

Report to the Colorado General Assembly:

**PRELIMINARY REVISION
OF COLORADO
CRIMINAL LAWS**



COLORADO LEGISLATIVE COUNCIL

RESEARCH PUBLICATION NO. 98

NOVEMBER 1964

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OF THE

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During the sessions, the emphasis is on supplying legislators, on individual request, with personal memoranda, providing them with information needed to handle their own legislative problems. Reports and memoranda both give pertinent data in the form of facts, figures, arguments, and alternatives.

PRELIMINARY REVISION OF COLORADO CRIMINAL LAWS

"

(Colorado - Legislative Council)

Report To The

Colorado General Assembly

Research Publication No. 98
November, 1964

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To Members of the Forty-fifth Colorado General Assembly:

As directed by the terms of House Joint Resolution No. 25 (1963), the Legislative Council is submitting herewith its report and recommendations concerning revision of Colorado's substantive criminal law. The report covers the specific offenses defined in Chapter 40 of the revised statutes; however, because of the complexity and scope of the assignment, the committee was not able to give full study and consideration to a number of other important subjects.

The committee appointed by the Legislative Council to make this study submitted its report on November 23, 1964, at which time the report was approved by the Legislative Council for transmission to the General Assembly.

Respectfully submitted,

C. P. Lamb
Chairman

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November 11, 1964

Representative C. P. Lamb, Chairman
Colorado Legislative Council
341 State Capitol
Denver, Colorado

Dear Mr. Chairman:

Transmitted herewith is the report and recommendations of the Legislative Council's Criminal Code Committee, appointed pursuant to House Joint Resolution No. 25 (1963). This report includes the committee's preliminary revision of the substantive criminal laws of the state of Colorado.

Because of the scope and complexity of the field of criminal law, the committee did not have sufficient time to consider non-substantive criminal law, including such subjects as arrest and arraignment, sentencing, parole and probation, and criminal responsibility. The committee therefore is recommending that further interim consideration be given this subject, with a final report thereon being submitted in 1966.

Respectfully submitted,

Edward J. Byrne, Chairman
Criminal Code Committee

EJB/mp

FOREWORD

This study was made under the provisions of House Joint Resolution No. 25 (1963). This resolution directed the Legislative Council to appoint a committee to study Colorado criminal statutes and their application, including but not limited to such subjects as crimes against the person, crimes against property, crimes against public health and safety, arrest and arraignment, sentencing, parole and probation, narcotics control, and criminal insanity.

The Legislative Council committee appointed to make this study included Senator Edward J. Byrne, Denver, chairman; Representative William E. Myrick, Englewood, vice chairman; Senator Vernon A. Cheever, Colorado Springs; Senator William B. Chenoweth, Denver; Senator James E. Donnelly, Trinidad; Senator Dale P. Tursi, Pueblo; Representative Joseph R. Albi, Denver; Representative Robert S. Eberhardt, Denver; Representative Don Friedman, Denver; Representative John Kane, Northglenn; and Representative Walter R. Stalker, Joes. Representative C. P. Lamb, Legislative Council Chairman, served as an ex officio committee member.

The Council's committee in turn appointed an advisory committee whose members represented a cross section of knowledge and interest in criminal law. This advisory committee included Judge Addison M. Gooding, 14th Judicial District; Judge Mitchel B. Johns, 2nd Judicial District; Judge Henry E. Santo, 2nd Judicial District; Judge Francis L. Shallenberger, 13th Judicial District; Judge Max C. Wilson, 11th Judicial District; District Attorney Fred E. Sisk, 16th Judicial District; Assistant District Attorney David J. Hahn, 18th Judicial District; Deputy District Attorney Melvin Rossman, 2nd Judicial District; Professor Fred Cohen, University of Denver School of Law; Professor Austin S. Scott, University of Colorado School of Law; Mr. C. J. Berardini, Denver; Mr. Fred E. Dickerson, Denver; Mr. Walter L. Gerash, Denver; Mr. William V. Hodges, Sr., Denver; Mr. Robert T. Kingsley, Denver; Mr. Dean Mabry, Trinidad; Mr. Vasco Seavy, Pueblo; Mr. Robert Swanson, Denver; and Mr. William L. Rice, Denver.

