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Gene P. Schultz

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THE PROPOSED MISSOURI CRIMINAL CODE: SOME OFFENSES RELATED TO PROPERTY

GENE P. SCHULTZ*

I. INTRODUCTION

This article explains the provisions of the Proposed Code relating to offenses against property. Not every such offense is included in the discussion; attention is restricted to major offenses and major departures from current law. The Proposed Code itself, together with the official comments, is a more complete source of information.

II. OFFENSES RELATED TO PROPERTY

A. *Theft Offenses*

1. Stealing

The law of theft offenses has a long and well-documented history.¹ As early as 1300 larceny was described in terms that are recognizable today:

Larceny is the treacherously taking away from another moveables corporeal, against the will of him to whom they do belong, by evil getting of the possession, or the use of them. It is said a taking, for bailing, or delivery is not in the case; it is said of moveables corporeal, because of goods not moveables, or not corporeal, as of land, rent, advowsons of churches there can be no larceny. It is said treacherously, because that if the taker of them away conceive the goods to be his own, and that he may well take them, in such case it is no offense. Nor in case where one conceives that it pleases the owner of the goods that he take them, but thereof there ought to be apparent presumption and evidence.²

At the time, England was an agrarian society with little commerce. Moveable property consisted mostly of cattle, farm products and furniture. A single theft offense, larceny, was broad enough to cover most acts resulting in deprivation of property.³

The great increase in commercial activities during the Renaissance created a need for different forms of theft offenses. Servants and bailees became common. Their nonconsensual appropriation of property did not fit within the definition of larceny because larceny required a trespassory,

*Assistant Professor of Law, Saint Louis University School of Law; B.A. Northwestern University, 1965; LL.B. Columbia University, 1968; Reporter, Committee for a Modern Criminal Code.

1. For an excellent discussion of the development of the law of theft see J. HALL, *THEFT, LAW AND SOCIETY* (2nd Ed. 1952).

2. A. HORN, *THE MIRROR OF JUSTICES* 25 (1895).

3. J. HALL, *supra* note 1, at 6.

or unauthorized, taking from the one in possession.⁴ Refinements in the law of theft were necessary. For instance, in 1473 it was held that a bailee could be guilty of larceny if he "broke bulk", *i.e.*, if he broke into a container and took the contents.⁵ The court considered the bailee to have possession of the container only and hence was taking the contents from the possession of another.

During the same period the courts developed the distinction between custody and possession in the context of the master-servant relationship. In 1506 it was held that a master retains possession of property in or about his house; a servant has mere custody, and thus can be convicted of larceny for stealing the property.⁶ A servant who received his master's property from a third person, however, obtained possession.⁷ Parliament enacted an embezzlement statute in 1799 to cover this situation.⁸ The statute covered cases in which possession was obtained lawfully in the course of specified types of employment.

Another form of theft, larceny by trick, developed from the famous case of *King v. Pear*,⁹ decided in 1799. The defendant hired a horse to travel to a nearby town, but instead sold it. Against a contention that there was no trespassory taking, the majority of judges held that the defendant had not obtained possession, his acquisition of the horse having been fraudulent.¹⁰ There was a constructive trespass and the defendant was guilty of larceny.¹¹ Such stealing by deceit, based upon a constructive trespass in obtaining possession, became known as larceny by trick.

4. *Id.*

5. *Carrier's Case*, Y.B. Pasch. 13 Edw. 4, f. 9, pl. 5 (1473).

6. Y.B. Hil. 21 Hen. 7, f. 14, pl. 21 (1506). The servant lacks possessory intent as to this property.

7. S. KADISH & M. PAULSEN, *CRIMINAL LAW AND ITS PROCESSES* 610 (2nd Ed. 1969).

8. 39 Geo. 3, c. 85, at 175 (1799). This statute provided that:
[I]f any Servant or Clerk, or any Person employed for the Purpose in the Capacity of a Servant or Clerk, to any Person or Persons whomsoever, or to any Body Corporate or Politick, shall, by virtue of such Employment, receive or take into his Possession any Money, Goods, Bond, Bill, Note, Banker's Draft, or other valuable Security, or Effects, for or in the Name or on the Account of his Master or Masters, or Employer or Employers, and shall fraudulently embezzle, secrete, or make away with the same, or any Part thereof, every such Offender shall be deemed to have feloniously stolen the same

There were earlier embezzlement statutes, but these were not applicable to clerks and servants generally. See HALL & MUELLER, *CRIMINAL LAW AND PROCEDURE* 300 (2d Ed. 1065).

9. 168 Eng. Rep. 208 (K.B. 1799).

10. *Id.* at 209.

11. It is not clear why the court did not apply 30 Geo. 2, c. 24, § 1, at 73 (1757), an earlier statute, which provided: "[A]ll Persons who knowingly and designedly, by false Pretense or Pretenses, shall obtain from any Person or Persons, Money, Goods, Wares or Merchandises, with Intent to cheat or defraud any Person or Persons of the same . . . shall be deemed Offenders . . ." Professor Hall suggests that one reason why the judges did not apply this statute was that obtaining property by false pretenses was only a misdemeanor, and horse stealing was considered a very serious offense. J. HALL, *supra* note 1, at 48.

Another offense, obtaining property by false pretenses, developed shortly thereafter.¹² This offense required that the defendant, by a misrepresentation of fact, obtain *title* to property.¹³

In 1816, the Territory of Missouri adopted the common law and statutes of England in force in 1607.¹⁴ Earlier the Territorial Legislature had enacted its first grand larceny statute,¹⁵ a portion of which has a direct counterpart in current Missouri law.¹⁶ The law of theft in Missouri developed along familiar common law lines until the present theft provisions were enacted in 1955.¹⁷ A brief look at the development of Missouri's theft law is necessary to understand the stealing provision in the Proposed Code.

Missouri's theft law was sorely in need of revision by 1955. More than 50 statutory sections dealt with theft offenses,¹⁸ with unjustifiable discrepancies in permissible punishment.¹⁹ Further, the courts had incorporated the common law definitions of offenses into the statutes, reversing convictions where the defendant, though clearly guilty of some

12. *Young v. King*, 100 Eng. Rep. 475 (K.B. 1789).

13. This offense was based on 30 Geo. 2, c. 24, § 1, at 73 (1757), quoted in note 11 *supra*.

14. 1 Mo. TERR. LAWS, Jan. 19, 1816, at 436, § 1.

15. 1 Mo. TERR. LAWS, Nov. 4, 1808, at 211, § 10, provided:

If any person or persons shall steal from any other person, any horse, mare, gelding, mule, or ass, he, she or they so offending shall, on conviction, for the first offense, pay to the owner of such property, double the value thereof, and receive not less than fifty stripes nor more than one hundred, and shall be committed to prison until such sentence be fully complied with. Upon a second conviction, the offender shall be imprisoned not exceeding seven years, and be fined not exceeding one thousand dollars.

16. § 560.161.2, RSMo 1969:

The offense defined in subsection 2 of section 560.156 (stealing) is deemed a felony regardless of the value of the property stolen and a person convicted shall be punished as provided in subdivision (2) of subsection 1, if the property intentionally stolen: . . . (3) Consists of any horse, mare, gelding, colt, filly, ass, mule, dog, sheep, goat, hog or neat cattle

17. §§ 560.156, .161, RSMo 1969.

18. The following is a sample from the Revised Statutes of Missouri, 1949. § 560.155: "Grand Larceny" defined; § 560.165: Larceny of a motor vehicle or equipment (value over \$30.00) (provides penalty); § 560.170: Larceny of motor vehicle equipment (value under \$30.00) (provides penalty); § 560.185: Stealing domestic fowls in nighttime; § 560.190: Larceny in dwelling houses where value of property is \$30.00 or more (provides punishment); § 560.195: Larceny in dwelling houses where value of property is under \$30.00 (provides punishment); § 560.200: Larceny of bond or note; § 560.210: Larceny of will or note; § 560.235: Larceny of timber and other things; § 560.240: "Petit Larceny" defined (provides penalty).

19. The maximum penalty for stealing any motor vehicle equipment worth more than \$30.00 was 25 years in the penitentiary. § 560.165, RSMo 1949. If the value was less than \$30.00, the maximum sentence was one year in the county jail. § 560.170, RSMo 1949. Stealing \$10,000 worth of merchandise from a loading dock carried a maximum sentence of 5 years in the penitentiary. § 560.160, RSMo 1949. The same penalty was available for stealing a single chicken from the messuage at night. § 560.185, RSMo 1949.

theft offense, was charged with a technically incorrect one. For example, in *State v. Roussin*,²⁰ the defendant was convicted of grand larceny for taking city funds. The Missouri Supreme Court reversed, finding that the offense was embezzlement because the defendant had initially obtained lawful possession of the money in his capacity as a city employee.²¹

The statutory revision in 1955, defining theft in one offense "stealing," appeared to sweep away the troublesome common law concepts of custody, possession, trespass, constructive trespass, and title.²² The new statute

20. 354 Mo. 522, 189 S.W.2d 983 (1945).

21. In another case, *State v. Ewing*, 270 S.W. 116 (St. L. Mo. App. 1925), the defendant was convicted of larceny by trick after he had obtained \$25 as a commission for services he was to render in obtaining a loan for the prosecuting witness. The St. Louis Court of Appeals reversed because it felt that title as well as possession had passed to the defendant, thus making him guilty of obtaining money by false pretenses, if anything.

22. §§ 560.156, .161, RSMo 1969, read as follows:

§ 560.156. Stealing—elements of offense

1. As used in section 560.156 and 560.161, the following words shall mean:

(1) "Property", everything of value whether real or personal, tangible or intangible, in possession or in action, and shall include but not be limited to the evidence of a debt actually executed but not delivered or issued as a valid instrument and all things defined as property in sections 556.070, 556.080 and 556.090, RSMo;

(2) "Steal", to appropriate by exercising dominion over property in a manner inconsistent with the rights of the owner, either by taking, obtaining, using, transferring, concealing or retaining possession of his property.

2. It shall be unlawful for any person to intentionally steal the property of another, either without his consent or by means of deceit.

3. If the property stolen within the meaning of subsection 2 is a chattel and the person charged with stealing the same proves by a preponderance of the evidence that no further transfer was made, and that, at the time of the appropriation he intended merely to use the chattel and promptly to return or discontinue his use of it, he has a defense to a prosecution under subsection 2. "Chattel" as used in this section does not include money, securities, negotiable instruments, documents of title, postage or revenue stamps, or other valuable papers.

4. A person who appropriates lost property shall not be deemed to have stolen the same within the meaning of subsection 2, unless such property is found under circumstances which give the finder knowledge of or means of inquiry as to the true owner.

