim ran down the street, jumped into a river, and drowned.[96]

Assault

Existing Arizona law manifests an encyclopedic proliferation of redundant assault-related offenses.[97] There are presently 15 such stat-

91. O. HOLMES, THE COMMON LAW 58 (1881).

92. English Homicide Act, 5 & 6 Eliz. 2, c. 11, § 1 (1957):

> Where a person kills another in the course or furtherance of some other offence, the killing shall not amount to murder unless done with the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in the course or furtherance of another offence.

93. HAWAII REV. STAT. § 701 (1970).

94. KY. REV. STAT. ANN. § 507.020 (1975).

95. In commenting upon the American Law Institute proposal, its reporter stated:

> Despite the generality of the rule in the United States and the frequency with which it is deemed applicable to even accidental homicide, principled argument in its defense is hard to find. Such argument as can be made reduces in essence to the explanation Holmes gave in *The Common Law* . . . for finding the law "intelligible as it stands," though he carefully withheld his own endorsement:
>
> ". . . if experience shows, or is deemed by the law-maker to show, that somehow or other deaths which the evidence makes accidental happen disproportionately often in connection with other felonies, or with resistance to officers, or if on any other ground of policy it is deemed desirable to make special efforts for the prevention of such deaths, the law-maker may consistently treat acts which, under the known circumstances, are felonious, or constitute resistance to officers, as having a sufficiently dangerous tendency to be put under a special ban. The law may, therefore, throw on the actor the peril, not only of the consequences foreseen by him, but also of consequences which, although not predicted by common experience, the legislator apprehends."

MODEL PENAL CODE § 201.2(1)(b), Comment, at 37-38 (Tent. Draft No. 9, 1959). The reporter then noted that there was no basis in experience for thinking that accidental homicides happened disproportionately often in connection with specific felonies. Indeed, the number of homicides occurring in the commission of such crimes as robbery, rape, and murder was lower than some thought. *Id.* at 38-39.

96. This somewhat anomalous result occurred in State v. Casper, 192 Neb. 120, 219 N.W.2d 226 (1974).

97. *Compare, e.g.*, ARIZ. REV. STAT. ANN. § 13-245(C) (Supp. Pamphlet 1973) *with id.* § 13-249; *and id.* § 13-252 (1956) *with id.* § 13-253.

utes, most of which bear multiple provisions sprinkled with archaic language that adds little more than local western color.[98] The various statutes tend to overlap; some criminalize behavior that should not be criminalized, and others exempt from punishment behavior that clearly should be criminal.

Application of Arizona's archaic statutes has spawned some bizarre cases. Section 13-242, for example, requires potential injury, however slight, as an element of assault. Nonetheless, that statute gives spitting as an example of an unlawful assault. Moreover, in dicta applicable to all lovers' lanes, the Arizona supreme court has stated that the mere unconsented touching of a girl on her side or shoulders and the holding of her hand may constitute aggravated assault.[99] Some undefined assaults may be pregnant with another larger twin: a defendant who had beaten a police officer has been held liable for assault with intent to commit a felony, the intended felony being aggravated assault.[100]

Remedying the statutory situation that led to these unexpected results requires a complete overhaul of the present multiplicity of offenses and exceptions. First of all, the distinction between assault and battery should be abolished.[101] Almost by definition in present law,

98. The basic definition of assault and battery is provided in section 13-241. Section 13-242 adds that either assault or battery can be committed by any means capable of inflicting even the slightest injury, including "spitting in the face." Sections 13-243 and 13-244 define simple assault and simple battery. Section 13-245(A), on the other hand, lists nine circumstances constituting aggravated assault or battery, including the infliction of disgrace upon a person by the use of cowhide or a whip, and commission of a serious or premeditated injury. Section 13-246 carves out certain exceptions to criminal assault for justified uses of force such as violence used to preserve order in a religious or political meeting or that used by parents or a teacher to discipline children. Section 13-247 specifically penalizes public officers who unnecessarily assault persons. Section 13-248, although defining assault with intent to commit murder, is actually penalizing attempted murder rather than assault. Section 13-249 penalizes all assaults committed with a deadly weapon or deadly force. Section 13-250 imposes a harsher penalty for assault with a deadly weapon or deadly force committed by a prisoner serving a life term. Section 13-251 covers assault by means of a caustic chemical capable of blinding, injuring, or disfiguring. Section 13-252 penalizes assaults committed with the intent to commit the further crimes of rape, mayhem, robbery, and other offenses. Section 13-253 offers a lesser penalty for assault with the intent to commit other felonies. Finally, sections 13-521 and 13-861 outlaw mayhem and poisoning with intent to kill, respectively. None of these variegated provisions incorporates any consent defense for medical or athletic situations. *See* R. PERKINS, *supra* note 43, at 109 (noting that at common law valid consent provided a defense to a charge of assault and battery). Nor is mitigation due to heat of passion available, although assault is often first cousin to homicide and equally likely to be committed in circumstances of provocation. *See generally* W. LAFAVE & A. SCOTT, JR., *supra* note 46, at 609; R. PERKINS, *supra* note 43, at 114-48.

99. State v. Carrillo, 108 Ariz. 524, 526-27, 502 P.2d 1343, 1345-46 (1972).

100. *See* State v. Blankenship, 99 Ariz. 60, 67, 406 P.2d 729, 733 (1965). The related offense of attempted assault is in fact a logical absurdity because it is "an attempt to attempt" a crime. *See generally* S. KADISH & M. PAULSEN, *supra* note 44, at 339-40.

101. Criminal assault is an unlawful attempt to commit injury upon an individual, ARIZ. REV. STAT. ANN. § 13-241(A) (Supp. Pamphlet 1973), while battery is the willful use of unlawful force upon another. *Id.* § 13-241(B).

whenever a battery is committed, so also is an assault.[102] The converse is not necessarily true.[103] Thus, if assault were redefined to include hostile contact, the crime of battery could be abolished. Simplification of assault into simple, aggravated, and armed offenses also would eliminate needless confusion and redundancy. Retaining a separate offense of battery only serves to inject tort principles into Arizona criminal law[104] and to graft another unnecessary statute onto the criminal code.

Such a definitional solution, however, assumes a more rational basis for distinguishing simple from aggravated assault than appears in current law. Some of the present standards for establishing aggravated assault bear relation only to the status of the victim, not to the actual amount of force used. For instance, any attempt to commit a physical injury upon a child, school teacher, or corrections officer is automatically an aggravated assault.[105] Except for these limitations, and a handful of other curious exceptions,[106] the statute's standards are of little help to a jury in determining whether an attempted touching[107] is a simple assault, an aggravated assault, or no assault at all. The seriousness of injury or threat of injury necessary to support an assault charge should be statutorily defined instead of being left to a jury with no statutory guidance. This is especially important if the higher degrees of assault are to be applied. While spitting or touching may be sufficient injury to support a simple assault charge, there is little logical justification for allowing any degree of injury, no matter how slight, to support the more serious offense of aggravated assault merely because the victim is a child, school teacher, or corrections officer.

An additional difficulty with the present assault section is the lack of any provision for a statutory defense of consent. As in the proposed federal criminal code, consent of the victim should be a statutory defense to exempt from liability participants in athletic, scientific, medi-

102. State v. Schutte, 87 N.J.L. 15, 19, 93 A. 112, 114 (Sup. Ct. 1915); *see* Guarro v. United States, 237 F.2d 578, 579 (D.C. Cir. 1956); Hall v. State, 309 P.2d 1096, 1100 (Okl. Crim. App. 1957) (dictum).

103. *See* State v. Williams, 13 Ariz. App. 201, 202, 475 P.2d 293, 294 (1970); State v. Hazen, 160 Kan. 733, 740, 165 P.2d 234, 239 (1946); Hall v. State, 309 P.2d 1096, 1101 (Okla. Crim. App. 1957) (per curiam).

104. *Cf.* R. PERKINS, *supra* note 43, at 111-12.

105. ARIZ. REV. STAT. ANN. §§ 13-245(A)(3), (8)-(9) (Supp. Pamphlet 1973).

106. The Arizona aggravated assault and battery statute also defines the crime of aggravated assault to include an assault committed by a person of robust health or strength upon one who is decrepit, or by one utilizing an instrument or means which will inflict disgrace. Assault with a whip is the statutory example of the latter provision. *Id.* §§ 13-245(A)(2), (4).

107. The present aggravated assault statute does provide that where the attempted touching is committed with premeditated design and by use of means calculated to inflict great bodily injury, the elements of the offense have been fulfilled. *Id.* § 13-245(A)(6).

cal, and other occupations requiring submission to bodily contact.[108] No such exemption now exists in Arizona law. Without such explicit exceptions for consent, acceptable athletic or medical acts might become criminal under a literal reading of the assault statutes.

Finally, section 13-246(A)(3), exempting from criminality any assaultive violence used "for preservation of the peace" or "to prevent the commission of an offense"[109] cries out for revision. This outdated justification statute has been used to decriminalize apparent criminal conduct, as occurred recently in Arizona when two men were exonerated of violently beating a nude river-rafter because they claimed their violent assault was aimed at preventing the victim's indecent exposure.[110] At the very least, justifiable assault should be allowed only to protect persons or property in response to a reasonable expectation of assaultive violence from the victim.[111] An aggressive response far more assaultive than the threat should not be allowed; after all, the justification for such an exemption is to protect life and property, not to encourage its destruction.

Kidnap

Although kidnapping was a misdemeanor at common law, well-publicized cases have caused it to become one of the most severely penalized felonies.[112] This severe legislative reaction has produced unexpected problems. The offense is generally so loosely defined as to include even momentary detentions in the course of committing other crimes, such as the detention occurring during husband-wife assaults.[113] Furthermore, a charge of kidnapping is sometimes used as a prosecutorial technique to increase the penalty for an underlying crime such as rape or prostitution,[114] a technique foreign to those who enacted the severe penalty to deter more lengthy and extreme forms of detention.

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108. PROPOSED FED. CRIM. CODE, *supra* note 56, §§ 1619(1)(b)-(c).

109. *See* ARIZ. REV. STAT. ANN. § 13-246(A)(3) (1956).

110. State v. Payne, CR 83822 (Super. Ct., Maricopa County, Ariz., Feb. 4, 1975).

111. The Model Penal Code provides an example of an assault statute restricting the use of violence to protection of persons and property in a few carefully defined circumstances. MODEL PENAL CODE, §§ 3.04-.07. *See also* N.Y. PENAL LAW §§ 35.15, .25 (McKinney 1975).

112. The Lindbergh kidnapping appears to have motivated the more severe penalties. This is particularly true of the federal code, which was amended following the Lindbergh case. *See* Pub. L. No. 232, ch. 301, 48 Stat. 781, *amending* 18 U.S.C. §§ 408 (a)-(c) (codified at 18 U.S.C. §§ 1201-1202 (1970), *as amended*, (Supp. V, 1975)).

113. *See* State v. Hunter, 112 Ariz. 128, 539 P.2d 885 (1975); State v. Williams, 111 Ariz. 222, 526 P.2d 1244 (1974).

114. *See* State v. Jacobs, 93 Ariz. 336, 342, 380 P.2d 998, 1002, *cert. denied*, 375 U.S. 46 (1963) (evidence showing "defendant forced his victim at knife point from the bathroom of the trailer house out to the screened-in porch and then back through the trailer and out a back door onto the cabana where the rape occurred sufficiently supports the finding of kidnapping . . . .").

The existing collage of Arizona's kidnapping statutes define crimes ranging from kidnap for ransom to detention in a house of prositution for an unpaid debt.[115] Changes would be helpful. First, all kidnapping and kidnap-related offenses should be consolidated in one statutory section and integrated to avoid the overlapping and contradiction which haunt the present series of statutes. Second, kidnapping should be broken down into the distinct offenses of custodial interference by a divorced parent, unlawful imprisonment, and simple and aggravated kidnapping. A distinct statute should deal with interference with child custody,[116] since this sort of detention may reflect sincere family interest in the child or antagonism between adults, rather than danger to the child. Unlawful imprisonment, of course, would cover the situation where a person is detained under color of law but without lawful authority.[117] Kidnapping in the traditional sense should be broken into two degrees. The simpler kidnapping offense would penalize any mere abduction, with abductions involving risk of bodily injury or ransom classified as aggravated.