Mr. Phillip E. Jones and Mr. Harry O. Lawson, Legislative Council senior research analysts, had the primary responsibility for the staff work on this study, and were assisted by Mr. Myron H. Schlechte and Mr. Roger M. Weber, research assistants. Mr. James C. Wilson, Jr., Assistant Attorney General assigned to the Legislative Reference Office, also assisted the committee.

Fifteen meetings, including three two-day meetings, were held by this committee between April, 1963, and November, 1964. One meeting was held to discuss sex offenses and offenders with Doctors James Galvin, psychiatrist and former Director of Institutions, Bernardo Gaviria, staff psychiatrist, Fort Logan Mental Health Center, and Charles Oppgaard, psychiatrist and Medical Director, Bethesda Hospital; Colorado State Hospital Staff Psychologists George Stark and William Ross; and Mr. Frank Dillon, Chief Probation Officer, 2nd Judicial District. Also, this same subject was discussed with Mr. Edward Grout, Executive Director, Division of Adult Parole, and Dr. Mark Farrell, a psychiatrist formerly with the Division of Adult

Parole. One meeting was held to discuss tentative drafts of proposed definitions of several offenses with the Colorado Bar Association's Criminal Laws and Procedure Committee at the Association's 1964 convention in Colorado Springs.

Professor Austin S. Scott, Jr., University of Colorado School of Law, drafted the proposed homicide sections of the committee's revised code, and the committee is indebted to him for this and other valuable assistance. The committee also is grateful for the assistance of Denver District Court Judges Mitchel B. Johns and Henry E. Santo; Assistant District Attorneys David J. Hahn, James P. Johnson, and Mel Rossman; and Messrs. Walter L. Gerash, Robert Kingsley, Dean Mabry, William Rice, and Vasco Seavy, all of whom attended the committee's meetings on their own time and at their own expense.

November 11, 1964

Lyle C. Kyle
Director

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COMMITTEE FINDINGS AND RECOMMENDATIONS

Findings

If a "criminal code" is a catalogue of statutes defining major crimes that are placed in appropriate categories and reasonably related to fair penalties, and statutes comprehensively defining general criminal law, including liability, justification, and responsibility, then Colorado has no criminal code. In place of a codified, systematic body of law, Colorado has a collection of laws, narrow in scope, separately enacted over a period of years and decades, scattered throughout the majority of 154 chapters, requiring the supplementation of that vast accumulation of British pre-seventeenth century judicial decisions known as common law.

Chapter 40 of the revised statutes, which includes the larger portion of Colorado criminal laws, is a collection of statutes, the majority of which are obsolete, unconstitutional, duplicative, or highly specialized in scope. It contains many statutes that were enacted in other jurisdictions prior to Colorado's admission into the union. The model for much of the language of Colorado's present murder statute, as well as the classification of murder in degrees, was the Pennsylvania statute enacted in 1794. Chapter 40 contains statutes enacted upon statehood and statutes enacted prior to the twentieth century that have never been amended. Further, it contains statutes that have been amended in such a manner as to cause additional duplications and to make distinctions between other crimes uncertain. Few statutes cannot be criticized on the ground of verbosity.

A person convicted of murder in the first degree, if the sentence of death is not imposed, becomes eligible for parole after serving 10 years,¹ but a person convicted of second degree murder, a lesser grade of murder, may have to serve 15, 20 or more years, before becoming so eligible.² The maximum penalty for destroying a house with fire is 20 years;³ with explosives, 10 years.⁴ The maximum sentence for stealing a dog is 10 years;⁵ and for killing the dog, six months and a \$500 fine.⁶ For driving another's automobile without his consent, the maximum sentence is 90 days under one section,⁷ 12 months under another,⁸ and 10 years under a third.⁹ Indeed, there are over 50 sections defining some type of theft or another. Fourteen years is the maximum penalty for both robbing¹⁰ and assaulting with intent to rob.¹¹

1. 40-2-3(1) and 39-18-7(3), CRS 1963.
2. 40-2-3(3) and 105-4-7, CRS 1963.
3. 40-3-1, CRS 1963.
4. 40-18-1, CRS 1963 (assuming the value of the house exceeds \$500).
5. 8-2-31, CRS 1963.
6. 40-18-1, CRS 1963 (assuming the value of the dog does not exceed \$500).
7. 40-18-37, CRS 1963.
8. 13-13-2, CRS 1963.
9. 40-5-9 and 40-5-2(4), CRS 1963.
10. 40-5-1(1), CRS 1963.
11. 40-2-34, CRS 1963.