§ 560.161. Penalties for stealing—fourth offense

1. Any person convicted of stealing as provided in subsection 2 of section 560.156 shall be punished as follows:

(1) If the value of the property stolen is less than fifty dollars, unless otherwise provided herein, by a fine of not more than one thousand dollars or by imprisonment in the county jail for not more than one year or by both such fine and imprisonment;

(2) If the value of the property stolen is at least fifty dollars, by imprisonment in the penitentiary for not more than ten years nor less than two years, or by imprisonment in the county jail for not more than one year, or by a fine of not more than one thousand dollars, or by both such fine and imprisonment.

2. The offense defined in subsection 2 of section 560.156 is deemed a felony regardless of the value of the property stolen and a person convicted shall be punished as provided in subdivision (2) of subsection 1, if the property intentionally stolen:

seemingly included all of the previously discussed theft offenses: larceny, larceny by trick, embezzlement, and false pretenses. The essential elements of stealing under the statute are: (1) Intentional appropriation by exercising dominion (2) of property (3) of another (4) in a manner inconsistent with the rights of the owner, (5) accomplished without the owner's consent or by means of deceit. "Steal" means to appropriate by exercising dominion. "Exercising dominion" is defined as taking, obtaining, using, transferring, concealing, or retaining possession. The intent to deprive permanently,²³ trespassory taking, and asportation are not mentioned.

The Missouri courts have interpreted the statute reasonably and pragmatically. Nevertheless, as the following discussion illustrates, considerable improvement can be made.

The Missouri Supreme Court first interpreted the new stealing statute in *State v. Zammar*.²⁴ The court indicated that the purpose of the new statute was to eliminate the technical distinctions between the offenses of larceny, embezzlement, and obtaining property by false pretenses.²⁵ The indictment charged that the defendant "feloniously . . . [did] steal, take and carry away" some guns from a hardware store in the course of a burglary.²⁶ This conduct would have been larceny at common law. Under the new statute it was stealing without consent.²⁷ The indictment, however, did not use the words "without consent." Despite the fact that "steal" is specifically defined in the statute, the court looked to pre-revision case law for the definition.²⁸ The court found that to "steal" meant to take without right with the intent to keep wrongfully, and therefore, to take without consent.²⁹ Thus, the indictment was sufficient. This was a reasonable result because the indictment gave the defendant adequate informa-

(1) Is taken from a dwelling house or a person;

(2) Consists of any motor vehicle;

(3) Consists of any horse, mare, gelding, colt, filly, ass, mule, dog, sheep, goat, hog or neat cattle;

(4) Consists of any domestic fowl, and the same is taken in the night-time from the message of another;

(5) Consists of any will or deed affecting real property whether recorded or unrecorded;

(6) Consists of any act, bill or resolution, introduced or acted upon by the legislature of the state of Missouri;

(7) Consists of any pleading, notice, judgment, or any other record or entry of any court of this state, any other state, or of the United States;

(8) Any book of registration or list of voters required by chapter 116, RSMo.

23. The statute therefore purports to make unauthorized borrowing criminal. The Missouri Supreme Court, however, has read the intent to deprive permanently into the statute as an essential element of stealing. See *State v. Commenos*, 461 S.W.2d 9 (Mo. En Banc 1970), discussed on p. 404 *infra*.

24. 305 S.W.2d 441 (Mo. 1957).

25. *Id.* at 443.

26. *Id.*

27. See § 560.156, RSMo 1969, quoted note 22 *supra*.

28. *State v. Dewitt*, 152 Mo. 76, 53 S.W. 429 (1899).

29. *State v. Zammar*, 305 S.W.2d 441, 445-46 (Mo. 1957).

tion to prepare his defense. But, by relying on pre-revision case law to define "steal," the court came dangerously close to equating the word "steal" to common law larceny. This, carried to its logical extreme, would mean the statute does not cover embezzlement, and perhaps larceny by trick and false pretenses as well.

In *State v. Mace*,³⁰ the information charged ". . . that between the dates of September 1st, 1960, and December 15, 1960, Robert Mace did wilfully and feloniously steal automobile tires of a value in excess of Fifty dollars (\$50.00)"³¹ The trial court quashed the indictment and the Missouri Supreme Court affirmed, holding that the information did not inform the defendant of the particulars of the offense sufficiently because it did not indicate whether the offense charged was common law larceny or embezzlement.³² The court's concern for the defendant's ability to prepare his defense is laudable, but misplaced; larceny and embezzlement no longer exist in Missouri. The statutory language indicates that possession is irrelevant to the question of guilt under the "stealing" statute.³³

Subsequently, in *State v. Niehoff*,³⁴ involving conduct that formerly constituted embezzlement, the court upheld an indictment that alleged "that the said Leonard Niehoff did then and there intentionally, feloniously and unlawfully steal, embezzle and convert the same monies to his own use without the consent of the said Verna Lenau" and that the defendant obtained the money in his capacity as president of a corporation.³⁵ The court said that "the indictment alleges the essential facts constituting the offense."³⁶ But the court did not indicate what the essential elements (facts ?) of the offense are. Did the court mean that the allegation that defendant was president of the corporation and obtained

30. 357 S.W.2d 923 (Mo. 1962).

31. *Id.* at 924.

32. *Id.* at 925.

33. The court explained the relevant difference to be that embezzlement was a continuing offense in which the value of the property taken in separate instances could be cumulated in determining the grade of the offense. If, however, the defendant's acts constituted larceny, each was a distinct crime and, if the value taken each time was less than \$50, the defendant had committed a series of misdemeanors. Thus, the court believed it was necessary that the indictment allege whose possession the tires were in when the defendant formed the intent to appropriate them. The 1955 statute, however, eliminated the possession-custody distinction as a relevant consideration in the definition of "stealing". Therefore, the defendant gains nothing by being informed in the information whose possession the prosecutor believes the property was in. Nevertheless, the court looked to the consequences (cumulation of value) of the possession-custody distinction under prior law and used that consequence to justify retaining the distinction. The court should simply have determined, as a matter of law, which of the prior rules to apply to the new offense of stealing. The defendant was informed, for the purpose of his defense, of all the alleged facts that the legislature has determined are relevant.

34. 395 S.W.2d 174 (Mo. 1965).

35. *Id.* at 179.

36. *Id.*

the money in that capacity was essential? If the essential facts are obtaining possession legally with a subsequent conversion, then embezzlement still exists in Missouri and cases like *State v. Roussin*³⁷ can recur.

There is evidence that the court is not embarked on a campaign to resurrect the old common law offenses, but is simply trying to ensure that the defendant is given sufficient information to adequately prepare his defense. Still, this involves application of the former theft offenses. Thus, in *State v. Kesterson*³⁸ the court stated:

We hold that section 560.156, in describing the offense of theft by deceit, does use generic terms and that it is necessary that indictments or informations thereunder recite sufficiently the conduct constituting a theft by deceit with which a defendant is charged as to notify him as to the charge against which he must defend himself and likewise be sufficient to bar further prosecution for the same offense.³⁹

This rule requires that, in cases of stealing by deceit, the information set forth detailed allegations of conduct. Whether the former legal label thereof must be alleged is not clear. As regards stealing without consent, dicta in *State v. Miles*⁴⁰ indicates that, where the offense would have been simple common law larceny, merely charging that the defendant did "steal" the property is sufficient, but where the offense would have been embezzlement, the *Kesterson* rule applies and requires detailed allegations of facts and conduct.⁴¹ This dicta raises the possibility that a prosecutor may have to ascertain what common law offense he is charging in order to plead sufficiently. The amount of factual pleading should be regulated only by the defendant's need to prepare his defense, and his defense should depend on the elements of the offense as defined by statute, not by common law concepts.

Common law concepts have created a constitutional problem. In *State v. Commenos*,⁴² the Missouri Supreme Court held unconstitutional the following portion of subsection 3 of section 560.156, RSMo 1969:

If property stolen within the meaning of subsection 2 is a chattel and the person charged with stealing the same proves by a preponderance of the evidence that no further transfer was made, and that, at the time of the appropriation he intended merely to use the chattel and promptly to return or discontinue his use of it, he has a defense to a prosecution under subsection 2.

The court said that this provision shifts the burden of persuasion on an essential element of the offense, the intent to deprive permanently, to

37. 354 Mo. 522, 189 S.W.2d 983 (Mo. 1945). See p. 401 *supra*.

38. 403 S.W.2d 606 (Mo. 1966).

39. *Id.* at 611.

40. 412 S.W.2d 473 (Mo. 1967).

41. *Id.* at 475-76.

42. 461 S.W.2d 9 (Mo. En Banc 1970).

the defendant and therefore violates procedural due process.⁴³ But, the intent to deprive permanently is not mentioned as an element of the offense of stealing in section 560.156.⁴⁴ The court found that such intent was, nevertheless, an essential element of the offense, based on the words "intentionally steal" and the common law definition of "steal." This interpretation clearly changes the law from what the drafters had intended.⁴⁵

The Proposed Code is designed to remedy the uneven and awkward interpretations of the 1955 revision. Its provisions include definitions of all essential terms. The official comments make clear that these definitions supersede common law concepts, incorporation of which causes confusion when dealing with a statute designed to function without them.

The Proposed Code defines three methods of stealing—by coercion, by deceit, and without consent.⁴⁶ Stealing by coercion is commonly referred to as extortion. Extortion is properly included as a form of stealing, rather than as a form of robbery as at present,⁴⁷ because the punishment for both is approximately the same. The Proposed Code defines coercion

43. *Id.* at 13.

44. See statute quoted note 22 *supra*. This interpretation of the statute is a textual one: (1) The statute by its terms does not require an intent to deprive permanently; and (2) the statute provides a defense based on a lack of such intent in the case of chattels, excluding money, negotiable instruments and the like. The legislature obviously considered the issue and dealt with it as a matter of defense, much like the defense of insanity, instead of making it an essential element of "stealing" to be proved by the state. Therefore, the court in *Commenos* second-guessed the legislature by finding that this intent was an essential element.

45. See note 44 *supra*.

46. The Proposed Code stealing sections read as follows:

§ 15.030 *Stealing*

(1) A person commits the crime of stealing if he appropriates property or services of another with the purpose to deprive him thereof, either without his consent or by means of deceit or coercion.

(2) Stealing is a Class C Felony if

(a) the value of the property or services appropriated is one hundred fifty dollars or more; or

(b) the actor physically takes the property appropriated from the person of the victim; or

(c) the property appropriated consists of

(i) any motor vehicle, water craft or aircraft; or

(ii) any will or unrecorded deed affecting real property; or

(iii) any credit card or letter of credit; or

(iv) any firearm; or

(v) any original copy of an act, bill or resolution, introduced or acted upon by the legislature of the State of Missouri; or

(vi) any pleading, notice, judgment or any other record or entry of any court of this State, any other state or of the United States; or

(vii) any book of registration or list of voters required by Chapter 116 RSMo; or

(viii) any narcotic drugs as defined by Section 195.010, RSMo; otherwise, stealing is a Class A Misdemeanor.