Finally, the temporal scope of the detention involved in the crime needs to be clarified. Many offenses such as robbery and forcible rape necessarily involve some incidental physical restraint. For this restraint properly to constitute a separate kidnapping charge, the detention should exceed the restraint which ordinarily accompanies the underlying offense.[118] To support kidnapping, time and distance factors distinct from and in addition to those involved in the underlying crime should be required.

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115. Arizona's kidnapping laws are found scattered throughout the code. The major statutory section, ARIZ. REV. STAT. ANN. § 13-491 (Supp. Pamphlet 1973), defines kidnapping to include the forcible taking of a person to another country, state, or county. *See id.* § 13-491(A)(1). As defined, the offense also includes enticing, hiring, or persuading another person under false pretenses with the intent to subject him or her to slavery, involuntary servitude, or coercive employment. *Id.* § 13-491(A)(3). Violation of this statute can bring a maximum penalty of life imprisonment. Section 13-492 defines the more aggravated kidnapping offenses of hijacking, holding of a person for extortion or ransom, and kidnapping of a child with intent to commit rape or sodomy. *Id.* §§ 13-492(A)-(B) (Supp. 1975-76). This offense is a felony with a penalty of life imprisonment without possibility of parole if the kidnapped individual is subjected to serious bodily harm, *id.* § 13-492(C)(1); otherwise, the penalty is 20 to 50 years' imprisonment without possibility of parole. *Id.* § 13-492(C)(2). Other sections of Title 13 contain lesser-known kidnap-related offenses. These include the taking of a child for purposes of prostitution, *id.* § 13-587; detention in a house of prostitution for an unpaid debt, *id.* § 13-588; and the taking or enticing of a child from its parents. *Id.* § 13-841 (1956). Finally, section 13-961 penalizes false imprisonment. *Id.* § 13-961.

116. *See id.* § 13-492(A) (Supp. Pamphlet 1973) (specifically exempting parent-minor situations). *See also* PROPOSED ARIZONA CODE, *supra* note 1, § 1301.

117. *See* Slade v. City of Phoenix, No. CR 91708 (Super. Ct., Maricopa County, Ariz., Oct. 23, 1975); ARIZ. REV. STAT. ANN. § 13-961 (1956). *See also* PROPOSED ARIZONA CODE, *supra* note 1, § 1302. The position advocated in the proposed Arizona criminal code differs from that of the Model Penal Code, which retains the traditional false imprisonment designation. *See* MODEL PENAL CODE § 212.3.

118. *See* MODEL PENAL CODE § 212.1, Comment (Tent. Draft No. 11, 1960); *cf.* State v. Soders, 101 Ariz. 376, 419 P.2d 733 (1966). For illustration of the multiple

Robbery

Under the common law, robbery was theft of money or goods from or in the presence of the victim by force or fear either of immediate bodily injury or certain other grievous harms.[119] The gravamen of robbery was force or fear rather than taking. Taking, however, was a required element of the crime.[120] The present Arizona robbery statutes represent a codification of the encrusted common law defined above.[121] Taken as a whole, these statutes penalize a felonious taking by force or fear from the person or immediate presence of the victim. The threat may be of either present or future harm.[122] Robbery in Arizona thus is a theft aggravated by means of fear;[123] but unlike theft, no asportation is required.[124]

Statutory reliance on the element of fear injects an undesirable subjective element into the crime and should be eliminated. Basing the crime on the force or threat adequately covers the prohibited activity while employing a more objective test.[125] It also avoids the collapse of a robbery prosecution when hardy cowboy-types feel compelled to deny they were in fear when robbed. The force element should also be limited to immediate, personal force, with theft based on a future threat or a threat to property properly falling under the distinct offense of extortion.[126] Robbery should not be restricted to property taken from the victim or his immediate presence; the offense should lie also when a victim is forced to arrange a distant transfer of goods via a third person.[127] A statute of this nature should eliminate any need for the antiquated specialized coverage of bank and train robberies as exists under present law.[128]

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charges permissible under present law, see State v. Williams, 111 Ariz. 222, 526 P.2d 1244 (1974); State v. Padilla, 106 Ariz. 230, 474 P.2d 821 (1970).

119. *See* R. PERKINS, *supra* note 43, at 279-84; J. TURNER, 2 RUSSEL ON CRIME 858-63 (12th ed. 1964).

120. *See* R. PERKINS, *supra* note 43, at 282-84; J. TURNER, *supra* note 108.

121. *See* ARIZ. REV. STAT. ANN. §§ 13-641 to -644 (1956), *as amended*, (Supp. Pamphlet 1973, Supp. 1975-76). Section 13-644 penalizes the boarding or interfering with a train with intent to rob, a throwback from the old west retained despite a 1973 revision. Ch. 138, § 7, [1973] Ariz. Sess. Laws 971, *amending* Ariz. Rev. Stat. Ann. § 13-644 (1956) (codified at ARIZ. REV. STAT. ANN. § 13-644 (Supp. Pamphlet 1973)).

122. *See* ARIZ. REV. STAT. ANN. § 13-642 (1956). Robbery and extortion are thus confused. Compare *id.* § 13-642(1) *with id.* § 13-401(B)(1).

123. *See* State v. Barnett, 111 Ariz. 391, 393, 531 P.2d 148, 150 (1975); State v. Alexander, 108 Ariz. 556, 567, 503 P.2d 777, 788 (1972), *quoting* State v. George, 108 Ariz. 5, 7, 491 P.2d 838, 840 (1971).

124. *See* State v. Soders, 106 Ariz. 79, 81, 471 P.2d 274, 276 (1970); State v. Hitchcock, 87 Ariz. 277, 282, 350 P.2d 681, 684 (1960), *cert. denied*, 365 U.S. 609 (1961).

125. *See* PROPOSED ARIZONA CODE, *supra* note 1, § 1901, Commentary.

126. *See* ARIZ. REV. STAT. ANN. § 13-401 (1956).

127. *See* N.Y. PENAL LAW §§ 160.05-.15 (McKinney 1975). *See also* State v. Hitchcock, 87 Ariz. 277, 282, 350 P.2d 681, 684 (1960), *cert. denied*, 365 U.S. 609 (1961).

128. ARIZ. REV. STAT. ANN. § 13-644 (Supp. Pamphlet 1973). See discussion note 121 *supra*.

A final and more competent revision should involve elimination of the defense of claim of right. Present Arizona law, in barbarian fashion, permits creditors to use force and fear to recover payment of debt.[129] In a more carefully considered criminal law, a creditor's peaceful repossession properly would be a defense to theft, but repossession or debt collection aided by force or fear would be no defense to robbery.[130] Like other forms of violence, that used in repossession should be discouraged rather than encouraged by the law.[131]

Sexual Offenses

There is an assortment of statutes in Title 13 dealing with what can be loosely characterized as sexual offenses.[132] Traditionally, these crimes are of two types: those involving force or coercion against a person, and those classified as crimes against public morality.[133] Meaningful classification of the present statutes into this framework is difficult, however, because crimes against morality may also involve force or coercion.[134] Some sexual crimes clearly are crimes of force, rape being a primary example.[135]

Rape. In Arizona, rape in the first degree is defined as "an act of sexual intercourse accomplished with a female, not the wife of the perpetrator" without her consent.[136] The key term, sexual intercourse, is not defined, although penetration is required.[137] Consent also is not

129. *See* State v. Hardin, 99 Ariz. 56, 59, 406 P.2d 406, 408 (1965); Bauer v. State, 45 Ariz. 358, 362-63, 43 P.2d 203, 205 (1935).

130. "[T]he proposition [of debt collection as a defense to robbery] not only is lacking in sound reason and logic, but it is utterly incompatible with and has no place in an ordered and orderly society such as ours, which eschews self-help through violence." State v. Ortiz, 124 N.J. Super. 189, 192, 305 A.2d 800, 802 (App. Div. 1973); *accord* State v. Martin, 15 Ore. App. 498, 505, 516 P.2d 753, 756 (1973).

131. *See* State v. Martin, 15 Ore. App. 498, 516 P.2d 753 (1973).

132. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 13-201 to -202 (Supp. Pamphlet 1973) (abduction and seduction); *id.* §§ 13-221 to -222 (1956) (adultery); *id.* §§ 13-271 to -273 (bigamy); *id.* § 13-471 (incest); *id.* §§ 13-531 to -537 (1956), *as amended*, (Supp. Pamphlet 1973, Supp. 1975-76) (obscenity and indecency); *id.* §§ 13-581 to -593 (prostitution and related offenses); *id.* §§ 13-611 to -615 (1956), *as amended*, (Supp. Pamphlet 1973) (rape); *id.* §§ 13-651 to -653 (Supp. Pamphlet 1973) (sodomy and lewdness).

133. *Compare id.* § 13-611 (Supp. Pamphlet 1973) *with id.* §§ 13-221 to -222 (1956) *and id.* § 13-651 (Supp. Pamphlet 1973).

134. For example, sodomy and "lewd and lascivious" acts are criminal in Arizona whether forced or consensual. *See id.* §§ 13-652 to -653 (Supp. Pamphlet 1973).

135. Rape is a common law felony consisting of unlawful sexual intercourse with a female without her consent. R. PERKINS, *supra* note 43, at 152.

136. ARIZ. REV. STAT. ANN. § 13-611(A) (Supp. Pamphlet 1973).

137. *Id.* § 13-612 (1956); *see* State v. Williams, 111 Ariz. 175, 177, 526 P.2d 714, 716 (1974); State v. King, 110 Ariz. 36, 40, 514 P.2d 1032, 1036 (1973). *See generally* R. PERKINS, *supra* note 43, at 154-56. It should be noted that the requirement of penetration appears to have been intended to establish a minimal standard of what constitutes intercourse, in order that the "essential guilt" of the crime, "the outrage to the person and feelings of the female," ARIZ. REV. STAT. ANN. § 13-612 (1956), could be more easily vindicated in a prosecution; thus, the statute provides that "any sexual penetration however slight is sufficient to complete the crime." *Id.* The wording of the statute presumes that a man will always be the accused and that a woman will always be the victim. *See id.* § 13-611 (Supp. Pamphlet 1973).

defined.[138] Instead, five circumstances are listed which may raise a presumption that intercourse was accomplished against the female's will: when idiocy, imbecility, or unsoundness of mind renders the female incapable of giving consent; when the female's resistance is forcibly overcome; when resistance is prevented by fear of great bodily harm, or by liquor or drugs; when the accused knows that the female is unconscious of the nature of the act; and when the female is deceived by the accused into believing that they are married.[139] These criteria may be too restrictive; other factors frequently preventing physical resistance also should be recognized as negating consent. Among these are lesser degrees of bodily harm, threats of future harm, threats of harm to another person, and threats of harm to personal relationships.

One of the earliest statutory embellishments to the crime of rape was the inclusion of sexual intercourse with a female under the age of consent.[140] "Statutory rape," which is denominated as rape in the second degree in Arizona,[141] imposes strict criminal liability for sexual intercourse with females under the age of 18, regardless of whether consent is given or whether the "victim" precipitates the sexual encounter.[142] The accused will be deemed strictly liable[143] despite a

138. Consent is probably the most crucial issue in a rape conviction. One controversy that has arisen in this area relates to the admissibility into evidence of the victim's prior sexual conduct. Although unchastity is no defense to rape and is therefore irrelevant in this regard, the victim's past sexual behavior traditionally has been admitted to impeach her testimony concerning consent. *See* State v. Wood, 59 Ariz. 48, 122 P.2d 416 (1942), *overruled in* State *ex rel.* Pope v. Superior Court, 113 Ariz. 22, 28-29, 545 P.2d 946, 952-53 (1976). Such impeachment has been permitted due to an assumption that prior consent to sexual intercourse might be indicative of consent in the present case. Admission of evidence of the victim's prior sexual conduct is presently a hotly debated issue. *See generally* A. MEDEA & K. THOMPSON, AGAINST RAPE 120-21 (1974). The trend today is clearly toward restricting inquiry into the victim's past sexual history. In a recent decision, the Arizona supreme court joined this trend, reversing its position on this issue and holding that character evidence concerning unchastity is inadmissible to impeach the credibility of a victim in a forcible rape prosecution:

> Such evidence has little or no relationship to either the ability of the prosecuting witness to tell the truth under oath or her alleged consent to the intercourse. Any relevancy that may exist is outweighed by its inflammatory effect. Its use could easily discourage prosecutions for rape; it is distracting, and it may so prejudice the jury that it would acquit even in the face of overwhelming evidence of guilt.