Although a thorough revision of Colorado's criminal laws has been advocated by some for many years, it was not until 1959 that a legislative effort was made to examine this problem. In that year, the Legislative Council's Committee on Administration of Justice was directed to make a report and recommendations on judicial organization and administration as well as Colorado's criminal laws. The latter subject, however, was not that committee's major concern, but its report did contain an examination of the state's sentencing structure, licensing and regulation of bail bondsmen, and the recommendation that there be created, either on a single or multi-county basis, the office of public defender.¹²

In 1961, the Legislative Council's Criminal Code Committee was created for the sole purpose of examining Colorado's criminal laws. The committee spent its two-year life examining the total penal system in Colorado, including sentencing, licensing and regulation of bail bondsmen, counsel for indigent defendants, inchoate crimes, consolidation of theft offenses, criminal insanity, robbery offenses, control of narcotics, and the effect of the then proposed Colorado Rules of Criminal Procedure on existing statutes.¹³ During that time, Legislative Council staff members addressed themselves to compiling and publishing a comprehensive index of all offenses, misdemeanor and felony, contained in the revised statutes. This index was prepared to provide a basis for revising the substantive criminal code.

In 1963, the present Criminal Code Committee was created, pursuant to House Joint Resolution No. 25 to study criminal statutes and their application, including such subjects as crimes against the person, crimes against property, crimes against public health and safety, arrest and arraignment, sentencing, parole and probation, narcotics control, and criminal responsibility. In effect, this resolution directed the Legislative Council to create a committee to examine the total penal system.

In deciding how to carry out its assignment best, the committee agreed that its concern should be a major reexamination of the crimes defined in Chapter 40, rather than a mere reorganization and reclassification. Although it recognized that the duty to examine other facets of criminal law was necessary, it agreed that an attack on the substantive provisions should be the first and major concern, and the committee proceeded accordingly.

Comparisons of Colorado criminal statutes defining offenses directed against persons and property, and offenses affecting public decency, health, and safety, and public administration were made with

12. Colorado Legislative Council, Judicial Administration in Colorado, Research Publication No. 40, A Report of the Legislative Council Committee on the Administration of Justice, December, 1960, pp. 131-160.
13. Colorado Legislative Council, Colorado Criminal Law, Research Publication No. 68, A Report of the Legislative Council Criminal Code Committee, December, 1962.

the newly revised codes of Illinois (1962), Louisiana (1942), New Mexico (1963), and Wisconsin (1956), and the American Law Institute's Model Penal Code (1962). Many of the newly-revised laws enacted in these jurisdictions and proposed in the Model Penal Code were adopted by the committee, while other proposed changes were drafted by committee and advisory committee members. The remainder of the sections proposed in this code of substantive law are merely restatements of the present law.

Limitation of time has prevented the committee from undertaking a reexamination and redrafting of the majority of the provisions adopted. Only one meeting was held following the adoption of the complete code. Consequently, the committee is aware that coverage of some sections overlap the scope of others, and that some gaps exist. A definition of the offense of wire tapping or eavesdropping is not included, and an open act of sexual intercourse is an offense under both the proposed adultery and fornication sections and the proposed public indecency section. What is presented in this report is a firm foundation, an adequate base, upon which the committee recommends future effort should rest.

Limitation of time has also precluded the committee from assessing the relative seriousness of each offense. Proposed statutes were adopted without regard to the possible penalty each might provide. The committee agreed that the relative seriousness of each offense should be assessed only after all offenses were defined. Also, each offense should be labeled as to class, and the classification should be dealt with in separate sections. Felonies and misdemeanors were tentatively graded as follows:

CLASS	MINIMUM PENALTY	MAXIMUM PENALTY
<u>Felonies</u>		
1	Life Imprisonment	Death
2	Not Less Than 1 Year	Life Imprisonment
3	Not Less Than 1 Year	20 Years
4	Not Less Than 1 Year	15 Years
5	Not Less Than 1 Year	10 Years
6	Not Less Than 1 Year	5 Years
<u>Misdemeanors</u>		
1	6 Months or \$500	12 Months and \$1,000
2	3 Months or \$250	6 Months and \$500
3	30 Days or \$100	3 Months and \$250
4	No Imprisonment or Fine	30 Days and \$100
5	No Imprisonment or Fine	\$100

No minimum terms of imprisonment for felonies, other than for a class I felony, were set by the committee. However, the minimum term should be fairly low so as to give the court the maximum choice in selecting the penalty to fit the offender. Also, because of the possibility of probation, high statutory minimum penalties are almost meaningless.

The accompanying pages contain the results of the committee's work. Comments are presented to explain generally what is and is not criminal within the scope of each section, and the reasons for such inclusion or exclusion.

Recommendations

This committee recommends that a legislative committee be created upon the adjournment of the 1965 Regular Session for the purpose of:

- 1) Placing in final form the definitions of the specific offenses presented in this report and general provisions;
- 2) Preparing a rational classification of penalties and grading the offenses accordingly;
- 3) Discussing the proposed substantive code with interested members of the bench, bar, and other groups following its distribution. Much can be gained if this committee and the Colorado Bar Association's Criminal Laws and Procedure Committee meet en banc well before the session in which this recommended committee intends to introduce its proposed substantive code;
- 4) Examining the vast number of procedural and regulatory provisions that provide incidental criminal sanctions. These sanctions, for the most part, are misdemeanor offenses and many, through reference to the code of substantive criminal law, can be omitted; and
- 5) Codifying and, where the Colorado Rules of Criminal Procedure conflict or where injustices or abuses of the present law are known to exist, revise Colorado's non-substantive code of criminal law. This codification of criminal procedure should encompass arrest and bail through venue, information and indictments, and probation and sentencing to appeal and parole. The enactment of a new code of substantive criminal law should be followed by the enactment of a new code of criminal procedure.

PART A. OFFENSES DIRECTED AGAINST THE PERSON

ARTICLE 1. HOMICIDE

40-1-1. Murder. (1) Any person who kills another person without lawful justification and not under circumstances which reduce the killing to voluntary manslaughter commits murder if, while engaged in the conduct which causes the death:

- (a) He intends either to kill or do great bodily harm to that person or another; or
- (b) He engages in such conduct recklessly under circumstances revealing his extreme indifference to the value of human life, even though he has no intent to kill or do great bodily harm; or
- (c) He is attempting or committing, or is an accomplice in attempting or committing, or is in flight after attempting or committing, the crime of arson, rape, robbery, mayhem, burglary or kidnaping, even though he has no intent to kill or do great bodily harm.

(2) In order for any such killing to constitute murder, the death must occur within a year and a day after the cause of death was inflicted, in the computation of which the whole of the day on which the cause of death was inflicted shall be considered the first day.

(3) If the person charged with murder pleads not guilty, he shall be tried to a jury, which shall first determine his guilt or innocence by its unanimous verdict without determining the penalty. If the jury finds him guilty of murder, the same court shall conduct a separate proceeding, before the same jury which determined his guilt, to determine the penalty. At this proceeding the jury shall,

by a unanimous verdict, fix the penalty at death, or at imprisonment in the penitentiary for life, or at imprisonment in the penitentiary for an indeterminate term of not less than ten years nor more than twenty-five years; provided, that the death penalty shall not be imposed upon one who, at the time of the conduct causing death, was under the age of eighteen years, nor upon one who has been convicted upon circumstantial evidence alone. If the jury is unable to reach a unanimous verdict to fix the penalty, the court shall discharge the jury and impose the sentence of imprisonment in the penitentiary for an indeterminate term of not less than ten years nor more than twenty-five years.

(4) If the person charged with murder pleads guilty to the charge, the court shall impanel a jury for the sole purpose of imposing one penalty among the three alternative penalties set forth in subsection (3); but if the district attorney informs the court that he does not seek the death penalty, the jury shall, by unanimous verdict, fix the penalty at imprisonment in the penitentiary for life or for the indeterminate term of years set forth in subsection (3). In either case, if the jury is unable to reach a unanimous verdict, the court shall discharge the jury and impose the sentence of imprisonment for the indeterminate term of years set forth in subsection (3).