47. § 560.125, RSMo 1969: Robbery in the second degree; § 560.130, RSMo 1969: Robbery in the third degree. The penalty provisions are found in § 560.135, RSMo 1969.

as threats of all kinds.⁴⁸ Special care is taken, however, to protect the legal rights of those who honestly believe they have been injured.⁴⁹ If such a person threatens a law suit, criminal prosecution, or other official action, no coercion results if the property he is seeking is claimed as restitution for harm suffered in circumstances relating to the threat. An example is a person who threatens to sue his neighbor unless the neighbor pays for the picket fence he damaged during a badminton game.

The Proposed Code defines "deceit" for the first time in Missouri.⁵⁰ The definition requires that the actor purposely make a false representation which the actor believes is false and on which the victim relies. The representation may relate to a matter of fact, law, value, intention, or other state of mind. The common law distinguished between misrepresentations of fact and intention: both would support a conviction for larceny by trick,⁵¹ but only the former would support a conviction for obtaining money by false pretenses.⁵² This distinction is eliminated.

Two limitations are placed on the definition of deceit.⁵³ First, that the actor did not subsequently perform the promise does not raise an inference as to his intention. Otherwise, persons who borrow money, suffer financial reverses, and fail to meet their obligations to repay could be convicted, the fact of nonperformance raising an inference of an intention not to perform. Such a result is undesirable. If, however, there is evidence

48. PROP. NEW MO. CRIM. CODE § 15.010 (3) (1973):

- (a) "Coercion" means a threat, however communicated
- (i) to commit any crime; or
 - (ii) to inflict physical injury in the future on the person threatened or another; or
 - (iii) to accuse any person of any crime; or
 - (iv) to expose any person to hatred, contempt or ridicule; or
 - (v) to harm the credit or business repute of any person; or
 - (vi) to take or withhold action as a public servant, or to cause a public servant to take or withhold action; or
 - (vii) to inflict any other harm which would not benefit the actor.

49. A threat of accusation, lawsuit, or other invocation of official action, however, is not coercion within the meaning of this subsection if the property sought to be obtained by virtue of such threat was honestly claimed as restitution or indemnification for harm done in the circumstances to which the accusation, exposure, law suit or other official action relates, or as compensation for property or lawful service. Although the burden of raising this issue of justification is on the defendant, the burden of persuasion does not shift.

50. PROP. NEW MO. CRIM. CODE § 15.010 (6) (1973):

- (3) "Deceit" means purposely making a representation which is false and which the actor does not believe to be true and upon which the victim relies, as to a matter of fact, law, value, intention or other state of mind. The term "deceit" does not, however, include falsity as to matters having no pecuniary significance, or puffing by statements unlikely to deceive ordinary persons in the group addressed. Deception as to the actor's intention to perform a promise shall not be inferred from the fact alone that he did not subsequently perform the promise.

51. King v. Pear, 168 Eng. Rep. 208 (K.B. 1779).

52. S. KADISH & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 630 (2d Ed. 1969).

53. See note 50 *supra*.

that the borrower sold out his business and made flight reservations to Mexico contemporaneously with obtaining the loan, a jury can find an intention to deceive.

A second limitation protects puffing. Many salesmen misrepresent some qualities of their product in such a way that ordinary persons are not deceived. These claims for a product are taken with a grain of salt. The criminal law probably can not reform such exuberant salesmen, nor can it protect someone who is set on being duped. Under the Proposed Code, the test for differentiating acceptable and nonacceptable conduct is what is likely to deceive ordinary persons in the group addressed. The jury decides whether the misrepresentation exceeds acceptable limits.

"Consent," in the context of stealing without consent, is not defined in the Proposed Code because its meaning is well understood.

The particular method of stealing is an essential element that must be alleged and proved. The degree of specificity in alleging facts, as a foundation to support the charge, should be measured primarily by the defendant's right to be sufficiently informed to prepare his defense.

All other essential elements of stealing are defined in the statute. The first element is appropriation. To appropriate means to take, obtain, use, transfer, conceal, or retain possession of.⁵⁴ This definition is new but is based on the definition of exercising dominion in section 560.156, RSMo 1969. Appropriation does not require either taking from the possession of another or carrying away; neither is an essential element of stealing. Of course, a given appropriation may involve both.

Second, either property or services must be stolen. Property is defined much as it is under the current statute.⁵⁵ Services includes telephone, electricity, gas, water, or other public services; accommodation in hotels, restaurants, or elsewhere; transportation, admission to exhibitions, or use of vehicles.⁵⁶ Labor and professional services are intentionally omitted from the definition to avoid making the prosecutor a collection agent for businessmen and professional persons.

Third, the property or services stolen must be that of another;⁵⁷ someone other than the actor must have a proprietary or possessory interest in the property. A security interest is not considered a proprietary

54. PROP. NEW MO. CRIM. CODE § 15.010 (2) (1973).

55. PROP. NEW MO. CRIM. CODE § 15.010 (9) (1973):

"Property" means anything of value whether real or personal, tangible or intangible, in possession or in action, and shall include but not be limited to the evidence of a debt actually executed but not delivered or issued as a valid instrument.

56. PROP. NEW MO. CRIM. CODE § 15.010 (11) (1973).

57. PROP. NEW MO. CRIM. CODE § 15.010 (8) (1973):

Property or services is that "of another" if any natural person, corporation, partnership, association, governmental subdivision or instrumentality, other than the actor, has a possessory or proprietary interest therein, except that property shall not be deemed property of another who has only a security interest therein, even if legal title is in the creditor pursuant to a conditional sales contract or other security agreement.

or possessory interest. Another section of the Proposed Code protects secured parties from unscrupulous purchasers.⁵⁸

Fourth, the actor must have the purpose to deprive the other person of his property or services. "Purpose" is defined as acting with a conscious objective.⁵⁹ Section 15.010 (7) of the Proposed Code defines "deprive" as follows:

"Deprive" means

- (a) to withhold property from the owner permanently; or
- (b) to restore property only upon payment of reward or other compensation; or
- (c) to use or dispose of property in a manner that makes recovery of the property by the owner unlikely.

This definition is important because it replaces "intent to steal," an element of larceny at common law and, through judicial interpretation,⁶⁰ an element of stealing under section 560.156, RSMo 1969. This definition essentially codifies the case law defining the intent to steal. For example, a purpose to retain property on the condition of payment of reward or other compensation is equivalent to the intent to steal,⁶¹ as is a purpose to dispose of property so as to expose it to substantial risk of loss or destruction.⁶² Codifying the intent necessary to support a conviction for stealing aids judges in drafting jury instructions and ensures that the same standard will be used for all types of theft offenses.

The stealing section distinguishes felonies from misdemeanors. Traditionally, felony penalties are imposed when the value of the property stolen equals or exceeds \$50. Considering the effects of inflation and the trend in other jurisdictions,⁶³ the increase to \$150 under the Proposed Code is reasonable. As does present law, the Proposed Code makes stealing certain listed types of property a felony regardless of value. It also continues to make stealing from the person of the victim a felony.

2. Tampering

The Proposed Code makes criminal some interferences with property that do not amount to stealing. The most common offense of this type is joyriding.⁶⁴ The Proposed Code covers joyriding in the sections on

58. PROP. NEW MO. CRIM. CODE § 15.180 (1973).

59. PROP. NEW MO. CRIM. CODE § 7.020 (2) (a) (1973):

Purposely. A person acts purposely or with purpose, with respect to his conduct or to a result thereof when it is his conscious object to engage in that conduct or to cause that result.

60. State v. Commenos, 461 S.W.2d 9 (Mo. En Banc 1970).

61. Slaughter v. State, 113 Ga. 284, 38 S.E. 854 (1901).

62. State v. Davis, 38 N.J.L. 176 (1875).

63. N.Y. PENAL LAW § 155.30 (McKinney Supp. 1972) (\$250.00); Alaska, House Bill No. 524, S11.21.200 (\$500); PROP. NEW S. CAR. CRIM. CODE § 17.5 (\$200).

64. Joy riding is currently an offense in Missouri. See §§ 560.175, .180, RSMo

Tampering.⁶⁵ A more serious crime is committed if a person causes a substantial interruption or impairment of a public service, such as utility or health services.⁶⁶

3. Dealing in Stolen Property

Controlling the "fencing" of stolen property is difficult because of its clandestine nature and because neither party is likely to alert the authorities. The rewards for even limited success, however, may be substantial if reducing the ready market for stolen goods is an effective deterrent to theft. Increasing the risk of conviction for receiving stolen property may accomplish this. Under current law the risk is slight because the state must prove that the defendant knew the property was stolen.⁶⁷

The Proposed Code,⁶⁸ like current law, requires the state to prove that the defendant had a purpose to deprive the owner of a lawful interest in the property (under current law, the intent to defraud).⁶⁹ But, the Proposed Code eliminates the requirement that the state prove the defendant's actual knowledge that the property was stolen. Instead, the state need only prove that the defendant believed the property probably had been stolen. In an epistemological sense, most persons who receive

65. PROP. NEW MO. CRIM. CODE § 14.090, *Tampering in the Second Degree*:

- (1) A person commits the crime of tampering in the second degree if he
 - (a) tampers with property of another for the purpose of causing substantial inconvenience to that person or to another; or
 - (b) unlawfully operates or rides in or upon another's automobile, airplane, motorcycle, motorboat or other motor-propelled vehicle; or
 - (c) tampers or makes connection with property of a utility.

(2) Tampering in the second degree is a Class A Misdemeanor.

66. PROP. NEW MO. CRIM. CODE § 14.080, *Tampering in the First Degree*:

- (1) A person commits the crime of tampering in the first degree if, for the purpose of causing a substantial interruption or impairment of a service rendered to the public by a utility or by an institution providing health or safety protection, he damages or tampers with property or facilities of such a utility or institution, and thereby causes substantial interruption or impairment of service.

(2) Tampering in the first degree is a Class D Felony.

67. § 560.270, RSMo 1969; *State v. Taylor*, 422 S.W.2d 633 (Mo. 1968).

68. PROP. NEW MO. CRIM. CODE § 15.080 (1973):

- (1) A person commits the crime of receiving stolen property if for the purpose of depriving the owner of a lawful interest therein, he receives, retains or disposes of property of another knowing that it has been stolen, or believing that it has probably been stolen.

(2) Evidence of the following is admissible in any criminal prosecution under this Section to prove the requisite knowledge or belief of the alleged receiver:

- (a) That he was found in possession or control of property stolen on separate occasions from two or more persons.