State *ex rel.* Pope v. Superior Court, 113 Ariz. 22, 28-29, 545 P.2d 946, 952-53 (1976), *quoting* State v. Geer, 13 Wash. App. 71, 73, 533 P.2d 389, 391 (1975).

139. ARIZ. REV. STAT. ANN. § 13-611(A) (Supp. Pamphlet 1973).

140. *See* R. PERKINS, *supra* note 43, at 152-53. Another somewhat anachronistic statutory addition to the common law rape offense in Arizona provides that any teacher, tutor, or superintendent who has sexual intercourse with a female pupil not his wife, even with her consent and regardless of age, can be imprisoned for up to 10 years. ARIZ. REV. STAT. ANN. § 13-615 (1956).

141. *See* ARIZ. REV. STAT. ANN. § 13-611(B) (Supp. Pamphlet 1973).

142. *See* Taylor v. State, 55 Ariz. 29, 35-36, 97 P.2d 927, 930 (1940); R. PERKINS, *supra* note 43, at 168. If the female is the wife of the accused, however, no action will lie even though she may be under 18 years old. ARIZ. REV. STAT. ANN. § 13-611(B) (Supp. Pamphlet 1973).

143. *See* State v. Superior Court, 104 Ariz. 440, 442, 454 P.2d 982, 984 (1969);

good faith mistake as to the girl's age.[144]

Determining the appropriate direction for revisions in the statutory rape statute requires a policy decision regarding the purpose of the statute. Is the state only concerned with protecting children from harmful sexual contact with significantly older persons? Or is the state also interested in making criminal all consensual sexual experimentation between adolescents and adults of any age? Forcible rape, of course, is different in kind from statutory rape, the key distinguishing factors being consent and age. Yet the circumstances prevailing between youths of like age are not unlike those between adults, indicating that the same rules of consent may be applicable in both situations. A different situation is presented when one of the partners is an adult and the other a child. A teenager is particularly unlikely to realize the consequences of consent to sexual experiences when approached by a significantly older person. These factors suggest the wisdom of limiting statutory rape to situations involving a considerable age differential.[145] The legitimate concern to protect young people from harmful contact with elders need not necessarily result in criminalizing all consensual sexual experimentation by young persons of similar ages. The present

People v. Doyle, 16 Mich. App. 242, 16 N.W.2d 907 (1969). To be held criminally liable for rape, the accused himself usually must be aged 14 or over. *See* ARIZ. REV. STAT. ANN. § 13-613 (1956).

144. State v. Superior Court, 104 Ariz. 440, 443, 454 P.2d 982, 985 (1969). The California courts have reached the opposite conclusion, however, holding that an honest and reasonable mistake as to age will provide a defense to a charge of statutory rape.

> We are persuaded that the reluctance to accord to a charge of statutory rape the defense of a lack of criminal intent has no greater justification than in the case of other statutory crimes, where the Legislature has made identical provision with respect to intent. . . . At common law an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which the person is indicted an innocent act, has always been held to be a good defense . . . . So far as I am aware it has never been suggested that these exceptions do not equally apply to the case of statutory offenses unless they are excluded expressly or by necessary implication. . . . Our departure from [previously expressed views] is in no matter indicative of a withdrawal from the sound policy that it is the public interest to protect the sexually naive female from exploitation. No responsible person would hesitate to condemn as untenable a claimed good faith belief in the age of consent of an "infant" female whose obviously tender years preclude the existence of reasonable grounds for that belief. However, the prosecutrix in the instant case was but three months short of 18 years of age and there is nothing in the record to indicate that the purposes of the law . . . can be better served by foreclosing the defense of a lack of intent. This is not to say that the granting of consent by even a sexually sophisticated girl known to be less than the statutory age is a defense . . . . We hold only that in the absence of a legislative direction otherwise, a charge of statutory rape is defensible wherein a criminal intent is lacking.

People v. Hernandez, 61 Cal. 2d 529, 536, 393 P.2d 673, 677, 39 Cal. Rptr. 361, 365 (1964).

145. One approach would be limitation of the statutory rape offense to situations where the accused is more than 5 years older than a victim below 18 years of age, regardless of gender. Adopting a similar approach, the Model Penal Code proposes the criminalization of consensual sexual acts with a minor only when the accused is a stated number of years older. *See* MODEL PENAL CODE § 213.3(1). The penalty for the offense is in turn reduced to coincide with its nonviolent nature. *See id.* § 213.3(2).

scheme which places criminal responsibility for consensual sexual acts between two teenagers entirely on the male also is inconsistent with the modern trend towards equality of the sexes and of dubious constitutionality.

Two additional rarely used statutory crimes fitting indirectly into the category of forcible sexual offenses are abduction and seduction. Abduction punishes by not less than 2 or more than 14 years in prison the use of force or duress to compel another person to marry.[146] Seduction, on the other hand, is the act of inducing "an unmarried person of previous good repute for chastity to have sexual intercourse" by promising marriage.[147] There is no liability, however, if the accused before trial hastily marries or offers to marry the victim,[148] thereby substituting marriage for criminal guilt. A more unsound inducement for marriage cannot readily be imagined. To the extent that the conduct proscribed in the abduction and seduction statutes is an appropriate subject for the criminal law, it can be dealt with adequately by other more general criminal laws. Abduction clearly is a limited form of kidnapping and should be treated as such.[149] Seduction could be covered adequately by the rape statute if that law were slightly modified.[150]

The essence of all rape-related crimes is their assaultive element.[151] A more rational statutory approach than that presently existing, therefore, would cover all forms of nonconsensual sexual conduct under one broad category of sexual assault.[152] In addition to the traditional rape situation, this single crime would cover homosexual rape, sexual assaults by women upon men, and sexual assaults without penetration. Gradations of the crime could be established based on the degree of force or coercion used, with fraud included as a form of coercion. Consent should be defined in general terms as the will of the victim being overcome by the accused.[153]

Consensual Behavior. A host of additional criminal sexual offenses scattered throughout Title 13 bear witness to the heritage from

146. ARIZ. REV. STAT. ANN. § 13-201 (Supp. Pamphlet 1973).
147. *See id.* § 13-202(A) (1956).
148. *Id.*
149. *See* text accompanying notes 115-17 *supra.*
150. Seduction closely approximates the fifth subsection of the present rape statute which classifies as rape any sexual intercourse where the victim believed the perpetrator to be her husband. ARIZ. REV. STAT. ANN. § 13-611(A)(5) (Supp. Pamphlet 1973). This subsection should be expanded to cover the seduction situation as well, though it might be well to delete the possibility of using subsequent marriage as a shield for liability.
151. *Cf. id.* § 13-612 (1956).
152. The Model Penal Code has adopted such an approach, establishing a single crime of sexual assault with various gradations. *See* MODEL PENAL CODE § 213.4.
153. *Cf.* Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973) (voluntariness of consent to search determined from totality of circumstances).

ecclesiastical courts.[154] Statutes prohibiting fornication[155] and adultery[156] punish sexual relations between those who are unmarried and between those who are married to someone other than their sex partner. Both statutes should be repealed.[157] The laws serve no purpose except as an invitation to selective and arbitrary enforcement.[158]

Additional offenses covering "the infamous crime against nature"[159] and "lewd and lascivious acts"[160] proscribe uncustomary forms of sexual contact such as sodomy, fellatio, and cunnilingus.[161] The acts covered by these statutes may be coerced and if so, should be punished in the same manner as the more traditional forms of sexual assault.[162] Where consenting adults are involved, however, criminalization may not be appropriate.[163] Some courts have found sodomy and lewd and lascivious acts statutes to be unconstitutional invasions of privacy when applied to consenting adults.[164]

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154. *See generally* W. CLARK & W. MARSHALL, LAW OF CRIMES 767-69 (7th ed. 1967).

155. ARIZ. REV. STAT. ANN. § 13-222 (1956) (open and notorious cohabitaiton).

156. *Id.* § 13-221.

157. Adultery was retained in the proposed Arizona Revised Criminal Code, as was a statute against homosexual conduct. See PROPOSED ARIZONA CODE, *supra* note 1, §§ 1401-1402. The Commission voted to retain these offenses as "indicative of the moral tone in the state." *See id.*, Summary of Provisions, at xiv.

158. The only cases occurring under these two statutes are a libel case, *see* Roscoe v. Schoolitz, 105 Ariz. 310, 312, 464 P.2d 333, 335 (1970), and one criminal case involving a state's witness who was allegedly induced to testify by a promise that she would not be prosecuted for her illegal notorious cohabitation. *See* State v. Little, 87 Ariz. 295, 300, 350 P.2d 756, 759 (1960).

159. ARIZ. REV. STAT. ANN. § 13-651 (Supp. Pamphlet 1973).

160. *Id.* § 13-652.

161. *See* State v. Bateman, 25 Ariz. App. 1, 3, 540 P.2d 732, 734 (1975), *rev'd on other grounds*, 113 Ariz. 107, 547 P.2d 6 (1976).

162. See text accompanying note 152 *supra*.

163. *See generally* Note, *supra* note 7, at 224-30.

164. Arizona courts have split over the constitutionality of the state's sodomy and lewd and lascivious acts statutes. In State v. Callaway, 25 Ariz. App. 267, 542 P.2d 1147 (1975), and State v. Bateman, 25 Ariz. App. 1, 540 P.2d 732 (1975), the two divisions of the Arizona court of appeals struck down these statutes as being unconstitutional invasions of privacy. The *Bateman* and *Callaway* courts indicated that the state may not regulate sexual conduct among consenting adults in private. State v. Callaway, 25 Ariz. App. at 271, 542 P.2d at 1151; State v. Bateman, 25 Ariz. App. at 6, 540 P.2d at 737. *Callaway* also held that such sexual acts were equally protected regardless of whether the participants were married or not. 25 Ariz. App. at 271, 542 P.2d at 1151. Although these cases involve heterosexual conduct, the rationale of *Callaway* appears to apply to homosexual conduct as well. *See id.* The *Bateman* court also noted, however, that the state could regulate forceful nonconsenting sexual behavior even between married couples. 25 Ariz. App. at 5, 540 P.2d at 736. While both cases involved acts of forced sodomy and fellatio, the decisions stated that the Arizona statutes could not be interpreted as forbidding acts only between nonconsenting parties, thus rendering them constitutional. The words of the statutes did not lend themselves to a construction allowing a consent defense. State v. Callaway, 25 Ariz. App. at 272, 542 P.2d at 1152; State v. Bateman, 25 Ariz. App. at 6, 540 P.2d at 737.