(5) In the proceeding to determine the penalty, evidence may be presented by the district attorney or the defendant as to any matter which the court deems relevant to the imposition of the penalty, including the nature and circumstances of the crime, the defendant's character, background, history, mental and physical condition, and any other of the aggravating and mitigating circumstances set forth in subsections (6) and (7). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility

under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut hearsay evidence. The jury shall not impose the death penalty unless it finds one of the aggravating circumstances set forth in subsection (6) and further finds that there are no mitigating circumstances sufficiently substantial to call for leniency. The district attorney and the defendant shall be permitted to present argument for or against the death penalty.

(6) Aggravating circumstances:

- (a) The murder was committed by a convict under sentence of imprisonment.
- (b) The defendant was previously convicted of another murder or of a felony involving the use or threat of violence to the person.
- (c) At the time the murder was committed the defendant also committed another murder.
- (d) The defendant knowingly created a great risk of death to many persons.
- (e) The murder was committed while the defendant was attempting or committing, or was an accomplice in attempting or committing, or was in flight after attempting or committing, the crime of arson, rape, robbery, mayhem, burglary or kidnaping.
- (f) The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from lawful custody.
- (g) The murder was committed for pecuniary gain.
- (h) The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.

(7) Mitigating circumstances:

- (a) The defendant has no significant history of prior criminal activity.
- (b) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.
- (c) The victim was a participant in the defendant's homicidal conduct or consented to it.
- (d) The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct.
- (e) The defendant was an accomplice in a murder committed by another person and his participation in the homicidal conduct was relatively minor.
- (f) The defendant acted under duress or under the domination of another person.
- (g) At the time of the murder, the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication, although he was not criminally insane.
- (h) The youth of the defendant at the time of the crime.

Comment

A major portion of the proposed code contains sections which are restatements of existing law put in modern language, but there are several sections which radically depart from the present law. The proposed murder statute is one of these departures. Following is a section-by-section analysis of the proposed murder statute.

(1) Murder. The present statute defines murder as the "... unlawful killing of a human being with malice aforethought ..."

(40-2-1, CRS 1963). Malice is either express malice ("... deliberate intention unlawfully to take away the life of a fellow creature which is manifested by external circumstances capable of proof..." (40-2-2, CRS 1963)) or implied malice ("... when no considerable provocation appears, or when circumstances of the killing show an abandoned and malignant heart..." (40-2-3, CRS 1963)).

The committee rejected the use of the phrases "malice aforethought" and "abandoned and malignant heart." Malice is not an easy word to define. Courts have ruled that malice signifies a condition of the mind and heart at the time of the act; the deliberate intent unlawfully to kill, but does not necessarily mean ill-will toward the person killed or toward any particular person; and a general recklessness of the lives and safety of others, or a condition of the mind that shows a heart devoid of social duty and fatally bent on mischief. An "abandoned and malignant heart" has often been defined as extreme indifference to the value of human life. Not only are these phrases archaic, but they often result in confusion among lawyers as well as non-lawyers, particularly jurors. The committee did retain, however, the deliberate intent and recklessness elements of malice.

The committee has redefined murder as the killing of a person under the following conditions:

- (1) the killing is without lawful justification, and
- (2) not under circumstances which reduce the killing to voluntary manslaughter if:
 - (a) the actor intended to kill or seriously harm the victim or another; or
 - (b) the actor without intending to kill or seriously harm the victim or another:
 - (i) engages in reckless conduct which reveals his extreme indifference to human life, or
 - (ii) is attempting, committing, aiding in the attempt or commission, or fleeing from the attempt or commission of a major felony (arson, rape, robbery, mayhem, burglary, and kidnaping).