(b) That he received stolen property in another transaction within the year preceding the transaction charged.

(c) That he acquired the stolen property for a consideration which he knew was far below its reasonable value.

(3) Receiving stolen property is a Class A Misdemeanor unless the property involved has a value of one hundred fifty dollars or more, or the person receiving the property is a dealer in goods of the type in question, in which case [it] is a Class C Felony.

69. *State v. Ciarelli*, 366 S.W.2d 63 (K.C. Mo. App. 1963).

stolen property probably do not know that the property was stolen because they did not witness the theft. Yet the professional fence is no doubt certain that the property was stolen. If the defendant believes the property was stolen when he receives it, he acts as culpably as one who had actual knowledge. Current law, however, allows juries to acquit the former.

The Proposed Code codifies the rules of evidence vis-a-vis proving the defendant's belief. Circumstantial evidence is ordinarily used to prove the defendant's belief. When circumstantial evidence is offered to prove the existence of an essential element of an offense, there often is doubt whether it in fact tends to prove that element. Judges decide these questions of relevancy and materiality differently. The Proposed Code describes three facts that may always be proved.⁷⁰ Circumstantial evidence should be admitted more uniformly under this provision.

Also eliminated is the requirement that the property received be actually stolen.⁷¹ A person who receives property that is not stolen in the mistaken belief that it is stolen and with the purpose to deprive the owner of his interest in it should be treated the same as one who acts with the same purpose and belief but who receives property that was in fact stolen. Both are equally culpable and represent the same threat to the community.

Receiving stolen property is graded like stealing,⁷² with one exception. If the defendant is a dealer in the kind of goods received, the offense is a felony regardless of the property's value. This more severe treatment is justified because a dealer poses a greater enforcement problem than the casual purchaser. A dealer is better able to dispose of the property and often, being a legitimate businessman, has a ready made "cover" to conceal his activities. A strong deterrent is therefore desirable.

B. Robbery

According to Perkins,⁷³ the early common law treated robbery less harshly than larceny because the robber operated openly. In time, however, robbery came to be viewed as an aggravated larceny.⁷⁴ In Missouri, robbery is defined in classic terms by statute,⁷⁵ and the case law establishes that the statute includes all the elements of larceny plus the use of violence or putting the victim in fear of immediate injury to his person.⁷⁶

70. See proposed statute quoted note 68 *supra*.

71. In *People v. Jaffe*, 185 N.Y. 497, 78 N.E. 169 (1906), a conviction for attempting to receive stolen property was reversed on the grounds that it was impossible to "know" property was stolen where it was no longer stolen; the authorities recovered it after it was stolen but before the defendant attempted to receive it.

72. See proposed statute quoted note 68 *supra*.

73. R. PERKINS, *CRIMINAL LAW*, 280 (2d ed. 1969).

74. Note, *A Rationale of the Law of Aggravated Theft*, 54 COLUM. L. REV. 84 (1954).

75. § 560.120, RSMo 1969.

76. *State v. Lasky*, 133 S.W.2d 334 (Mo. 1939).

The Proposed Code defines robbery as forcible stealing⁷⁷ since larceny is no longer a crime. Forcible stealing is stealing⁷⁸ during the course of which the actor uses or threatens the immediate use of physical force upon another person for the purpose of: (1) Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or (2) compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the theft.

This provision accomplishes more than merely changing robbery from aggravated larceny to aggravated stealing. Most jurisdictions require that the property be taken from the victim or in his presence.⁷⁹ In Missouri, this requirement has been interpreted loosely. For example, a robbery conviction was upheld where a railroad express agent was forcibly ejected from a train one quarter of a mile from where, subsequently, the safe was blown open and the contents taken.⁸⁰ Another conviction was upheld where the property was taken from a room other than the one in which the victim lay wounded.⁸¹

77. The Proposed Code provisions on robbery read as follows:

§ 14.010 *Chapter Definitions*

(1) "Forcibly Steals." A person "forcibly steals", and thereby commits robbery, when, in the course of stealing, as defined in Code § 15.030 he uses or threatens the immediate use of physical force upon another person for the purpose of

(a) preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking, or

(b) compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the theft.

§ 1.120 *Definitions*

"Deadly weapon" means any firearm, loaded or unloaded, or any weapon from which a shot, readily capable of producing death or serious physical injury, may be discharged, or a switch blade knife, dagger, billy, black jack, or metal knuckles.

"Dangerous instrument" means any instrument, article or substance, which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury.

§ 14.020 *Robbery in the first degree*

(1) A person commits the crime of robbery in the first degree when he forcibly steals property and in the course thereof he, or another participant in the crime

(a) causes serious physical injury to any person; or

(b) is armed with a deadly weapon; or

(c) uses or threatens the immediate use of a dangerous instrument against any person; or

(d) displays or threatens the use of what appears to be a deadly weapon or dangerous instrument.

(2) Robbery in the first degree is a Class A Felony.

§ 14.030 *Robbery in the second degree*

(1) A person commits the crime of robbery in the second degree when he forcibly steals property.

(2) Robbery in the second degree is a Class B Felony.

78. See proposed statute quoted note 46 *supra*.

79. R. PERKINS, *supra* note 73, at 281.

80. State v. Kennedy, 154 Mo. 268, 55 S.W. 293 (1900).

81. State v. Williams, 183 S.W. 308 (Mo. 1916).

The Proposed Code assumes that the essence of robbery is the use or threatened immediate use of physical force to accomplish a theft, and hence there is no sound reason why the victim must be present at the taking. For example, the robber orders the victim, at gun point, to telephone his wife (or any other person) and instruct her to deliver the family savings to a pick up point. If the property is delivered, the crime is robbery as long as there is a threat to use physical force immediately to compel the owner to engage in conduct which aids in the commission of the theft. The danger of actual physical injury and the nexus between threatened immediate use of physical force and obtaining the property are present.

Eliminating the requirement that the taking be from the victim or in his presence does not eliminate the difference between robbery and stealing by coercion (extortion). The only threat that will support a robbery charge is one of immediate use (or threatened use) of physical force. If the threat to use physical force is not immediate, it will support only a stealing by coercion charge. The significantly higher penalties available for robbery⁸² are justified by the presumed greater likelihood of actual physical injury to the victim when the perpetrator evidences a willingness to use physical force instantaneously to accomplish his goal.

In cases where there is only a *threat* of immediate use of physical force, the Proposed Code provision does not require that the victim actually be put in fear. The threat is sufficient and the state need not prove actual fear. The Proposed Code provision assumes that the victim is afraid because the defendant's guilt or innocence should not depend on his victim's state of mind. This may already be the law in Missouri. In *State v. Ray*,⁸³ the defendant's conviction for first degree robbery was upheld even though the victim testified that she was not frightened when the defendant pointed a gun at her.⁸⁴ The Missouri Supreme Court said, "The fact that she complied with defendant's demand that she open the cash register would indicate that she feared the consequences of her failure to do so."⁸⁵ The theory of the proposal is that the offense of robbery should be designed to curb the use or threatened immediate use of physical force for the purpose of obtaining property because such conduct creates a high risk of serious injury to the victim.

For the purpose of grading the offense of robbery, the victim's state of mind is important. Second degree robbery consists of no more than forcible stealing; first degree robbery requires the trier of fact to find at least one of four additional aggravating circumstances.⁸⁶ If, during the course of a robbery, the defendant or another participant in the crime

82. Robbery in the second degree is a class B felony (maximum 15 years confinement). PROP. NEW MO. CRIM. CODE § 14.030. Whereas stealing in the first degree is a class C felony (maximum 7 years confinement). PROP. NEW MO. CRIM. CODE § 15.020.

83. 354 S.W.2d 840 (Mo. 1962).

84. *Id.* at 842.

85. *Id.* at 843.

86. See proposed statute quoted note 77 *supra*.

(1) causes serious physical injury to any person, or (2) is armed with a deadly weapon, or (3) uses or threatens the immediate use of a dangerous instrument against any person, or (4) displays or threatens the immediate use of what appears to be a deadly weapon or dangerous instrument, he is guilty of robbery in the first degree. The first three of these aggravating factors are designed primarily to protect the public from physical injury. The last may have this effect incidentally, but its main purpose is to discourage conduct that is likely to cause fear in the victim even though the actual danger involved may be no greater, and perhaps less, than that accompanying a nonaggravated robbery. Use of what appears to be a deadly weapon (*e.g.*, a toy gun) or a dangerous instrument (*e.g.*, a shoe box emitting a loud ticking) makes the actor as liable as if he had been armed with a sawed-off shot gun. The community's interests include protecting its members from mental stress as well as unlawful infliction of physical harm. The philosophy expressed in the proposal is that freedom from fear ranks equally in important with freedom from physical injury as a socially desirable goal.

Because the weapon or instrument need not be "real," the prosecutor need not prove that it was functional at the time of the robbery. Frequently the weapon is not recovered. If not, the prosecutor may otherwise have to prove that the weapon was real, operational, and loaded.⁸⁷

C. Burglary

Burglary at early common law was an offense against the sanctity of the dwelling house.⁸⁸ In 1804, the Missouri Territorial Legislature expanded the offense to include shops, stores, and vessels.⁸⁹ Since 1804,

87. Current Missouri law holds that an inoperable or unloaded pistol is a dangerous and deadly weapon. *State v. Morris*, 263 Mo. 339, 172 S.W. 603 (1915). Whether a toy pistol is also is not clear.

88. R. PERKINS, *supra* note 73, at 192 states:

Common law burglary is the breaking and entering of the dwelling of another in the nighttime with intent to commit a felony. There are six elements: (1) the breach, (2) the entry, (3) the dwelling, (4) of another, (5) the nighttime and (6) burglarious intent.

89. 1 Mo. Terr. Laws, Oct. 1, 1804, at 16, §§ 5, 6.

5. If any person or persons, shall, in the night season, break open and enter any dwelling house, shop, store or vessel, in which any person or persons dwell or reside, with a view and intention of stealing and purloining therefrom, any money goods or chattels, he, she, or they, so offending, shall be deemed guilty of burglary, and upon conviction thereof shall be fined in a sum not exceeding one hundred dollars, at the discretion of the court before which the trial is had, to the use of the district, and find sureties for good behavior for a term not exceeding one year, and upon default thereof shall be committed to jail, for a term not exceeding one year or until sentence be performed. If the person or persons so breaking or entering any dwelling house, shop, store or vessel, as aforesaid, shall actually steal and purloin therefrom any money, goods or chattels, he, she or they so offending, upon conviction thereof shall moreover be fined in triple the value of the article stolen, one third of such fine to be to the district and the other two thirds to the party injured.