The Supreme Court of Arizona reversed both these decisions in State v. Bateman, 113 Ariz. 107, 547 P.2d 6 (1976). In a 3-2 decision, the supreme court held that while the state's power to regulate private sexual conduct had been narrowed by such decisions as Griswold v. Connecticut, 381 U.S. 479 (1965), and Eisenstadt v. Baird, 405 U.S. 438 (1973), it still could forbid sodomy and other lewd and lascivious acts between consenting adults in private. 113 Ariz. at 111, 547 P.2d at 10. In a vigorous dissent, Justices Gordon and Struckmeyer argued that intimate sexual relations between adults in private,

Another statute directed at consensual behavior, that proscribing incest, punishes related persons who intermarry or commit fornication or adultery with each other.[165] The most common fact situation involves an older person, usually a male, with an immature female relative, often his daughter.[166] These fact situations can more effectively be dealt with as sexual assault[167] or statutory rape,[168] depending on the circumstances. If statutory rape or some other crime is not involved, it is questionable whether the act of consensual sexual union between related adults should be a concern of the criminal law.[169] The relationship between sex and procreation has lately become more attenuated, thereby deemphasizing fears from past centuries about the genetic effects of incest upon offspring.[170]

A final morality statute punishes bigamy as a crime, making liable even a previously unmarried partner so long as he or she had knowledge of the marital situation.[171] The statutes appear to punish criminally what is already adequately controlled elsewhere, since bigamous marriages are universally held to be void.[172] Additionally, fraud by a bigamous spouse upon an unsuspecting marriage partner may be remedied by either a civil or criminal action for fraud where property is lost,[173] or by a rape charge if appropriate.[174] Thus, the additional criminal bigamy statute is mere surplusage.[175]

Child Victim. Arizona law specifically criminalizes various forms of sexual contact involving a child victim. Child molestation is the most

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whether married or single, are constitutionally protected. The dissent argued that *Griswold* and *Eisenstadt* mandated such a position. *Id.* at 112, 547 P.2d at 11. It should be noted that a recent federal decision indicates that the Arizona supreme court's decision in *Bateman* may be constitutionally acceptable. *See* Doe v. Commonwealth's Attorney, 403 F. Supp. 1199, 1203 (E.D. Va. 1975), *aff'd without opinion*, 96 S. Ct. 1489 (1976).

165. *See* ARIZ. REV. STAT. ANN. § 13-471 (1956). The statute applies only to persons related "within the degrees of consanguinity within which marriages are declared by law to be incestuous and void." *Id.* To determine the requisite degrees of consanguinity, reference must be made to section 25-101, which indicates that marriage between parents and children, including grandparents and grandchildren of every degree and between uncles and nieces, aunts and nephews, and between first cousins, is prohibited and void. *Id.* § 25-101(B).

166. *See, e.g.*, State v. Tannahill, 100 Ariz. 59, 411 P.2d 166 (1966), *cert. denied*, 390 U.S. 909 (1968); State v. Boodry, 96 Ariz. 259, 394 P.2d 196 (1964), *cert. denied*, 379 U.S. 949 (1965); State v. Haston, 64 Ariz. 72, 166 P.2d 141 (1946).

167. See text accompanying note 152 *supra.*

168. *See* text accompanying note 145 *supra.* The Model Penal Code has dispensed with any statutory prohibition on incest.

169. *See* N. MORRIS & G. HAWKINS, THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL 18-19 (1970). *See generally* Note, *supra* note 7.

170. *See* N. MORRIS & G. HAWKINS, *supra* note 169.

171. *See* ARIZ. REV. STAT. ANN. §§ 13-271, -273 (1956).

172. *Cf.* Depper v. Depper, 9 Ariz. App. 245, 247, 451 P.2d 325, 327 (1969).

173. *See* ARIZ. REV. STAT. ANN. § 13-312 (Supp. Pamphlet 1973).

174. For example, this situation could be adequately covered under that section of the rape statute negating consent where the female submits to sexual intercourse believing that the person committing the act is her husband. *See id.* § 13-611(A)(5).

175. *See* N. MORRIS & G. HAWKINS, *supra* note 169, at 17-18.

serious, punishing with up to life imprisonment the "fondling, playing with, or touching the private parts" of a child under the age of 15, or causing such child "to fondle, play with, or touch the private parts" of the accused.[176] As with statutory rape, no age limit is set for the accused, and consent is not a defense.[177] Here again, sexual experimentation between children of the same age group should not be criminalized. The crime should be amended to require that the accused be considerably older than the victim before consensual behavior is criminalized.[178]

Contributing to the delinquency of a minor[179] and permitting or causing a child to develop "immoral associations"[180] also are proscribed as misdemeanors. Although an involved list of definitions[181] lends a superficial air of specificity, the crime of contributing to the delinquency of a minor nonetheless is defined in hopelessly vague, catchall terminology. It encompasses any person who "by any act, causes, encourages or contributes to . . . any act which tends to debase or injure the morals . . . of a child."[182] The same vagueness problem is inherent in the immoral associations statute, which penalizes a person having custody of a minor under 16 years of age who "wilfully causes or permits [the minor's] moral welfare to be imperiled, by . . . immoral associations . . . ."[183] While it may be appropriate to define for some adults a protective role toward the social development of children, that role must be limited insofar as it leads to the imposition of criminal liability. Punishable adult activity should be only such as actively and substantially leads to specifically defined forms of delinquent behavior by the minor. Much of such conduct is undoubtedly covered by other criminal statutes; that which remains should be stripped of its verbosity and vagueness.

The central policy consideration in drafting contemporary criminal statutes dealing with sexual conduct must be protection of individuals from forced, coerced, or fraudulently procured sexual contact. The law cannot afford the luxury of trying to enforce all public morals. Even were it possible for the legislature accurately to gauge public attitudes on sexual morality, there are other more pressing, though perhaps less

176. ARIZ. REV. STAT. ANN. § 13-653 (Supp. Pamphlet 1973).
177. *Id.*
178. The Model Penal Code requires that in consent situations, the victim be less than 16 years old and that the actor be at least 4 years older than the victim. MODEL PENAL CODE § 213.3.
179. ARIZ. REV. STAT. ANN. §§ 13-821 to -827 (1956), *as amended*, (Supp. Pamphlet 1973).
180. *Id.* § 13-842 (Supp. Pamphlet 1973).
181. *Id.* § 13-821.
182. *Id.* §§ 13-821 to -822 (1956), *as amended*, (Supp. Pamphlet 1973).
183. *Id.* § 13-842 (Supp. Pamphlet 1973).

provocative, demands on the limited resources of the criminal justice system.

CRIMES AGAINST PROPERTY

Trespass

Common law courts did not consider a mere trespass to be a criminal offense, though a trespass accomplished through force constituted the crime of forcible entry.[184] More recently, however, a number of states, including Arizona, have enacted legislation criminalizing various forms of aggravated trespass.[185] Arizona's existing trespass law mingles trespass with criminal damage.[186] With one exception, the multiple statutes in sections 13-711, 13-712 and 13-713 penalize criminal trespass only when the trespass is joined with damage to or removal of property.[187] The single exception criminalizes mere loitering or prowling on the property of another.[188] Other sections among the Arizona statutes define other trespass-related crimes, some being closer to actual trespass offenses than those described in the trespass statutes themselves. Sections 24-237 and 24-239, for instance, penalize owners whose animals stray on another's property.[189] Other statutory sections penalize trespass involving damage to state land such as defacing rocks,[190] and entering the property of an academic institution to interfere with its operations.[191]

Clarification and reorganization of these statutes are in order. In accord with the origin of common law trespass,[192] entry alone should suffice for the trespass offense; property damage should be eliminated as a defining element. The present antiloitering statute[193] does not sufficiently cover the offense because it describes a more prolonged form of entry.[194] Appropriate amendment is needed to author-

184. K. SEARS & H. WEIHOFEN, MAY'S LAW OF CRIMES, § 111, at 144 (4th ed. 1938).
185. *Id.* § 113, at 147. A typical statute punishes a trespass following notice that entry is not permitted. *Id.* at 147-48.
186. *See* PROPOSED ARIZONA CODE §§ 1500-1507, Commentary.
187. *See* ARIZ. REV. STAT. ANN. §§ 13-711 to -713 (1956), *as amended*, (Supp. 1975-76). Arizona is not the only state confusing trespass with criminal damage. *See* K. SEARS & H. WEIHOFEN, *supra* note 184, § 113, at 147-48.
188. ARIZ. REV. STAT. ANN. § 13-712(11) (Supp. 1975-76). This statute may be unconstitutionally vague. *See* Papachristou v. Jacksonville, 405 U.S. 156 (1972); Naylor v. Arizona, Civil No. 75-470 (D. Ariz., Nov. 10, 1975). *Contra*, State *ex rel.* Purcell v. Superior Court, 111 Ariz. 582, 535 P.2d 1299 (1975). *See generally* "The Void for Vagueness Doctrine in Arizona," 17 ARIZ. L. REV. 639, 694 (1975).
189. ARIZ. REV. STAT. ANN. §§ 24-237, -239 (1971).
190. *Id.* § 37-501 (1974).
191. *Id.* § 13-1092 (Supp. Pamphlet 1973).
192. *Cf.* State *ex rel.* Purcell v. Superior Court, 111 Ariz. 582, 584, 535 P.2d 1299, 1301 (1975).
193. ARIZ. REV. STAT. ANN. § 13-712(9) (Supp. 1975-76).
194. *See* State *ex rel.* Purcell v. Superior Court, 111 Ariz. 582, 584, 535 P.2d 1299, 1301 (1975).

ize prosecution for certain forms of intrusion onto private land or into well-defined zones of privacy, such as a residence, even though no damage results. Nomadic dirt bikers, prime offenders in this regard, have virtual criminal immunity under present trespass law. A grading system should be devised to give increasing protection based on the ascending privacies manifested in land, structures, and personal residences. Obviously the person who walks through one's backyard and the person who drives a dirt bike through one's garage should be treated differently. The seriousness of the intrusion should also be a factor in such a grading system, with slight intrusions possibly being exempted from criminal punishment altogether.

Further thought also needs to be given to clarifying the legal import of fencing[195] or posting land,[196] and the right of access to public land across adjoining private land.[197] Other similar areas of the law which should be harmonized with the trespass revisions are nonphysical forms of intrusion, including the traditional "peeping Tom" and eavesdropper offenses as well as the more modern forms of intrusion, such as electronic eavesdropping and noise and smoke pollution made possible by the mixed blessing of technology.[198]

Criminal Damage

In revising and clarifying the trespass statute, those sections of the present law which deal with criminal damage should reside within the statutory scheme for that offense. The criminal damage concept grows out of the common law crime of malicious mischief, denoting the malicious destruction or diminution in value of property.[199] Malicious mischief was applied to such acts as damaging crops and killing, injuring, or cruelly treating animals.[200] Although some older cases held actual hostility necessary to the offense,[201] the mens rea requirement usually

195. The present criminal trespass law refers to fences only in penalizing damage to a fence or leaving a gate open without the owner's permission, ARIZ. REV. STAT. ANN. § 13-712(8) (Supp. 1975-76), and proscribing hunting on enclosed land without the owner's permission. *Id.* § 13-712(10). *See also id.* §§ 24-341 to -345 (1971) (no-fence districts); *id.* §§ 24-501 to -505 (trespass of animals onto lands enclosed by a lawful fence).

196. Under present law, land can be posted to forbid hunting or shooting, thus enabling the owner to bring an action for trespass against anyone entering such land for the taking of wildlife. *Id.* § 17-304 (1975). There appears to be no related criminal provision.

197. *See* 43 U.S.C. § 1063 (1964).

198. Wire tapping and eavesdropping are currently covered by ARIZ. REV. STAT. ANN. §§ 13-1051 to -1061 (Supp. Pamphlet 1973).

199. *See* R. PERKINS, *supra* note 43, at 331.

200. *Id.* at 333-39.

201. *See, e.g.*, State v. Churchill, 15 Idaho 645, 656, 98 P. 853, 857 (1909); State v. Robinson, 20 N.C. 108, 109, 32 Am. Dec. 656, 657 (1838) (per curiam); State v. Wilcox, 11 Tenn. 278, 279, 24 Am. Dec. 569, 570 (1832); R. PERKINS, *supra* note 43, at 334.

turned not on malice but on intent to destroy or reckless disregard of the probability of material damage.[202] With the abandonment of any requirement for either malice or mischief, it seems preferable to refer to the present offense simply as criminal damage.

Arizona's existing legislation in this area consists of a general malicious mischief statute[203] complemented by a statutory Tower of Babel prohibiting various specific kinds of property damage.[204] These manifold offenses should be condensed into one all-inclusive statute to be applied generically to the damage or destruction of any property, whether real or personal, public or private. It should be made clear that the offense does not require malice; its designation as "criminal damage" should aid in this clarification. Thus, a prankster lacking the specific intent to damage will be subject to prosecution if his conduct is reckless and causes damage.[205]

Burglary

Among the more common and more serious crimes against property is the current broad offense of burglary. At common law, burglary was the breaking and entering of a dwelling at night with intent to com-

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202. [I]t is not necessary to prove actual ill-will or resentment towards the owner or possessor of the property; but if the act be done under circumstances which bespeak a mind prompt and disposed to the commission of mischief—or, in the language of the court, "wantonly and recklessly," it is sufficient.
Mosely v. State, 28 Ga. 190, 192 (1859). *See also* R. PERKINS, *supra* note 43, at 334-39.

203. ARIZ. REV. STAT. ANN. § 13-501 (1956).

204. A substantially complete list of this needless proliferation includes sections 5-348 (dumping refuse or rubbish in a waterway), 9-442 (dumping trash at places other than a dump), 13-502 (malicious injury or destruction of crops), 13-503 (altering or defacing logs), 13-504 (removal, destruction, or defacement of a boundary mark), 13-505 (defacement or destruction of a public or judicial notice), 13-506 (destruction of land or mining notices), 13-507 (multiliation or destruction of a private document of another), 13-508 (tampering with another's sealed letter), 13-509 (desecration of a marker or burial place), 13-510 (killing or destroying birds, eggs, or nests in a cemetery), 13-511 (injury or destruction of an ornament or plant within the city), 13-512 (damage to books or objects in a library or museum), 13-631(C) (damage to property arising from a riot), 13-862(A) (poisoning of water supply), 13-863 (poisoning domestic animals), 13-881 to -883 (damage to railroads), 13-889 (tampering with a water or gas line), 13-892 (tampering with property of electric power companies), 13-893 (tapping or injuring any water, gas, or electric line), 13-894 (interference with sewer systems), 13-1003 (removing timber from public lands), 13-1022 (throwing or shooting an object at any device used for transportation), 16-901 (destruction of a ballot box), 16-1312 (tampering with political signs), 18-212 (destruction of highway directional signs), 24-237 (herding animals on another's land or water), 28-898.01 (throwing or dropping objects from an overpass), 28-899 (permitting barbed wire to lie loose along a highway), 31-130 (destruction of or injury to a public jail), 33-103 (destruction of survey section markers), 33-322 (tenant's damage of leased premises), 36-641(B) (defacing lavatory walls), 36-861 (mutilation or disinterment of a dead body), 36-1858 (pollution of water), 41-511.13 (destruction of any public park or monument), and 41-853 (desecration of the flag).

205. *See* MODEL PENAL CODE § 220.3; PROPOSED ARIZONA CODE, *supra* note 1, § 1601; *cf.* State v. White, 102 Ariz. 97, 425 P.2d 424 (1967).

mit a felony therein.[206] Common law burglary was a crime directed against not ownership, but habitation.[207] Seeking to penalize the illegal invasion alone, the common law courts held that burglary constituted a separate offense from the crimes committed after entry.[208] During its evolution from the common law, burglary was statutorily expanded to cover a wide variety of breaking and entering crimes, including legal daylight, nonfelonious, and nonresidential entries. As a result, burglary ceased to be an offense exclusively against habitation,[209] becoming instead a crime against possession, as though it were merely a variety of theft.[210]

Arizona's principal burglary statute enumerates a grocery list of structures which receive special protection.[211] No distinction is made between the various invaded structures as to the likelihood of habitation or the degree of invasion of privacy involved. The ancient distinction between day and nighttime entry is maintained, the latter being first-degree burglary, a more serious offense.[212] An additional provision penalizes the possession of burglary tools,[213] while a final section adds an additional punishment for burglary achieved through mechanical means.[214]

Several changes in existing burglary law are needed. Whereas existing law penalizes nocturnal more severely than daylight burglary, the severity of the offense should reflect not the amount of light, but the likelihood of a person's presence in the structure. Although a house or dwelling is more likely to be occupied at night than during daylight, an office building is not. The day-night distinction should yield, therefore, to a distinction based on the likelihood of or suitability for occupancy, since terror and the risk of injury obviously are more likely when the structure is occupied.[215] Unlike present law, a daylight

206. F. INBAU, J. THOMPSON & J. ZAGEL, CRIMINAL LAW AND ITS ADMINISTRATION 322 (1974); R. PERKINS, *supra* note 43, at 192; J. TURNER, *supra* note 119, at 813.

207. *See* R. PERKINS, *supra* note 43, at 192.

208. *See* F. INBAU, J. THOMPSON & J. ZAGEL, *supra* note 206, at 324; J. TURNER, *supra* note 119, at 835.

209. F. INBAU, J. THOMPSON & J. ZAGEL, *supra* note 206, at 324-25; R. PERKINS, *supra* note 43, at 213-16.

210. State v. Noe, 93 Ariz. 373, 374-75, 381 P.2d 99, 100 (1963) (holding that burglary is an offense against possession, not habitation, thus relating it to larceny rather than trespass).

211. "[B]uilding, dwelling house, office, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, garage, tent, vessel, railroad car, or motor vehicle, trailer or semitrailer, a fenced or otherwise enclosed commercial yard . . . ." ARIZ. REV. STAT. ANN. § 13-302(A) (Supp. 1975-76).

212. *Id.* § 13-302(B).

213. *Id.* § 13-304 (1956).

214. "[B]y use of nitroglycerine, dynamite, gunpowder . . . electricity, acetylene gas, oxyacetylene gas or other burning or melting power of force, or by use of any mechanical device or contrivance whatsoever . . . ." *Id.* § 13-303.

215. Residences are treated equally with commercial premises under present Arizona law. *See id.* § 13-302(A) (Supp. 1975-76).

burglary of a residence should be more serious than a nocturnal burglary of an automobile or shed. This approach would require a reasonably precise, but flexible, definition of what constitutes a residential structure so that modern intermittently inhabited structures such as campers, trailers, and cabin cruisers would be granted the same protection as a house.

There is one other significant problem with present burglary law. For burglary to occur at common law there must have been an unlawful entry. Under Arizona's burglary laws, however, a lawful entry with consent may be burglary if it is coupled with the intent to commit a felony once inside.[216] The existing burglary statutes in Arizona are broad enough, therefore, to permit burglary convictions for entering the glove compartment of a car, fiddling with the coin box in a public phone booth,[217] walking through the open front door of a courthouse intending to commit perjury, or legally entering an open store and later shoplifting. Examples of other potential burglars under Arizona law could include students entering a fellow student's home to smoke marijuana, an unmarried couple entering his or her home to have sexual relations, or friends entering a home for a friendly social bout of gambling. The appellate courts have fueled this confusion concerning legal entry by defining an open phone booth as a building within the meaning of section 13-302(A), so as to penalize the theft of coins therefrom as burglary rather than larceny.[218]

The traditional offense constituting burglary is a trespassory invasion of habitation, not a dispossession offense in the nature of larceny.[219] The aim of burglary law, therefore, should be protection of enclosures from illegal invasion, especially those which are inhabited; it is the purpose of theft law to prevent dispossession subsequent to legal entry. Other jurisdictions have properly clarified the scope of burglary law. In New Mexico, for example, entry into an open store with the intent to shoplift is treated as theft, not burglary.[220] One federal court has gone a step further to hold it reversible error to instruct a jury that lawful entry coupled with a subsequent intent to steal constitutes burglary.[221] Arizona's burglary statutes should be amended to forbid only those entries which are illegal; legal entry coupled with felonious intent to steal would then fall under some variety of theft.[222]

216. *See* State v. Owen, 94 Ariz. 354, 356, 385 P.2d 227, 228 (1963).
217. *See* State v. Hogue, 15 Ariz. App. 434, 489 P.2d 281 (1971).
218. *Id.* at 435, 489 P.2d at 282.
219. See text accompanying notes 206-08 *supra.*
220. State v. Rogers, 83 N.M. 676, 677, 496 P.2d 169, 170 (1972).
221. United States v. Cooper, 473 F.2d 95, 97 (D.C. Cir. 1972).
222. *See* MODEL PENAL CODE § 221.1; PROPOSED ARIZONA CODE, *supra* note 1, §§ 1505-1507.

Arson

Common law arson was the malicious and voluntary burning of the dwelling of another.[223] Complete destruction was not required; any damage to the fibers sufficed to constitute the offense.[224] The subjects of common law arson traditionally were dwellings and the attached structures of the curtilage such as barns, sheds, and stables. Burning insured property with intent to defraud the insurer was not encompassed within common law arson.[225] Also outside the offense was burning one's own dwelling, unless a tenant was in possession at the time. Instead, this act constituted the common law misdemeanor of "house burning" if done intentionally and in such a manner as to endanger other dwellings.[226] The test for whether a dwelling was that of another was not title, but possession or occupancy.[227] Thus, common law arson, like burglary, was a crime against peaceable habitation rather than ownership.[228]

The mental element for common law arson could be provided by either an intent to burn the dwelling of another or "an act done under such circumstances that there is obviously a plain and strong likelihood of such a burning."[229] This description reveals one of the greatest inconsistencies in common law arson: the grouping in one offense of two significantly different states of mind, intention and negligence. The intentional arsonist obviously has culpability far greater than is exhibited by the reckless smoker's careless discarding of a cigarette. The common law also failed to distinguish situations where human life is threatened from those involving only the destruction of a building. Clearly the latter should be treated as less culpable. Finally, common law arson has been used occasionally to punish the separate destruction of personalty, a different type of crime and one better suited for prosecution as criminal damage.

The Arizona arson statutes closely follow their common law ancestors: they exhibit imprecise definitions, inconsistent mental states,

223. F. INBAU, J. THOMPSON & J. ZAGEL, *supra* note 206, at 332; R. PERKINS, *supra* note 43, at 216; J. TURNER, *supra* note 119, at 1332. The common law limited arson to structures on land and did not include burning of the land itself, thus requiring two sets of offenses. Arizona laws, following suit, penalized setting fire to land in statutes separate from arson. *See* ARIZ. REV. STAT. ANN. §§ 13-231 to -236 (1956); *id.* §§ 13-941 to -944 (1956), *as amended*, (Supp. Pamphlet 1973).

224. R. PERKINS, *supra* note 43, at 220; J. TURNER, *supra* note 119, at 1332; *see* F. INBAU, J. THOMPSON & J. ZAGEL, *supra* note 206, at 332.

225. McDonald v. People, 47 Ill. 533, 536 (1868) (dictum); Norville v. State, 144 Tenn. 278, 280, 230 S.W. 966, 966 (1921); R. PERKINS, *supra* note 43, at 229.

226. *See* R. PERKINS, *supra* note 43, at 226-28; J. TURNER, *supra* note 119, at 1335.

227. Snyder v. People, 26 Mich. 106, 108, 12 Am. R. 302, 304 (1872); State v. Fish, 27 N.J.L. 323, 324-25 (Super. Ct. 1859); R. PERKINS, *supra* note 43, at 226; J. TURNER, *supra* note 119, at 1335.

228. R. PERKINS, *supra* note 43, at 223.

229. *Id.* at 219-20.

and considerable overlapping.[230] No attempt is made to deal with the various mens rea possibilities or the differing degrees of culpability involved in differing acts of arson.[231] Some form of revision is clearly in order. A preferable approach would be limitation of arson to fires that cause structural damage; those involving risk and damage to personalty should be covered separately by a generic criminal damage statute.[232] Additionally, careful adherence to mens rea principles dictates that negligent burning be distinguished from the more culpable deliberate intent to destroy.[233] Unlike the existing statutory scheme where arson of an unoccupied outhouse is treated more severely than arson of a crowded restaurant,[234] the severity of sentence should reflect the known presence or absence of human beings, rather than the nature or value of the building.[235] Such changes would make the arson statutes more reflective of mens rea, more internally consistent, and more proportioned to the severity of the crime.