6. If any person or persons so breaking and entering any dwelling

other circumstances under which burglary may be committed have been added by statute, so that today, burglary statutes cover virtually all types of buildings. Presently, nine sections of the Missouri Revised Statutes cover burglary.⁹⁰ Some of these overlap and appear to conflict. For example, section 560.070 covers any building "in which there shall be at the time any human being or any goods, wares, merchandise or other valuable thing kept or deposited . . ." Section 560.075 covers bank buildings "in which there shall be at the time any money, notes, checks, goods, wares, merchandise or other valuable things kept or deposited . . ." These sections overlap and carry identical penalties; yet, an intent to commit a felony is required for conviction under the latter provision, but an intent to commit any crime will suffice for the former.⁹¹

The expansion of the offense of burglary may be due to the inadequacy of the law of attempt.⁹² Even if this inadequacy is remedied,⁹³ it is unrealistic to expect that burglary, historically so integral a part of the criminal law, will be eliminated. If it is to be retained, it should be made as useful, rational, and straightforward as possible.

house, store or vessel as aforesaid, shall actually steal and purloin therefrom any money, goods or chattels and shall commit or attempt to commit any personal abuse, force or violence, or shall be so armed with any dangerous weapon or weapons, or clearly to indicate a violent intention, he, she or they so offending upon conviction thereof, shall suffer death and forfeit so much of his, her or their estate, real and personal as shall be sufficient to satisfy the party injured his full damages.

90. § 560.045, RSMo 1969: Burglary, not in first degree; § 560.050, RSMo 1969: Burglary involving breaking out of dwelling; § 560.055, RSMo 1969: Burglary involving breaking inner door; § 560.060, RSMo 1969: Burglary, after being admitted with consent of occupant; § 560.070, RSMo 1969: Burglary involving breaking and entering enclosures besides dwelling places; § 560.075, RSMo 1969: Burglary involving bank building; § 560.080, RSMo 1969: Burglary-breaking and entering vacant building; § 560.100, RSMo 1969: Burglary with explosives.

91. Furthermore, the narrower statute (§ 1887, RSMo 1899) is more recent in origin than the other (§ 20, at 20, RSMo 1835).

92. MODEL PENAL CODE § 221.1, Comment, (Tent. Draft No. 11, 1960): The chaotic burglary legislation is probably explicable as an effort to compensate for defects of traditional attempt law. The common law ordinarily did not punish a person who embarked on a course of criminal behavior unless he came very close to his goal; sometimes it is put that to be guilty of attempt the actor must do the final act which would accomplish his object but for the intervention of circumstances beyond his control. Under that view, a person apprehended while breaking into a bank or store would not yet have committed any offense, apart from burglary, for he had not even arrived at the scene of his projected theft, rape or murder. Moreover, penalties for attempt were disproportionately low as compared with the completed offense. Expansion of burglary provided a kind of solution for these problems. By making entry with criminal intent an independent substantive offense, the moment when the law could intervene was moved back, and severe penalties could be imposed.

93. PROP. NEW MO. CRIM. CODE § 9.010 (1973). Attempt:

(1) A person is guilty of attempt to commit an offense when, with the purpose of committing the offense, he does any act which is a substantial step towards the commission of the offense.

(2) It is no defense to a prosecution under this Section that the offense

The essence of modern burglary can be characterized as unlawful intrusion plus a purpose to commit a crime. Aggravating factors vary between jurisdictions but usually relate to the safety of the individual. The Proposed Code attempts to translate this essence into workable statutory language.⁹⁴

The heart of the offense is embodied by the phrase "enter unlawfully or remain unlawfully." This phrase is defined as follows:

A person "enters unlawfully or remains unlawfully" in or upon premises when he is not licensed or privileged to do so. A person who, regardless of his purpose, enters or remains in or upon premises which are at the time open to the public does so with license and privilege unless he defies a lawful order not to enter or remain, personally communicated to him by the owner of such premises or by another authorized person. A license or privilege to enter or remain in a building which is only partly open to the public is not a license or privilege to enter or remain in that part of the building which is not open to the public.⁹⁵

For example, if a person enters a department store during business hours and conceals himself in the restroom until it closes for the purpose of stealing merchandise, he is guilty of burglary. On the other hand, if a person enters that portion of a business premise open to the public during business hours with the purpose of stealing merchandise, he is not guilty of burglary even though the management has posted a sign above the entrance reading "No admittance to persons intending to perpetrate a crime herein." Such an order, to effectively eliminate his license or privilege as a member of the general public, must be communicated to him personally.

With respect to property not open to the public, an invitation may be limited geographically or temporally. For example, a salesman invited into the foyer of a home is not automatically licensed or privileged to

attempted was, under the actual attendant circumstances, factually or legally impossible of commission, if such offense could have been committed had the attendant circumstances been as the actor believed them to be.

(3) Penalty. Unless otherwise provided, an attempt to commit an offense is a:

- (a) Class B Felony if the offense attempted is a Class A Felony;
- (b) Class C Felony if the offense attempted is a Class B Felony;
- (c) Class D Felony if the offense attempted is a Class C Felony;
- (d) Class A Misdemeanor if the offense attempted is a Class D Felony;
- (e) Class C Misdemeanor if the offense attempted is a misdemeanor

of any degree.

94. PROP. NEW MO. CRIM. CODE § 14.170 (1973). Burglary in the second degree, the basic offense, is defined as follows:

(1) A person commits the crime of burglary in the second degree when he knowingly enters unlawfully or knowingly remains unlawfully in a building or inhabitable structure for the purpose of committing a crime therein.

(2) Burglary in the second degree is a Class C Felony.

95. PROP. NEW MO. CRIM. CODE § 14.010 (8) (1973).

enter other areas of the house. A person invited to a party in a private home who is asked to leave by the host thereby loses his license or privilege. If he remains with the purpose of stealing a silver goblet he is guilty of burglary in the second degree.

Whether the property is open to the public or not, a person cannot be guilty of burglary under the Proposed Code unless the unlawful entering or remaining is done knowingly. The person must be aware of the facts that make his conduct unlawful. This knowledge is usually proved by circumstantial evidence, *i.e.*, that a person is discovered in another's home at 2 a.m. wearing dark coveralls and sneakers indicates he knew his presence was unlawful. Yet, a person may enter a large department store and become so engrossed in shopping for a particular item that he is unaware the store has closed. This actor does not have knowledge of the fact (the store is closed) that makes his conduct unauthorized.

The discussion above is of basic burglary, or second degree burglary. First degree burglary under the Proposed Code⁹⁶ is basic burglary plus one of two aggravating circumstances: The burglar, "in effecting entry or while in the building or inhabitable structure or in immediate flight thereupon," is (1) armed with explosives or a deadly weapon, or (2) causes or threatens immediate physical injury to any person who is not a participant in the crime. First degree burglary is a class B felony. Both of these factors are intended to discourage conduct that is likely to result in personal injury to nonparticipants in the crime. Other jurisdictions use additional or different criteria, including whether the burglary is committed at night and whether the building is a dwelling house.⁹⁷ The committee judged the latter factors to be less important than those more directly related to the safety of the individual. An additional degree of burglary incorporating them could have been created, but the committee felt that they are not closely related to strong social policies. Making statutory provision for factors closely related to relatively unimportant policies or remotely related to important policies leads to the kind of statutory proliferation the Proposed Code is designed to remedy.

Overall, the Proposed Code should consolidate and rationalize the law of burglary without greatly changing its substance.

96. PROP. NEW MO. CRIM. CODE § 14.160 (1973).

Burglary in the First Degree

(1) A person commits the crime of burglary in the first degree if he knowingly enters unlawfully or knowingly remains unlawfully in a building or inhabitable structure for the purpose of committing a crime therein, and when in effecting entry or while in the building or inhabitable structure or in immediate flight therefrom, he or another participant in the crime

(a) is armed with explosives or a deadly weapon; or

(b) causes or threatens immediate physical injury to any person who is not a participant in the crime.

(2) Burglary in the first degree is a Class B Felony.

97. See, e.g., N.Y. PENAL LAW § 140.25 (McKinney Supp. 1972).

D. Arson

Arson was a felony at common law, punishable at one time by death by burning.⁹⁸ It was defined as the malicious burning of the dwelling of another. According to Burdick,

At common law, it is not an offense against mere property but against human life and safety. It matters not whether a dwelling is worth thousands of dollars or only a few shillings, or whether it is a palace or a hovel, it is the safety of those who occupy the building as a dwelling that the law seeks to protect.⁹⁹

By 1804, when Missouri made arson a statutory offense, it included property other than dwellings.¹⁰⁰ Today, burning virtually any kind of property may be arson under certain circumstances.¹⁰¹

Six sections of the Missouri Revised Statutes deal with arson.¹⁰² Section 560.010¹⁰³ describes the most serious form of arson. Although its coverage is much broader than common law arson, it follows the common law philosophy of primary concern for the danger to life presented by the burning of the homestead¹⁰⁴ or one of the adjoining buildings. The expanded coverage is consistent with this philosophy because human life is endangered by the burning of many structures other than the homestead.

98. R. PERKINS, *supra* note 73, at 217.

99. 3 W. BURDICK, *THE LAW OF CRIME* § 687 (1946).

100. 1 Mo. Terr. Laws, Oct. 1, 1804, at 16, § 4.

4. If any person or persons, shall wilfully and maliciously burn or cause to be burned, or shall wilfully and knowingly aid or assist in burning or causing to be burned, any dwelling house, store house, barn, stable or other building adjoining thereto, or shall wilfully burn or cause to be burned, or shall knowingly aid or assist in burning or causing to be burned, any grist or saw mill, every person so offending shall be deemed guilty of arson and upon conviction thereof shall suffer death and forfeit so much of his, her or their estate, real and personal, as shall be sufficient to satisfy the party injured his full damages.

101. § 560.025, RSMo 1969.

102. §§ 560.010-035, RSMo 1969.

103. § 560.010, RSMo 1969 (Arson-penalty).

Every person who shall willfully set fire to or burn any dwelling house or any kitchen, shop, barn, stable, garage or other outhouse that is parcel thereof or belong to or adjoining to said dwelling, or who shall willfully set fire to or burn any boat or vessel in which there shall be at the time some human being, or willfully set fire to any bridge or causeway upon any railroad whether the property of himself or of another shall be adjudged guilty of arson and upon conviction therefor be punished by imprisonment in the penitentiary for a term of not less than two years.

104. § 560.015, RSMo 1969 defines a "dwelling house."

Every house, prison, jail or other edifice, which shall have been usually occupied by persons lodging therein, shall be deemed a "dwelling house" of any person having charge thereof or so lodging therein; but no warehouse, barn, shed or other outhouse shall be deemed a dwelling house, or part of a dwelling house, within the meaning of this section or section 560.010, unless the same be joined to or immediately connected with and is part of a dwelling house.

The sections defining the less serious forms of arson are illogical. Apparently, a person can be sentenced to life in prison for setting fire to any empty jail,¹⁰⁵ but can receive no more than ten years confinement for putting a torch to a crowded church on Sunday morning.¹⁰⁶ The maximum penalty for burning a railroad car is five years,¹⁰⁷ but it is ten years for burning a machine used for manufacturing.¹⁰⁸ A defendant can be convicted of arson for burning his own building or machinery,¹⁰⁹ but he is not guilty of arson if he burns his own merchandise or automobile, unless it is done with the purpose to defraud or destroy property of another.¹¹⁰ Houses, barns, and stables are each covered in two sections, one providing a maximum punishment of life in prison,¹¹¹ the other five years imprisonment.¹¹²

The arson provisions are obviously in need of revision. What property should be subject to the offense of arson? The assumption underlying the Proposed Code is that the original common law purpose of protection of human life is of prime importance and that the extreme property destruction potential of fire should also be considered. Therefore, the property subject to arson is limited to buildings and inhabitable structures.¹¹³

The term "building" is broad. Generally, it connotes a structure that, if not specifically designed for regular human use, is used or entered by humans at least occasionally. No attempt is made to limit coverage to certain kinds of buildings because virtually all are particularly suited to destruction by fire or explosion and, because frequently located near

105. §§ 560.010, .015, RSMo 1969.

106. § 560.020, RSMo 1969.

107. § 560.025, RSMo 1969.

108. § 560.020, RSMo 1969.

109. § 560.020, RSMo 1969.

110. § 560.025, RSMo 1969.

111. § 560.010, RSMo 1969.

112. § 560.025, RSMo 1969.

113. The PROP. NEW MO. CRIM. CODE §§ 14.040, .050 (1973) read as follows:
§ 14.040 *Aggravated Arson*

(1) A person commits the crime of aggravated arson when he knowingly damages a building or inhabitable structure, when any person is then present or in near proximity thereto, by starting a fire or causing an explosion and thereby recklessly places such person in danger of death or serious bodily injury.

(2) Aggravated arson is a Class B Felony.

§ 14.050 *Arson*

(1) A person commits the crime of arson when he knowingly damages a building or inhabitable structure by starting a fire or causing an explosion.

(2) A person does not commit a crime under this section if

(a) no person other than himself has a possessory, proprietary or security interest in the damaged building, or if other persons have those interests, all of them consented to his conduct; and

(b) his sole purpose was to destroy or damage the building for a lawful and proper purpose.

(3) The defendant shall have the burden of injecting the issue under Subsection (2).

(4) Arson is a Class C Felony.

other buildings, have the same potential for multiplying danger and damage.

Some property other than buildings must be included if protection of human life is the primary purpose of the statute. Thus, "inhabitable structures"¹¹⁴ includes property in which persons live or lodge, like mobile homes and house boats, and congregate, like tents and sports arenas. Property that is not a building or inhabitable structure cannot be the object of arson. If no danger to human life is likely to result, the destruction of property by fire should be punished like destruction by any other means. The Proposed Code includes separate provisions on property destruction.¹¹⁵

Following current Missouri law, the proposal eliminates the common law requirement that the property belong to someone other than the actor.¹¹⁶ In *State v. Myer*,¹¹⁷ the Missouri Supreme Court explained persuasively this departure from the common law:

The gist of the offense . . . consists, not in the injury to the building set fire to, but the danger to the persons occupying the adjoining building. This being true, the ownership of the building is immaterial and need not be alleged.¹¹⁸

The Proposed Code takes this philosophy a bit further, while at the same time more fully protecting the rights of the actor. There may be circumstances in which the owner of a building desires to demolish his property for entirely lawful purposes. Although it is unlikely, such an individual could be charged with arson. This owner should not be convicted if his actions did not recklessly endanger human life. His acquittal is not certain under present law. The proposal provides a defense of justification under these circumstances.¹¹⁹ If the record reveals some evidence that the defendant had the right to destroy the property and that his purpose was lawful, then justification requires the state to prove beyond a reasonable doubt: (1) That some nonconsenting person had a proprietary, possessory, or security interest in the property, or (2) that the defendant

114. PROP. NEW MO. CRIM. CODE § 14.010 (2) (1973), which is based on MODEL PENAL CODE § 220.1 (4), (Prop. Off. Draft 1962), reads as follows:

§ 14.010 *Definitions*

(2) "Inhabitable Structure" includes a ship, trailer, sleeping car, airplane, or other vehicle or structure

(a) where any person lives or carries on business or other calling; or

(b) where people assemble for purposes of business, government, education, religion, entertainment or public transportation; or

(c) which is used for overnight accommodation of persons.

Any such structure or vehicle is "inhabitable" regardless of whether a person is actually present.

115. See PROP. NEW MO. CRIM. CODE §§ 14.100-120 (1973).

116. Currently, only § 560.025, RSMo 1969, requires that the property be that of another.

117. 259 Mo. 306, 168 S.W. 717 (1914).

118. *Id.* at 312, 168 S.W. at 718.

119. See proposed statute quoted note 113 *supra*.

did not act solely for a lawful and proper purpose. For example, if the state proves that the defendant burned a building, that is sufficient to preclude a directed verdict. But, once there is some evidence of justification, such as that the defendant owned the building (which infers a lawful purpose in burning), the state must prove that the defendant intended to defraud the insurance company, *i.e.*, that he did not have a lawful and proper purpose. Evidence of the defendant's ownership is sufficient as such evidence to raise the issue of justification because ownership carries the inference of a proper and lawful purpose. Once the issue of justification is raised, the state has to prove that the defendant intended to defraud the insurance company in order to prove that he did not have a lawful and proper purpose.

Often, the defendant may own the property subject to the possessory, proprietary, or security interests of others. Under those circumstances the state has to prove those interests (or an illegal or improper purpose) in order to obtain a conviction.

The advantage of this approach is that, while the state need not routinely prove ownership, the defendant is protected in those instances when he did own the property. The risk of non-persuasion is not shifted to the defendant on any essential element and, therefore, there is no constitutional problem.¹²⁰ Moreover, the defendant does not risk self-incrimination in order to take advantage of a potential justification defense because justification can be raised merely by getting *some* evidence of his ownership into the record.¹²¹

The Proposed Code's grading of arson is dependent on the known risk to human life the conduct creates. The theory underlying simple arson is that setting fire to a building or inhabitable structure is so likely to endanger human life that it warrants felony penalties. A person who, by committing arson, *consciously* creates a substantial and unjustifiable risk of death or serious bodily injury to a person (s) in or near the premises has demonstrated a degree of culpability significantly greater than the ordinary arsonist. Such conduct is classified as first degree arson, a class B felony under the Proposed Code.¹²²

The committee considered other methods of classification. The Kansas Code describes aggravated arson as arson "committed upon a building or property in which there is some human being."¹²³ This approach makes the defendant's liability for the more serious offense fortuitous. He may not have been aware that some person was in the building, and might not have committed the offense had he been aware. The Kansas standard provides no assurance that the aggravated arsonist is more culpable than the ordinary arsonist. Further, an actor cannot be deterred by a more severe penalty if he has no reason to believe it is applicable to his conduct.

120. See *State v. Commenos*, 461 S.W.2d 9 (Mo. En Banc 1970), and p. 404 *supra*.

121. Ownership could ordinarily be proved by documentary evidence.

122. See proposed statute quoted note 113 *supra*.

123. KAN. STAT. ANN. § 21-3719 (Supp. 2, 1972).

Under the New York scheme,¹²⁴ a conviction of arson in the first degree requires the state to prove not only that a person was on the premises, but also that the defendant knew that fact, or that the circumstances made the presence of a person therein a reasonable possibility.¹²⁵ The latter requirement ensures that the defendant was aware of the grave risk to human life created by his conduct.

The Proposed Code uses criteria very similar to New York's except that the person who is endangered need not be in the very building set on fire.¹²⁶ Frequently, arson takes place in a crowded urban setting. A person who sets fire to a business building during the evening when no one is on the premises, but when a capacity crowd is enjoying a motion picture in a theater next door, should be treated as harshly as if there was a janitor in the business building itself. The important question is whether the defendant was aware of the grave risk to human life he created.

The Proposed Code uses a two-pronged test for first degree arson.¹²⁷ First, it must be proved that a person was "present or in near proximity" to the building or inhabitable structure. Second, it must be proved that the defendant "recklessly place[d] such person in danger of death or serious bodily injury." To fully appreciate this requirement, the Proposed Code's definition of recklessly must be kept in mind.

Recklessly. A person acts recklessly or is reckless when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.¹²⁸

Under this test, the jury would be told not to convict for aggravated arson unless convinced beyond a reasonable doubt that the defendant was actually aware of a substantial and unjustifiable risk that someone was on the premises and that his conduct created a substantial and unjustifiable risk of death or serious bodily harm to that person. This risk must be so great that the defendant's conduct amounts to a gross deviation from the reasonable man standard of care.¹²⁹ This approach limits the circumstances under which an actor would be found guilty of first degree arson without imposing a mechanical limitation on the physical location of the endangered person or persons.

124. N.Y. PENAL LAW §§ 150.00-15 (McKinney Supp. 1972).

125. N.Y. PENAL LAW § 150.15 (McKinney Supp. 1972).

126. See proposed statute quoted note 113 *supra*.

127. See proposed statute quoted note 113 *supra*.

128. PROP. NEW MO. CRIM. CODE § 7.020 (2) (c) (1973).

129. Ordinarily, there will be no direct evidence that the defendant was in fact aware of the particular risk he was creating; it will be circumstantial. Nevertheless, asking the trier of fact to focus on the defendant's state of mind is not uncommon in the criminal law, and that state of mind is of enough criminologic significance to warrant the inquiry.

The Proposed Code includes two new offenses directed at conduct related to arson. Section 14.060, *Reckless Burning or Exploding*, makes it a misdemeanor to purposely start a fire or cause an explosion and thereby recklessly damage a building or inhabitable structure.¹³⁰ Again, the actor's state of mind is determinative. If a person burns off his field when the wind is blowing strongly towards his neighbor's house and the house is burned down as a result, a jury may find him guilty of this offense if it decides his conduct was reckless.

Section 14.070, *Causing Catastrophe*, is also new.¹³¹ Almost self-explanatory, this section is aimed at conduct that causes great personal injury (though not necessarily death) or great property damage by any means that is difficult to confine. Life imprisonment can be imposed for this offense, based on the extreme threat to society.