Theft

At common law, larceny was the trespassory taking and asporting of the tangible personal property of another with the intent to deprive the owner permanently of possession.[236] Common law larceny developed incredible refinements, partly due to verbal confusion, but also due to its original status as a capital offense.[237] Revulsion at this severe penalty often led judges and juries to acquit the accused when

230. Statutory arson incorporates the common law concepts with few modifications. In Arizona both occupied and unoccupied structures may be objects of arson. Section 13-231 penalizes the burning of an occupied dwelling identically with burning an unoccupied tent, kitchen, shop, barn, or outbuilding. *See* ARIZ. REV. STAT. ANN. § 13-231 (1956). The burning of valuable personal property also is covered as third-degree arson. *See id.* § 13-233. Attempted arson, a superfluous statute since this offense is covered adequately by the general attempt statutes, *id.* §§ 13-108 to -110, is listed as fourth-degree arson. *See id.* § 13-234. Burning one's own property with the intent to defraud an insurer requires proof of specific intent to defraud, thus making conviction harder than under section 13-231. *Compare id.* § 13-235 *with id.* § 13-231. A final statute penalizes burning enumerated properties not the subject of arson, thus extending another protective mantle over the same bridges, snowsheds, boats, tents, crops, fences, and lumber already protected by the multiple criminal damage statutes. *See id.* § 13-236; text & notes 199-205 *supra.*

The common law did not directly sanction the criminal use of explosives. Accordingly, sanctions upon such activities were enacted separately from arson statutes. *See* ARIZ. REV. STAT. ANN. § 13-881(A)(2) (1956) (placement of explosives to blow up a train); *id.* §§ 13-921 to -923 (1956), *as amended,* (Supp. Pamphlet 1973) (use of explosives in general). Setting fire to land rather than buildings also is governed by separate statutes. *See id.* §§ 13-941 to -944; discussion note 223 *supra.*

231. *See* ARIZ. REV. STAT. ANN. §§ 13-231 to -235 (1956); discussion note 230 *supra.*

232. See text accompanying notes 204-05 *supra.*

233. *See* PROPOSED ARIZONA CODE, *supra* note 1, §§ 1701-1703.

234. *Compare* ARIZ. REV. STAT. ANN. § 13-231 (1956) *with id.* § 13-232.

235. *See* PROPOSED ARIZONA CODE §§ 1702(b), Commentary, 1703(b), Commentary.

236. R. PERKINS, *supra* note 43, at 234; J. TURNER, *supra* note 119, at 885.

237. F. INBAU, J. THOMPSON & J. ZAGEL, *supra* note 206, at 296-97; R. PERKINS, *supra* note 43, at 232-33.

the letter of the law deviated from the facts.[238] This judicial restraint, combined with the inherent definitional problems, prompted prolific legislation, resulting in a patchwork of offenses.[239] It was held, for example, that the legal recipient of property could not commit larceny because he had not taken and carried away property in the possession of another.[240] A new statutory offense of embezzlement therefore was created in 1799 to punish this and the similar offenses labeled fraudulent conversion, larceny by bailee, and larceny after trust.[241]

The offense of obtaining property by false pretenses also became a separate statutory crime following strict judicial enforcement of the technical larceny requirement that property be obtained against the possessor's will.[242] If the possessor voluntarily parted with his property, the defendant did not "take" the property and thus could not be found to have committed larceny, no matter how fraudulent his methods. Thus the statutory offense of false pretenses, dating from the act of 1757, criminalized the use of fraud to effect the voluntary surrender of another's property.[243] Common law larceny also failed to cover extortion because this type of property transfer appeared voluntary. Statutes rapidly enacted to cover such transfers typically failed to distinguish the threat involved in extortion from the seemingly similar threat involved in robbery, thus blurring the two.[244] Other gaps in the larceny framework which had to be later filled by specialized statutes included theft of services,[245] temporary deprivations of property,[246] and failure to disburse monies at the agreed upon time.[247]

238. F. INBAU, J. THOMPSON, & J. ZAGEL, *supra* note 206, at 296-97; R. PERKINS, *supra* note 43, at 232-33.

239. R. PERKINS, *supra* note 43, at 233.

240. *See id.* at 239-44, 286-95.

241. *Id.* at 289-93.

242. *Id.* at 296.

243. *Id.* at 296-98. The fraud vitiated the consent, leaving the possession trespassory and the conversion larcenous. *See* English v. State, 80 Fla. 70, 71, 85 So. 150, 151 (1920). Of this reasoning, Holmes said:

> In modern times the judges enlarged the definition a little by holding that, if the wrongdoer gets possession by a trick or device, [larceny] is committed. This really was giving up the requirement of a trespass, and it would have been more logical, as well as truer to the present object of the law, to abandon the requirement altogether. That, however, would have seemed too bold . . . .

Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 470 (1897).

244. *See* R. PERKINS, *supra* note 43, at 367.

245. "Under modern statutes it is larceny to steal a railroad ticket. . . . But it is not larceny to 'steal a ride' on a train." *Id.* at 237.

246. *Id.* at 272-73; *see* ARIZ. REV. STAT. ANN. § 13-672 (Supp. 1975-76) (making joyriding a misdemeanor).

247. R. PERKINS, *supra* note 43, at 237-38, 244-45. The withholding of checks by an employer, for instance, was not larceny because of the intangibility of the obligation and the lack of any transfer of possession. *See id.* at 237 & n.13. Nor was it larceny to see a motion picture wrongfully without paying the required admission; to hear a communication over the telephone, intended only for another; or to sleep in a hotel bed without compensation. *Id.* at 237. None of these wrongful takings involve tangible items subject to asportation. Natural gas, however, would be subject to larceny since it can be taken or carried away, although it may be difficult to do so. *Id.* at 238.

Shaped by these common law antecedents and compelled to imitate their profusion, the Arizona theft statutes[248] define almost as many theft crimes as there are conceivable ways or objects of stealing.[249] A revision of these statutes is sorely needed to eliminate the technical and often confusing distinctions between the various forms of common law larceny and to criminalize modern thefts not encompassed by the language of taking. The essence of the theft offense should be the single evil of obtaining control over property with the intent to withhold it from the rightful possessor. The technical distinctions among shoplifting, embezzlement, receiving stolen property, finding and keeping lost property, defrauding an innkeeper, and other common law theft crimes should merge into an overriding concept of unlawfully controlling the property or services of another.[250] Reducing the cumbersome technical distinctions stemming from medieval England would expedite courtroom prosecution by reducing the need to prove archaic elements.

Some further recommended changes deserve elaboration. Unlike existing Arizona law,[251] the theft statute should speak not of taking another's property but of exercising control over it, so as to broaden the offense to cover sophisticated electronic, computer, or telephonic manipulations. Such acts as information theft, misdirecting shipments, or luring an animal out of its cage or away from its owner, which lack the common law requirement of asportation,[252] also would be encompassed by such terminology. Furthermore, unlike existing law, property subject to theft need not always technically belong to someone else. The offense should lie even when a person takes his own prop-

248. Arizona combines the common law offenses of larceny and false pretenses under the heading "theft", with a separate section covering theft by embezzlement. *See* discussion note 249 *infra*.

249. The following Arizona statutes attempt to plug all the imaginable loopholes in the present theft laws: sections 13-661 (definition and methods of theft), 13-662 (use of "larceny, embezzlement or stealing" in statute), 13-663 (degrees of theft), 13-664 (proof of false pretense), 13-665 (property subject to theft), 13-668 and 13-684 (theft of money, bank note, stock certificate, or securities), 13-669 (possession of livestock without bill of sale), 13-670 (theft of neat animal), 13-672 (theft of motor vehicle or motorcycle), 13-673 (willful concealment or shoplifting of merchandise in store), 13-676 (coin-operated contrivances break-in), 13-677 (failure to return rented vehicle), 13-681 (definition of embezzlement), and 13-682 (acts constituting embezzlement). Other theft-related statutes are scattered throughout Title 13. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-318 (Supp. Pamphlet 1973) (defrauding a business establishment); *id.* § 13-319 (hiring vehicle or animal with intent to defraud); *id.* §§ 13-401 to -404 (1956) (extortion by fear and threat); *id.* § 13-621 (Supp. Pamphlet 1973) (receiving stolen property); *id.* § 13-971 (1956) (larceny committed by use of slugs or false coins); *id.* § 13-1001 (possession or use of false keys with intent to commit theft); *id.* §§ 13-1073 to -1079 (Supp. Pamphlet 1973) (theft of or fraudulent use of credit card).

250. Abolition of these technicalities is not a wholly new idea. *See* State v. McCormick, 7 Ariz. App. 576, 580-81, 442 P.2d 134, 138-39, *vacated on other grounds*, 104 Ariz. 18, 448 P.2d 74 (1968); ARIZ. REV. STAT. ANN. § 13-662 (1956).

251. *See* ARIZ. REV. STAT. ANN. § 13-661 (1956).

252. For Arizona cases discussing the asportation requirement, see Davis v. State, 41 Ariz. 12, 15 P.2d 242 (1932); Pass v. State, 34 Ariz. 9, 267 P. 206 (1928); State v. Allen, 1 Ariz. App. 161, 400 P.2d 589 (1965).

erty encumbered with another's interest: for instance, one might take his own watch from a jeweler without payment for repairs, or groundlessly reclaim leased property before expiration of the lease.[253]

Intent "permanently" to deprive the owner of possession has been judicially read into Arizona's theft statute as a necessary element of the offense.[254] A more sophisticated approach, however, would criminalize any retention of property which substantially diminishes its value or usefulness regardless of temporal duration. The legislature might wisely wish to relax the permanent deprivation element.[255] To avoid harsh results, however, the larcenous control over the taken property should be knowing and intentional, thus precluding strict liability or liability based on recklessness or negligence.[256]

While numerous other reforms of the theft laws could be suggested,[257] the other area in critical need of change is the problem of bad checks. Careful thought should be given initially to whether an insufficient funds statute is needed at all. A check drawn on insufficient funds may reflect only careless bookkeeping. Where the intent to defraud is in fact present, the violation can readily be treated under the statutory provisions governing theft or fraud.[258] If the statute is to be retained, the law should be revised to make it easier to establish intent to defraud. Under current bad check law, it is often necessary to obtain information from a suspect's bank concerning his or her checking account in order to show an intent to defraud. Banks, however, asserting the customer's right to privacy, frequently will not give this information to legitimate inquirers without a court order. The victim of a bad check should be empowered to notify the check writer in person or by registered mail that he or she has 10 days to cure the default, with the drawer's failure to respond constituting prima facie

253. *See* PROPOSED ARIZONA CODE, *supra* note 1, § 1800(c).

254. *See, e.g.*, State v. Marsin, 82 Ariz. 1, 3, 307 P.2d 607, 608 (1957); State v. Parsons, 70 Ariz. 399, 407, 222 P.2d 637, 642 (1950); Whitson v. State, 65 Ariz. 395, 397, 181 P.2d 822, 823 (1947).

255. The Model Penal Code has adopted a less rigid definition of permanently deprive. MODEL PENAL CODE § 223.0(1) (defining "deprive" as including withholding an object for so extended a period as to appropriate a major portion of its economic value); *accord*, PROPOSED ARIZONA CODE, *supra* note 1, § 1800(a).

256. *See* Sisson v. State, 16 Ariz. 170, 141 P. 713 (1914); State v. Abbey, 13 Ariz. App. 55, 474 P.2d 62 (1970); PROPOSED ARIZONA CODE, *supra* note 1, § 1801(a).

257. For instance, in view of the unqualified $100 distinction between grand and petty theft, ARIZ. REV. STAT. ANN. § 13-663 (Supp. Pamphlet 1973), a more precise standard of valuation is needed. At present there is no test to indicate whether the crucial value of the goods is to be the retail, wholesale, appreciated, depreciated, replacement, purely sentimental, or purely potential value of the property.

258. The same reasoning may well apply to credit card violations, *see id.* §§ 13-1071 to -1079 (Supp. Pamphlet 1973), a second area where legislative pressure by banking interests has resulted in promulgation of specialized theft statutes for crimes adequately covered under the generic statutes. Section 13-1079 already expressly permits credit card offenses to be treated under generic statutes such as those defining theft, fraud, or forgery. *Id.* § 13-1079.

evidence of intent to defraud.[259] Finally, the penalties for writing a bad check should be brought into line with penalties for theft of the same amount.[260] There is little difference in intent, result, or amount between obtaining funds via bad check or by a more traditional form of theft.[261]

Fraud

The present Arizona law dealing with fraud is scattered haphazardly throughout both the criminal and civil codes.[262] The hodgepodge character of this collection unfortunately results in the lack of a centralized theme criminalizing large-scale business frauds. Complicating the problem is the fact that fraud is so poorly defined as to touch, however inadequately, a variety of unrelated acts such as bribery,[263] forgery,[264] perjury,[265] and theft by misrepresentation.[266] Revision of the current Arizona fraud statutes would help curb the infestation of business swindles in the state, particularly in the land sales industry.[267] Insofar as it covers such complicated business swindles, present criminal law makes no reference to scheme or artifice; it merely penalizes theft by misrepresentation.[268] Thus successful prosecution of fraudulent business

259. A similar provision presently exists in the embezzlement statutes on rented equipment. *Id.* § 13-682(B).

260. The penalty for theft of property worth $101 runs up to 10 years in prison, while obtaining the same amount by writing a bad check brings a maximum penalty of only 5 years. *Compare id.* § 13-663(A)(1) *and id.* § 13-671(A) (Supp. 1975-76) *with id.* § 13-316(A)(1) (Supp. Pamphlet 1973). In contrast, the penalty for theft of $99 is 1 year's imprisonment while writing a bad check for the same amount results in a sentence of up to 5 years. *Compare id.* § 13-663(B) *and id.* § 13-671(B) (Supp. 1975-76) *with id.* § 13-316(A)(2) (Supp. Pamphlet 1973).

261. Two other changes in the present bad check law would seem advisable. First, the dividing line between felony and misdemeanor check fraud should be the same as that applying to theft. Additionally, the unnecessary open-ended offense for writing bad checks between $25 and $100, *id.* § 13-316(A)(2), should be eliminated.

262. Fraud as a distinct crime apparently was unknown at common law; it was incorporated instead into existing offenses as one mode of committing such offenses, such as theft by false pretenses. *See id.* § 13-664 (1956) (false pretenses); *id.* § 44-1522 (1967) (consumer fraud); R. PERKINS, *supra* note 43, at 296-306.

263. *See* ARIZ. REV. STAT. ANN. §§ 13-281 to -291 (1956).

264. *See* ARIZ. REV. STAT. ANN. § 13-421 (Supp. Pamphlet 1973).

265. *See id.* § 13-561 (1956).

266. *See id.* § 13-661(A)(3).

267. Business fraud, to the extent penalized, is presently covered only by the general civil provisions of sections 44-1522 to 44-1533 prohibiting consumer fraud. *See id.* §§ 44-1522 to -1533 (1967), *as amended*, (Supp. 1975-76).

268. *See id.* § 13-661(A)(3) (1956). Subsection 3 is most likely the only operative criminal fraud statute applicable to business fraud. The lack of prosecutions in the area of commercial fraud may be due to a judicial tendency to construe the criminal statutes strictly. For example, theft by false pretenses usually requires that there be a false "assertion of an existing fact, not a promise to perform some act in the future." *See* Commonwealth v. Moore, 99 Pa. 570, 574 (1882). Thus, a merchant who cheats a consumer out of his money by promising something in the future, never intending to fulfill the promise, is not guilty of false pretenses. In addition, even if a case is brought to trial, judges and juries are apt to treat the white-collar criminal leniently. Faced with these realities a prosecutor in balancing the possible penalty against the cost of prosecution often will tend not to prosecute.

activities is possible only if they meet the highly technical requirements of taking, asportation, and permanent deprivation required under theft law.[269] Furthermore, fraud may be based only on a misrepresentation of past or present facts; promises of future acts are not covered.[270] A salesman, for example, who sells a customer a tract of land with a false promise that a shopping center will be built nearby or sewage facilities installed has not violated any Arizona law. In addition, in Arizona the victim bears the burden of proving that he has been swindled by producing witnesses or documentary evidence.[271]

The shortcomings of Arizona criminal law in the area of business fraud have resulted in a virtual abdication of fraud prosecutions to the federal government.[272] Federal law therefore may be useful as a model for filling the gaps in the state laws. For example, the Federal Mail Fraud Act[273] penalizes anyone who by any scheme or artifice obtains money or property by means of false or fraudulent pretenses, representations, or promises. Although the term "fraudulent" may beg the question, this federal fraud statute has an advantage over Arizona's laws by both precisely defining the prohibited acts and then penalizing them.[274] If the state is serious about controlling white collar crime, it must give law enforcement agencies the necessary statutory tools to prosecute and penalize effectively both commercial and business fraud.[275]

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269. *See* text accompanying notes 236, 251, 254 *supra*.

270. *See* Willis v. State, 34 Ariz. 363, 366, 271 P. 725, 726 (1928). The requirement that promises of future acts were not punishable came about as the result of pressure from the business community upon the common law courts. Businessmen feared that they would be held liable for virtually any sales pitch made. The Model Penal Code solves this problem by excepting "puffing" from any statutory prohibition and requiring that the person deliberately intend to deceive. MODEL PENAL CODE § 223.3; *accord*, PROPOSED ARIZONA CODE, *supra* note 1, § 1801(a)(3), Commentary.

271. The victim must produce either a document signed by or in the handwriting of the defendant, two witnesses to the pretense, or one witness plus corroborating circumstances. ARIZ. REV. STAT. ANN. § 13-664(A) (1956).

272. *See* Arizona Republic, Feb. 4, 1976, § 1, at 1, col. 2; *id.* Nov. 17, 1975, § 1, at 1, col. 5.

273. 18 U.S.C. § 1341 (1970).

274. *Compare* ARIZ. REV. STAT. ANN. §§ 13-661 to -672 (1956), *as amended*, (Supp. Pamphlet 1973, Supp. 1975-76); *id.* §§ 13-673 to -676 (Supp. Pamphlet 1973); *and id.* §§ 13-672.01, -677 (Supp. 1975-76), *with* 18 U.S.C. § 1341 (1970).

275. In response to the murder of Phoenix investigative reporter Don Bolles, believed to be related to his stories on organized crime and land fraud in Arizona, the state legislature enacted several statutes aimed at procedurally aiding investigation and prosecution of land fraud operations by organized crime as well as of the murder itself. *See* ch. 116, [1976] Ariz. Sess. Laws 504-05. The existing laws preventing conviction solely on the testimony of an accomplice, Ariz. Rev. Stat. Ann. § 13-136 (1956), and defining accessories, *id.* § 13-141 (Supp. Pamphlet 1973), were repealed, and the statutes defining perjury, ARIZ. REV. STAT. ANN. §§ 13-561 to -562 (1956), and making it a crime to conceal, alter, or destroy evidence, *id.* § 13-321 (1956), were tightened. *See* ch. 116, §§ 1-4, [1976] Ariz. Sess. Laws 504-05. Perhaps most important, legislation was enacted outlawing blind trusts whereby the true ownership of property could be concealed. *See* ch. 105, § 33-401, [1976] Ariz. Sess. Laws 376-78.

Although there appears some reluctance to criminalize and prosecute business fraud and other white-collar crimes, it may be that consumer fraud is a more harmful kind

INCHOATE CRIMES

Certain anticipatory acts, though not criminal offenses themselves, nevertheless manifest an intent to bring about the commission of a crime. The crimes of attempt, conspiracy, and solicitation have an overriding justification in permitting the arrest of dangerous persons without waiting until their criminal schemes are completed.[276] An attempt to commit any indictable offense whether of common law or statutory origin was punished as a misdemeanor at common law.[277] The urging or commanding of another to commit a crime generally was not regarded as an attempt but as the object of the separate common law crime of solicitation.[278] Criminal conspiracy was a third common law misdemeanor, punishing an agreement by two or more persons to commit an unlawful act.[279] Conspiracy imposed criminal liability based on the agreement itself, and thus no overt act in furtherance of the plan was required.[280]

With the exception of solicitation, which is not currently criminalized,[281] statutes on inchoate crimes litter the existing criminal law. The conspiracy statute defines three redundant degrees of conspiracy,[282] requiring an overt act to constitute the offense.[283] Attempt is defined as "the performance of an act immediately and directly tending to the commission of the crime with the intent to commit such crime, the con-

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of social behavior than traditional crime. This view has been advanced by former United States Attorney General Ramsey Clark, among others. "White-collar crime is the most corrosive of all crimes. The trusted prove untrustworthy; the advantaged, dishonest. It shows the capability of people with better opportunities for creating a decent life for themselves to take property belonging to others. As no other crime, it questions our moral fiber." R. CLARK, CRIME IN AMERICA 38 (1970). *See also* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE TASK FORCE REPORT: CRIME AND ITS IMPACT—AN ASSESSMENT 102-115 (1967) (financial costs); R. SMITH, HEALTH HUCKSTERS (1960) (health costs); N.Y. Times, Oct. 11, 1966, at 39, col. 4 (social costs). It is possible also that consumer fraud may be more easily deterred by the imposition of criminal sanctions than traditional offenses. *See* H. PACKER, LIMITS OF THE CRIMINAL SANCTION 356-57 (1968); K. LLEWELLYN, JURISPRUDENCE 403-04 (1962); Geis, *Deterring Corporate Crime*, in CORPORATE POWER IN AMERICA 182 (R. Nader & M. Green eds. 1972).

276. *See generally* R. PERKINS, *supra* note 43, at 552-636.

277. *Id.* at 552.

278. *Id.* at 582-88. If the crime was carried out, the solicitor could be convicted of the substantive offense. *Id.* at 584.

279. *Id.* at 612-36.

280. *Id.* at 616-18. *See* United States v. Geaney, 417 F.2d 1116 (2d Cir. 1969); Mulcahy v. The Queen, 1 Ir. R.C.L. 12, 38 (1867).

281. Although there is no separate solicitation statute, solicitation is an element of several offenses. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-570 (1956) (subornation of perjury); *id.* §§ 13-581 to -582, -586 (prostitution) (Supp. Pamphlet 1973). *See also* State v. Mandel, 78 Ariz. 226, 278 P.2d 413 (1954) (wife's solicitation of undercover police officer to murder her husband, coupled with partial payment and instructions, punished under attempt statute).

282. *See* ARIZ. REV. STAT. ANN. § 13-331 (Supp. 1975-76). Subsections A, B, and C define the identical crime, the only difference being the severity of the conspired offense.

283. *Id.* § 13-332 (1956).

summation of which fails on account of some intervening cause."[284] This language requires that the attempt fail due to some outside factor.[285] This requirement is archaic and unnecessary, and is frequently lacking in factual attempts. Moreover, it has led to a plethora of specific attempt statutes in a legislative effort to criminalize conduct which escapes liability under the general attempt statute. These specialized statutes, punishing attempted extortion,[286] attempted arson,[287] attempted escape,[288] and attempt to influence justice,[289] are unnecessary and duplicative. In addition, they raise a logical problem as to whether they incorporate the generic elements of attempt entombed in section 13-108.