E. Forgery

In early English law forgery was considered a form of treason because it involved falsifying the King's seal, an act viewed much the same as attacking his person.¹³² In 1562, a forgery statute was enacted,¹³³ which, in 1727, was held applicable to unsealed as well as sealed instruments.¹³⁴ Thus began the development of the modern law of forgery.

Missouri's first forgery statute, found in 1835 Revised Statutes,¹³⁵ remained essentially unchanged until 1955 when a major revision was enacted.¹³⁶ The revised statute, unchanged to date, consolidates traditional forgery into one paragraph; other paragraphs cover counterfeiting anything other than a writing, uttering anything that has been forged or counterfeited, and making or possessing any device used for forging or counterfeiting.

The Proposed Code does not materially change the substance of the

130. PROP. NEW MO. CRIM. CODE § 14.060 (1973) reads as follows:
Reckless Burning or Exploding

(1) A person commits the crime of reckless burning or exploding when he knowingly starts a fire or causes an explosion and thereby recklessly damages or destroys a building or an inhabitable structure of another.

(2) Reckless burning or exploding is a Class A Misdemeanor.

131. PROP. NEW MO. CRIM. CODE § 14.070 (1973) reads as follows:

Causing Catastrophe

(1) A person commits the crime of causing catastrophe if he knowingly causes a catastrophe by explosion, fire, flood, collapse of a building, release of poison, radioactive material, bacteria, virus or other dangerous and difficult-to-confine force or substance.

(2) "Catastrophe" means death or serious physical injury to ten or more people or substantial damage to five or more buildings or inhabitable structures or substantial damage to a vital public facility which seriously impairs its usefulness or operation.

(3) Causing catastrophe is a Class A Felony.

132. 2 F. POLLOCK & F. MATTLAND, *THE HISTORY OF ENGLISH LAW* 504 (2d ed. 1898).

133. 5 Eliz., c. 14 (1562).

134. *The King v. Ward*, 92 Eng. Rep. 451 (K.B. 1472).

135. § 1, at 183, RSMo 1835.

136. Mo. Laws 1955, at 505, § A (1) [now § 561.001, RSMo 1969].

forgery statute.¹³⁷ Nevertheless, some innovations merit comment. For the first time the word "writing" has been defined.¹³⁸ The definition includes virtually any symbol of value, right, privilege, or identification. The reason for a broad definition is that forgery is now properly viewed as the falsification of any symbol for the purpose of defrauding another.¹³⁹

Forgery also includes the falsification or counterfeiting of anything other than a writing¹⁴⁰ if there is an accompanying purpose to defraud.¹⁴¹ Thus, for example, making a copy of a Rembrandt to be sold as an original Rembrandt is prohibited both by the current statute and by the proposed provision.

Generalizing the concept of forgery to such an extent arguably renders it unnecessary because stealing by deceit is broad enough to cover acquisition of another's property by means of some forged symbol or object.¹⁴² Forgery, however, is so embedded in the criminal law that it is not likely

137. PROP. NEW MO. CRIM. CODE §§ 15.090, .100 (1973) read as follows:
§ 15.090 *Forgery*

(1) A person commits the crime of forgery if, with the purpose to defraud, he

(a) makes, completes, alters or authenticates any writing so that it purports to have been made by another or at another time or place or in a numbered sequence other than was in fact the case or with different terms or by authority of one who did not give such authority; or

(b) erases, obliterates or destroys any writings; or

(c) makes or alters anything other than a writing, so that it purports to have a genuineness, antiquity, rarity, ownership or authorship which it does not possess; or

(d) uses as genuine, or possesses for the purpose of using as genuine, or transfers with the knowledge or belief that it will be used as genuine, any writing or other thing which the actor knows has been made or altered in the manner described in Subsections (1) (a), (b) or (c).

(2) Forgery is a Class C Felony.

§ 15.100 *Possession of a Forging Instrumentality*

(1) A person commits the crime of possession of a forging instrumentality if, with the purpose of committing forgery, he makes, causes to be made or possesses any plate, mold, instrument or device for making or altering any writing or anything other than a writing.

(2) Possession of a forging instrumentality is a Class C Felony.

138. PROP. NEW MO. CRIM. CODE § 15.010 (12) (1973) reads as follows:

"Writing" includes printing, any other method of recording information, money, coins, negotiable instruments, tokens, stamps, seals, credit cards, badges, trademarks and any other symbols of value, right, privilege or identification.

139. Because the current statute includes the erasing, obliterating and destroying of writings, the draft proposal does also. See proposed statute quoted note 137 *supra*.

140. Counterfeiting of anything other than a writing is already prohibited by § 561.011, RSMo 1969. Therefore, the draft proposal only changes the name of the offense.

141. Although no falsification is involved in the use, possession or transfer of something which has been forged, if this activity is accompanied by an intent to defraud, it is so closely related to forgery as to be included under the same heading. See proposed statute quoted note 137 *supra*.

142. PROP. NEW MO. CRIM. CODE § 15.030 (1973). See pt. II, § A(1) of this article.

many would favor its elimination. Moreover, forgery traditionally has not required that any property actually be obtained as long as a making, using, or possessing with intent to defraud is present. Even a modern attempt statute probably would not reach far enough into the stage of preparation to cover mere possession with purpose to defraud.¹⁴³

Another change in the proposed provision is the elimination of the requirement that the writing be one "having legal efficacy or [one] commonly relied upon in business or commercial transactions . . ." ¹⁴⁴ This change is logically consistent with the statute's expanded scope, and also has the effect of including such things as doctors' prescriptions, trademarks, identification cards, and diplomas without any special legislation.

Possession of a forging instrumentality is prohibited in a separate section to simplify the task of drafting.¹⁴⁵ Whereas the intent requirement for forgery is the purpose to defraud, for possession of a forging instrumentality it is the purpose to commit forgery. The reason for this distinction is that one may possess a forging instrumentality, e.g., a camera, with the purpose to defraud another in a manner quite unrelated to forgery.

F. *Passing Bad Checks*

As might be expected, the increase in the use of checks has brought an increase in the number of bad checks. A "bad check" as commonly referred to may be one of several kinds, but most commonly it is a check drawn on an account that contains insufficient funds. Other bad checks include a check drawn (1) on an account in a nonexistent bank; (2) on a nonexistent account in an existent bank;¹⁴⁶ (3) in favor of a fictitious payee. A bad check is usually distinguished from a forged check.¹⁴⁷

A merchant holding a bad check may try to arrange for payment with the drawer. If this fails, he may seek the services of a collection agency, either a private profit making organization or the prosecuting attorney. If the latter, the prosecuting attorney will notify the drawer to expect prosecution unless payment is made. If payment is not forthcoming the prosecutor may seek to have the offending drawer charged and tried for a bad check offense.

This activity consumes a major portion of a prosecutor's time. In St. Louis County during 1971, 5,928 insufficient funds check notices were

143. See note 93 *supra*.

144. § 561.011.1 (1), RSMo 1969.

145. See proposed statute quoted note 137 *supra*.

146. *State v. Bird*, 242 S.W.2d 576 (Mo. 1951) distinguishes between a bad check and a bogus check. The former is a check drawn on a bank in which the drawer has no funds or insufficient funds. The latter is a check drawn on a fictitious bank or in favor of a fictitious payee.

147. A bad check is exactly what it purports to be, even if the drawee bank or the payee do not exist. A forged check, on the other hand, is not what it purports to be. For example, if A signs B's name to a check, the check purports to be B's but in reality it is not.

issued, covering checks with a total face amount of \$662,680.87.¹⁴⁸ Over 12 percent of all cases in which the office issued warrants during 1971 were for bad checks.¹⁴⁹ This amounted to 456 warrants, over 100 more than for any other major crime.¹⁵⁰

Currently insufficient funds check offenses are covered in two sections,¹⁵¹ and other bad check offenses are treated as a form of obtaining property by false pretenses under a third section.¹⁵² Because false pretenses is eliminated as a separate offense in the Proposed Code,¹⁵³ a reorganization of bad check offenses into one section is appropriate. The Proposed Code treats check offenses involving a fictitious bank, non-existent account, or insufficient funds account together.¹⁵⁴ The proposal treats offenses involving a fictitious payee, because they involve more complicated schemes, as a form of stealing by deceit.¹⁵⁵

A rule of evidence was enacted in 1917¹⁵⁶ to help prosecutors prove

148. PROS. ATTY, ST. LOUIS CO., MO., ANN. REP. 7 (1971).

149. *Id.* at 6.

150. *Id.* at 6, 27. These statistics raise an important question as to the role of the prosecuting attorney. Should he be spending such a large portion of the limited resources of his office on a problem which may be viewed as merely a civil matter between businessman and customer? Perhaps not, but the decriminalization of insufficient funds offenses is not likely to become a reality. The business community would certainly oppose such a change because of the potential impairment in the negotiability of checks.

151. §§ 561.460, .470, RSMo 1969.

152. § 561.450, RSMo 1969.

153. *See* p. II, § A (1) of this article.

154. The proposed section reads:

§ 15.120 *Passing Bad Checks*

(1) A person commits the crime of passing a bad check when, with purpose to defraud, he issues or passes a check or other similar sight order for the payment of money, knowing that it will not be paid by the drawee, or that there is no such drawee.

(2) If the issuer had no account with the drawee or if there was no such drawee at the time the check or order was issued, this fact shall be prima facie evidence of his purpose to defraud and of his knowledge that the check or order would not be paid.

(3) If the issuer has an account with the drawee, failure to pay the check or order within ten days after notice in writing that it has not been honored because of insufficient funds or credit with the drawee is prima facie evidence of his purpose to defraud and of his knowledge that the check or order would not be paid.

(4) Notice in writing means notice deposited as first class mail in the United States Mail and addressed to the issuer at his address as it appears on the dishonored check or to his last known address.

(5) The face amount of any bad checks passed pursuant to one course of conduct within any ten day period, may be aggregated in determining the grade of the offense.

(6) Passing bad checks is a Class A Misdemeanor unless the face amount of the check or sight order or the aggregated amounts is one hundred fifty dollars or more, in which case it is a Class D Felony.

155. The typical fictitious payee case involves placing the names of non-existent persons on a payroll, arranging to have the checks mailed to a post office box, retrieving and endorsing the checks in the name of the fictitious payee and then cashing the check.

156. MO. LAWS 1917, at 244, § 2.

the necessary intent to defraud and knowledge of insufficient funds at the time the check was passed. The rule ensures that the state gets to the jury on these issues if there is proof that payment of the check was refused and the drawer

[S]hall not have paid the drawee thereof the amount due thereon, (together with the drawee thereof the amount due thereon) [sic] together with all costs and protest fees, within five days after receiving notice that such check, draft or order has not been paid by the drawee.¹⁵⁷

With some modification, the proposal retains this rule. The proposal makes prima facie evidence, of both purpose to defraud and of the knowledge that the check would not be paid, the nonexistence of the account or the drawee. The same rule applies where the account does exist but the drawer fails to pay the check within ten days after notice in writing that the check has not been honored because of insufficient funds. The rule in the last situation differs from the current rule in two respects. First, the statute states specifically that the dishonor must be for lack of funds or credit with the drawee. Secondly, the rule is inapplicable unless notice is given in writing as defined in section 15.120 (4). Both of these changes are designed to protect the defendant.