Statutory improvements in the area of inchoate crimes might begin with recognition of solicitation as a distinct offense imposing criminal liability on those who request or order others to commit crime.[290] Further, unlike present law,[291] conspiracy and solicitation should be treated as unilateral rather than bilateral offenses.[292] The failure to convict one participant would not automatically preclude conviction of others. The immunity, minority, incapacity, nonprosecution, or acquittal of an accomplice should have no bearing on the guilt of accomplices. An individual who manifests a desire to further his or her criminal objectives by joining with others is hardly less responsible because he or she joined with an incompetent, an undercover agent, a person subsequently granted immunity, or someone otherwise incapable of being prosecuted for the crime.[293] Two additional reforms are needed. A broader, all-inclusive statute should dispense with the useless requirement that the attempt fail due to an intervening cause. Finally, impos-

284. *Id.* § 13-108.
285. Such outside factor apparently can be impossibility of completion which is unknown to the defendant. *See* State v. Mandel, 78 Ariz. 226, 229-30, 278 P.2d 413, 416 (1954).
286. ARIZ. REV. STAT. ANN. §§ 13-402 to -403 (1956).
287. *Id.* § 13-234.
288. *Id.* §§ 13-392 to -393 (1956), *as amended,* (Supp. Pamphlet 1973); *id.* §§ 13-395 to -396 (Supp. Pamphlet 1973).
289. *See id.* § 13-548 (1956).
290. *See* MODEL PENAL CODE § 5.02; *accord,* PROPOSED ARIZONA CODE, *supra* note 1, § 601. See discussion note 281 *supra.* Solicitation should be punishable without the additional overt acts needed to establish attempted murder. *See generally* State v. Mandel, 78 Ariz. 226, 228, 278 P.2d 413, 415 (1954) (where intent to commit crime is shown, a slight overt act is sufficient to constitute attempt).
291. Eyman v. Deutsch, 92 Ariz. 82, 85, 373 P.2d 716, 718 (1962) (the court holding that acquittal of one of two alleged coconspirators mandates reversal of the other's conviction).
292. *See* MODEL PENAL CODE §§ 5.03-.04 & Comments (Tent. Draft No. 10, 1960).
293. *Cf.* Eyman v. Deutsch, 92 Ariz. 82, 90, 373 P.2d 716, 721-22 (1962) (Struckmeyer, J., dissenting). *See also* State v. Mandel, 78 Ariz. 226, 229-30, 278 P.2d 413, 416 (1954). Arizona statutes also should state that a single agreement for multiple crimes constitutes one, rather than multiple conspiracies. *See* Braverman v. United States, 317 U.S. 49, 53 (1942).

sibility should not be a defense to any inchoate crime; attempted pickpocketing should be punished even if the pocket is empty.[294]

SENTENCING

Any revision of Arizona's substantive criminal law must devote considerable attention to penalties. To effectuate the unstated goals of punishment, Arizona judges currently are authorized to choose from a plethora of disparate, random penalties. Apart from the felony-misdemeanor distinction, there exists no system of classifying sentences; each sentence is prescribed individually in the statute defining the offense. Sentences for each newly enacted crime are created simply on an ad hoc basis without integration into the scheme of existing sanctions.

As a result, Title 13 is fraught with absurdly inconsistent sentencing possibilities. Theft of a credit card may subject the actor to as severe a penalty as conviction for enticing a minor into prostitution.[295] Moreover, the latter crime may be punished less severely than would be the case if an adult rather than a child were the victim.[296] Bribing a football player is as seriously treated as bribing a judge.[297] Taking sunglasses from the glove compartment of a vehicle may be punished more severely than taking the entire car.[298]

These comparisons witness the undesirable results attributable to piecemeal accumulation of statutory penalty provisions by a constantly changing legislature. Such legislative gallimaufry has not escaped criticism:

> No branch of penal legislation is, in my view, more unprincipled or more anarchial than that which deals with prison terms that may or sometimes must be imposed on conviction of specific crimes. The legislature typically makes determinations of this order not on any systematic basis but rather by according its *ad hoc* attention to some discrete area of criminality in which there is a current hue and cry. Distinctions are thus drawn which do not have the slightest bearing on the relative harmfulness of conduct and the consequent importance of preventing it so far as possible, on the probable dangerousness of the individual whose conduct is involved, or even on a public demand for heavy sanctions which is so inexorable that it cannot safely be denied. What dictates legis-

294. *See generally* H. KADISH & M. PAULSEN, *supra* note 44, at 352-68.
295. *Compare* ARIZ. REV. STAT. ANN. § 13-1073(A) (Supp. Pamphlet 1973) *with id.* § 13-587.
296. *Compare id.* § 13-587 *with id.* § 13-581.
297. *Compare id.* § 13-287 *with id.* § 13-292.
298. *Compare id.* § 13-302(A)(B) (Supp. 1975-76) *with id.* § 13-672(B) *and id.* § 13-671(A).

> lation is the simple point of politics that reelection demands voting against sin, whenever ballots on the question must be cast.[299]

Absolute uniformity in sentencing is neither possible nor desirable, for offenses do vary in severity. The inconsistencies in existing Arizona sentencing statutes, however, are so irrational as to reinforce a criminal's belief in the cruelty of the judicial system as well as the layman's belief in its arbitrariness. When prisoners compare their differing sentences, they may come to the conclusion that their rights and their liberty have been capriciously treated, a feeling that impedes rehabilitation and hastens their return to crime upon release. An analogous feeling ironically may strike the victims of crimes who see patternless disparity in the sentencing of criminal defendants.

Further disparities result from the judicial discretion provided by most sentencing statutes.[300] The sentence ultimately imposed by the

299. Wechsler, *Sentencing, Correction, and the Model Penal Code*, 109 U. PA. L. REV. 465, 472-73 (1961).

300. Most criminal statutes give the judge a range of sentences from which to choose. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-231 (1956) (first degree arson punishable by not less than 2 nor more than 20 years' imprisonment); *id.* § 13-421(B) (Supp. Pamphlet 1973) (forgery punishable by imprisonment for 1 to 14 years); *id.* § 13-992 (loitering in or about a school punishable by a fine of up to $300, 6 months' imprisonment, or both). The following charts illustrate the resulting disparities:

AVERAGE MINIMUM SENTENCING
By Arizona Superior Court Judges
1969-72

	Number of Judges Included	Average Minimum Sentence Pronounced LOW (months)	MEDIAN (months)	HIGH (months)
Burglary	41	20.2	31.3	76.5
Assault	22	27.8	48.8	142.0
Drug Violations	22	20.7	50.9	93.3
Robbery	21	52.5	85.1	180.0
Larceny	20	21.0	38.7	54.0
Forgery	12	23.0	36.3	69.0
Homicide	11	61.5	140.0	253.3
Fraud	7	17.3	27.3	33.0

ARIZONA STATE UNIVERSITY, THE PROBLEM OF CRIME IN ARIZONA 77, Table 2 (1975).

SENTENCE VARIATIONS FOR 1973 ADMISSIONS

	Number of Cases		State Average Terms		Metropolitan Counties		Rural Counties	
	No.	%	Min.	Max.	Min.	Max.	Min.	Max.
Willful Homicide	24	3.3	12.1	20.3	10.8	19.9	13.9	20.9
Negligent Manslaughter	13	1.8	6.6	10.0	5.6	8.2	10.0	16.0
Armed Robbery	83	11.3	8.5	13.7	8.8	13.4	7.0	15.7
Unarmed Robbery	12	1.6	4.9	8.8	4.8	8.3	6.0	15.0
Aggravated Assault	73	9.9	4.9	7.8	4.6	7.3	5.8	9.3
Theft (except vehicle)	54	7.3	3.7	5.8	3.9	6.2	3.2	4.6

judge is affected by a number of factors. A prior prison record may raise the minimum sentence pronounced by the court by about 50 percent compared to the average minimum for the same offense by a novice.[301] Women generally have received shorter sentences than men for the same offense with the exception of assault, for which women's sentences are comparatively longer.[302] Whites have received minimum sentences for robbery and assault averaging 17 months longer than those handed down to members of ethnic minorities. Conversely, minorities have received minimum sentences 16 months longer for drug violations than those meted out to Whites.[303] Heavy drinkers and alcoholics tend to receive longer terms for assault and sexual assault, but shorter than average terms for robbery.[304] These statistics reflect what daily involvement with the Arizona courts illustrates—that sincere, well-motivated judges sentence similar offenders to radically differing lengths and types of punishment. A classification scheme is desperately needed to remedy the disparity, whether it resembles the grading system in the proposed federal code[305] or the recent, controversial "flat time" proposal of the Illinois Law Enforcement Commission.[306] Other

Vehicle Theft	28	3.8	2.3	3.8	2.3	4.3	2.3	3.3
Forgery/ Fraud by Check	48	6.5	3.6	6.0	3.6	5.9	3.6	6.3
Other Fraud	7	.9	3.7	5.9	3.7	5.9	——	——
Rape Forcible	23	3.1	9.4	14.3	9.6	14.6	6.0	9.0
Rape Statutory	1	.1	15.0	20.0	15.0	20.0	——	——
Sex Offense Against Juveniles	6	.8	5.2	8.8	4.5	6.5	6.5	13.5
Other Sex Offenses	4	.5	2.5	6.3	4.0	10.0	2.0	5.0
Drug Violations	137	18.6	4.4	7.6	5.1	8.3	3.4	6.6
Other	41	5.6	8.0	13.9	8.1	14.5	5.7	8.9
TOTAL	738	100%	5.2	8.5	5.5	8.8	4.4	7.5

Id. at 78, Table 3.

301. Interview with Richard Geisenhoff, Ass't Warden, Arizona State Prison, April 1975.
302. *Id.*
303. *Id.*
304. *Id.*
305. *See* PROPOSED FED. CRIM. CODE, *supra* note 56, §§ 3001-3002; *accord*, PROPOSED ARIZONA CODE, *supra* note 1, §§ 901-902.
306. *See generally* D. FOGEL, WE ARE THE LIVING PROOF (1976). The "flat time" system imposes sentences based on the following schedule:

Offense	Flat-Time Sentence	Range in Aggravation or Mitigation
Murder (capital)	Death	——
Murder (non-capital)	Life or 25 years	± up to 5 years
Felony—Class 1 (e.g., kidnapping)	8 years	± up to 2 years

sentencing models may be even more feasible. "Presumptive sentencing," espoused by the Twentieth Century Fund, is attracting considerable attention.[307] It is an approach that permits the sentencing judge limited discretion to tailor punishment to the particular offender without showing radically different penalties for similar offenders. Under this concept the legislature would not only set the minimum and maximum sentence but also, and more importantly, the normative sentence for a typical first-time offender. The trial judge could raise or lower the stated presumptive sentence by a given percentage based on the presence of specified aggravating or mitigating factors. Any departure from the normative sentence would require a written record. Appellate courts would operate under a stated preference for the presumptive sentence. Sentencing judges would thus be encouraged to impose inflexible presumptive sentences on the vast majority of offenders, while still having the flexibility to go beyond, or below, the norm in rare, unusual cases. With an ingenuous interplay of flexibility and mandate, this approach would insure a clustering of sentences for the bulk of offenders and deviation when, and only when, such is merited by uncommon circumstances. The proposed Arizona revision lacks any concept of presumptive sentencing. Sentencing, in short, must be a primary focus of any revision of Title 13, and the more comprehensive and cohesive the system adopted, the greater will be the improvement.

CONCLUSION

Many would agree with Dickens' statement that "the law is a[n] ass."[308] The present criminal justice system is not functioning adequately by any standard. The criminal justice system has been unable to keep pace with the growing sophistication of criminals or the growing insecurity of the average citizen. The system must adapt or ultimately all citizens will suffer from the breakdown of confidence in the rationality of law. Adapting the criminal law to the complexities of contemporary society will require the participation of all who are interested in the criminal justice system and in setting realistic goals for that system. In Arizona, such a reform movement might well begin with a

Felony—Class 2 (e.g., rape)	5 years	± up to 2 years
Felony—Class 3 (e.g., burglary)	3 years	± up to 1 year
Felony—Class 4 (e.g., theft)	2 years	± up to 1 year

Derived from *id.* at 254-55. No parole is permitted, though the possibility of good time credit is left open. *See id.* at 255.

307. *See generally* TWENTIETH CENTURY FUND, FAIR AND CERTAIN PUNISHMENT (1975).

308. C. DICKENS, OLIVER TWIST 354 (1966).

thorough revision of the Arizona criminal law. New statutes must be promulgated to replace archaic laws that hinder rather than help effective law enforcement. A cohesive and consistent body of law should replace the current unsavory stew of territorial leftovers. Legislative movement in this direction must be given priority in the immediate future if Arizona's criminal law is to catch up with a rapidly moving society.