These rules may seem unfair to the defendant. Admittedly, they place on the defendant the burden of coming forward with evidence that he did not have the requisite purpose and knowledge.¹⁵⁸ The state, however, must prove these issues beyond a reasonable doubt.

The proposal includes some changes in sentencing. Currently, an insufficient funds check offense is a misdemeanor if the amount involved is less than \$100; if more, it is a felony.¹⁵⁹ Other check offenses are felonies regardless of amount involved.¹⁶⁰ Under the proposal, any bad check offense is a felony if the amount involved is \$150 more; otherwise, it is a misdemeanor.¹⁶¹ Also, the face amounts of bad checks written within a ten day period may be cumulated. This provision is designed specifically for the transient bad check artist who passes numerous small checks during brief visits to different communities.

G. *Fraudulent Use of a Credit Device*

The scope of the Proposed Code provision¹⁶² in this area is as broad

157. § 4696, RSMo 1939.

158. *See, e.g., State v. Phillips*, 430 S.W.2d 635 (St. L. Mo. App. 1968).

159. § 561.460, RSMo 1969.

160. § 561.450, RSMo 1969.

161. This figure conforms with the sentencing structure of stealing. *See* pt. II, § A (1) of this article.

162. PROP. NEW MO. CRIM. CODE § 15.010 (4) (1973) reads as follows:

"Credit device" means a writing, number or other device purporting to evidence an undertaking to pay for property or services delivered or rendered to or upon the order of a designated person or bearer.

§ 15.130 *Fraudulent Use of a Credit Device*

(1) A person commits the crime of fraudulent use of a credit device when

as the current statute¹⁶³ but more straightforward. Some minor changes have been made. The intent to defraud is no longer required because it is superfluous. Use of a credit device to obtain property or services knowing that such use is unauthorized is much the same as acting with an intent to defraud. A case can be hypothesized where the defendant could demonstrate that in spite of his knowingly unauthorized use of a credit device, he fully intended to, and was capable of, paying for the property, but these cases are not likely to end up in criminal court. For example, *A* uses *B*'s gasoline credit card without *B*'s permission. *A* and *B* are brothers and *A* intends to pay *B* for the charged gasoline. Under the Proposed Code, *A* is technically guilty of an offense. If it is feared that essentially innocent conduct might be penalized, an affirmative defense can easily be added to cover these cases.¹⁶⁴

The period for cumulating the value of goods or services obtained or sought to be obtained is shortened to 30 days, which corresponds to ordinary billing procedures and generally is more reasonable than the current 90 day period. Also, the monetary amount determining the grade of the offense is raised to \$150 to conform with stealing.¹⁶⁵

H. Possession of Burglar's Tools

The possession of burglar's tools has been an offense in Missouri since 1899.¹⁶⁶ On its face, the current statute makes possession of a screwdriver a felony punishable by up to ten years in the penitentiary because screwdrivers are "commonly used for breaking into" warehouses, shops, and stores.¹⁶⁷ Obviously overbroad, the statute has been limited judicially by requiring the state to prove a "general intent that they [the tools] shall be used for a burglarious purpose."¹⁶⁸ The court has thereby changed the statute from a simple contraband provision (making criminal the possession of an endless variety of tools and implements) into an inchoate offense.

So construed, possession of burglar's tools might now be considered

he uses a credit device for the purpose of obtaining services or property, knowing that

- (a) the device is stolen, fictitious or forged; or
- (b) the device has been revoked or cancelled; or
- (c) for any other reason his use of the device is unauthorized.

(2) Fraudulent use of a credit device is a Class A Misdemeanor unless the value of the property or services obtained or sought to be obtained within any thirty day period is one hundred fifty dollars or more, in which case fraudulent use of a credit device is a Class D Felony.

163. § 561.415, RSMo 1969.

164. MODEL PENAL CODE § 224.6 (Prop. Off. Draft 1962) reads, in part, as follows: "It is an affirmative defense to prosecution under paragraph (c) if the actor proves by a preponderance of the evidence that he had the purpose and ability to meet all obligations to the issuer arising out of his use of the card."

165. See pt. II, § A(1) of this article.

166. § 1892, RSMo 1899.

167. § 560.115, RSMo 1969.

168. State v. Hefflin, 338 Mo. 236, 249, 89 S.W.2d 937, 945 (1935).

a specialized form of attempt. There are, however, two significant differences between this offense and attempted burglary. First, attempt requires that the defendant's conduct go beyond mere preparation. Possession of matches with intent to commit arson is not attempted arson. Second, attempt requires the state to prove a specific intent to commit the underlying offense. Case law indicates that the intent requirement read into the current burglar's tools statute is much less specific. For example, in *State v. Hefflin*,¹⁶⁹ the court held that evidence that the defendant had engaged in a robbery immediately prior to his apprehension was admissible to prove intent in a prosecution for possession of burglar's tools. As *Hefflin* demonstrates, the offense remains broad enough to permit abuse. The only justification for the offense is preventing harm before it occurs; presently, however, it provides an easily provable offense where the actual offense, robbery in *Hefflin*, cannot be proved.

Even if the state must prove intent to use the tools to commit a burglary, the evidence allowed to prove that intent may render this burden illusory. In *State v. Lorts*,¹⁷⁰ the arresting officer testified that he knew the defendant to be an associate of burglars. The court held that the testimony was properly admitted on the issue of intent, saying:

The testimony bore probatively on a constitutive element of the offense, the intent with which defendant possessed the burglar's tools. It related to a particular matter and not to the general reputation of defendant. It was not character or reputation testimony.¹⁷¹

This case comes close to allowing a conviction on the grounds that the defendant had undesirable friends.

On the assumption that the statute's purpose is to prevent burglaries, not to provide an easy alternative to a difficult prosecution, the Proposed Code requires the state to prove that the possession was with the purpose to use the tools in a burglary or with knowledge that some other person had the purpose of so using the tools. This proof should require the state to introduce evidence of the circumstances under which the tools were found instead of relying on evidence of the defendant's reputation.¹⁷² Thus, the circumstances of the possession, not the defendant's purpose, is the focal point. In fact, proof of the defendant's purpose is limited to the circumstances under which the possession takes place. This standard is designed to allow some judicial interpretation; however, the proposal specifically provides that purpose may not be inferred from prior arrests or reputation. These provisions should reduce the potential for abuse without emasculating the statute.

169. *Id.*

170. 269 S.W.2d 88 (Mo. 1954).

171. *Id.* at 92.

172. PROP. NEW MO. CRIM. CODE § 14.180 (1973).

I. *Deceptive Business Practices*

In spite of the common law principle of caveat emptor, some deceptive business practices have been criminal since 1541, when Parliament enacted the first statute on cheating by false tokens.¹⁷³ The Missouri Revised Statutes presently contain a number of scattered provisions that deal with particular aspects of deceptive business practices.¹⁷⁴ The Proposed Code includes a modern day version of the English statute that is designed to comprehensively cover deceptive business practices.¹⁷⁵ Its object is to provide an alternative to the specific statutes in other chapters¹⁷⁶ (it does not eliminate them) with uniform penalties. No attempt is made to replace all current provisions because some are integral parts of particular chapters in the Statutes. The proposed provision is, however, a vehicle for integration of these offenses into the new criminal code.¹⁷⁷

There is no requirement in the proposal that the actor obtain any property through his deception. That the defendant was acting in the course of a business, occupation, or profession is the reason for this special treatment. Enforcement officials, having discovered false weights or measures on the premises, should not be required to wait until they are able to catch the businessman in the act of using them.

Further, the proposal does not require that the defendant had actual knowledge of the deceptive practice. It is sufficient that the defendant acted recklessly, *i.e.*, that he was aware of a substantial and unjustifiable risk that deceptive business practices existed.¹⁷⁸ In a business context this

173. 33 Hen. 8, c. 1, § II (1541).

174. *See, e.g.*, ch. 196, RSMo 1969 (Food and Drugs), especially §§ 196.015, .025, RSMo 1969; ch. 265, RSMo 1969 (Standardization, Inspection and Marketing of Agricultural Products), especially § 265.110, RSMo 1969.

175. The Proposed Code reads as follows:

§ 15.140 *Deceptive Business Practice*

(1) A person commits the crime of deceptive business practice if in the course of engaging in a business, occupation or profession he recklessly

(a) uses or possesses for use a false weight or measure, or any other device for falsely determining or recording any quality or quantity; or

(b) sells, offers or exposes for sale, or delivers less than the represented quantity of any commodity or service; or

(c) takes or attempts to take more than the represented quantity of any commodity or service when as buyer he furnishes the weight or measure; or

(d) sells, offers or exposes for sale adulterated, or mislabeled commodities; or

(e) makes a false or misleading written statement for the purpose of obtaining property or credit.

(2) Deceptive business practice is a Class A Misdemeanor.

176. PROF. NEW MO. CRIM. CODE § 2.030 (1973). *Classification of Offenses Outside this Code*, specifically recognizes crimes outside the code and sets up a standardized system for classifying them.

177. If these other offenses are eliminated, the Proposed Code provision will cover them. Also, new paragraphs may be added to the present provision.

178. *See* text accompanying note 128 *supra*. A merchant may know he is selling strawberries in quart containers with a false bottom because he checked the cartons and found that they hold less than one quart. On a subsequent purchase of strawberries from the same wholesaler at a price well below market he

is fair.¹⁷⁹ Proving a shopkeeper's actual knowledge of an inaccurate scale would effectively bar many prosecutions. Also, using a standard of recklessness increases the *in terrorem* effect of the statute.

Deceptive Business Practices is a class A misdemeanor. Of course, if property is actually obtained through the deception, felony penalties for stealing may be available.¹⁸⁰

III. CONCLUSION

As with areas other than offenses relating to property, some of the changes embodied in the Proposed Code represent substantial departures from current law and some merely cosmetic adaptation. The goal has been change for the sake of improvement. It is hoped that this article will contribute to an evaluation of the Committee's success in attaining that goal.

may not check the cartons but nevertheless "know" that each quart carton of strawberries probably contains less. Proof of these facts would permit the trier of fact to find that the defendant acted recklessly.

179. Regulatory measures frequently have no culpability requirement at all. See statutes cited note 174 *supra* for examples.

180. PROP. NEW MO. CRIM. CODE § 15.030 (1973).