Essentially, the three types of homicides contained in the proposed murder draft (intentional, unintentional but caused by reckless conduct and extreme indifference to human life, and violent felony - homicides) are contained in the present murder statute as first degree murder. All other homicides committed with "malice aforethought" but not denominated as first degree murder are defined as second degree murder in the present statute. The committee felt it was unwise to define what murders should be subject to punishment of death and what murders should not. (Presently, death can be handed down only if the jury decides at the same time the defendant 1) is guilty, and 2) guilty of first degree murder.) As a consequence, every person, if found guilty of murder under the proposed statute, can be sentenced to death provided:

- (1) the defendant was 18 years old or older at the time he inflicted the cause of death (present death penalty cannot be imposed if the defendant was 17 years of age or younger at the time of his conviction rather than at the time of the offense), and
- (2) the defendant was not convicted solely upon circumstantial evidence, and
- (3) at least one aggravating circumstance, not offset by mitigating circumstances, was present.

(1)(a) Purposely or Intentionally. A homicide resulting from an intention to kill or seriously harm another (whether the victim was the intended victim or an innocent bystander) clearly is murder. Obviously, such a homicide must have occurred without substantial provocation, excuse, or justification. Such a homicide under the present law is an act of first degree murder -- "All murder which shall be perpetrated by means of poison or lying in wait, torture, or any kind of willful, deliberate and premeditated killing ... or perpetrated design, unlawfully and maliciously, to effect the death of any human being other than him who is killed... shall be deemed murder of the first degree ..." (40-2-3, CRS 1963).

(1)(b) Recklessness. A homicide resulting from extreme indifference to human life, coupled with reckless conduct, is also defined as murder. Present law, in different language, defines this type of homicide also as first degree murder -- "All murder which shall be ... perpetrated by any act greatly dangerous to the lives of others and indicating a depraved mind, regardless of human life, shall be deemed murder of the first degree ..." (40-2-3, CRS 1963). Examples of this type of murder include shooting into an occupied automobile or train, and guiding a speedboat through an area expressly reserved for swimmers. Although chance is against the specific act causing death, extreme indifference to the value of human life is exhibited. If recklessness exists but is not considered extreme, the homicide is involuntary manslaughter.

(1)(c) Felony-Homicide. Felony-murder is considered first degree murder under present law -- "All murder which shall be ... committed in the perpetration or attempt to perpetrate any arson, rape, robbery, mayhem or burglary ... shall be deemed murder of the first degree ..." (40-2-3, CRS 1963) -- and is also defined as murder in the proposed statute. Felony-homicide will only constitute murder if it is committed purposely or knowingly, or recklessly where the recklessness demonstrates extreme indifference to the value of human life. However, recklessness is presumed if the actor is attempting, committing, aiding the attempt or commission, or fleeing from the commission of arson, rape, robbery, mayhem, burglary, and kidnaping (kidnaping is not included in the present law; its inclusion in the proposed law is based on the similar threat of harm present in the other specific and violent offenses). If extreme recklessness cannot be proven, the homicide constitutes involuntary manslaughter.

(2) A Year and a Day. In order for a killing to constitute either murder or manslaughter under the present law, it is essential the victim die within one year and one day after the cause of death

was inflicted. In computing this period of time, the cause of death is considered to be inflicted on the first day (40-2-9, CRS 1963). With the exception of changes in language, this proposed section contains the same limitation. However, this limitation is not available under the proposed sections as a bar to prosecution for manslaughter. During the days of English common law, the time when this bar to prosecution developed, it was difficult for medical experts to know for certain the exact cause of a person's death beyond the expiration of a year. Medical science has improved since common law days, and now the cause of a death which occurred 20 or 30 years prior to death can be detected. Inhalation of mustard and other World War I gases, for example, are being listed as the cause of death today of many veterans.

However, the committee did not believe it to be wise to remove this limitation. As an intended murder victim continues to live beyond the moment of harm inflicted, the chances of his eventual death being caused by erroneous or unskillful medical treatment, in addition to the inflicted harm, are increased. Also, gross neglect or improper treatment by the victim, such as not submitting to a necessary operation or adopting a new and necessary diet, climate or occupation, can contribute to his death. With the passage of time, intervening factors can and sometimes do affect the victim's longevity.

(3) Bifurcate Trial. Normally, a court before whom a defendant has been convicted of a non-capital offense felony will investigate the defendant's background, including his prior criminal record, if any, his character, and his mental and physical condition. This investigation is made to inform thoroughly the court concerning the defendant, and is helpful in determining the defendant's sentence. Much of this information cannot be submitted during the trial, however, as it would be considered irrelevant, if not prejudicial, in the determination of guilt or innocence.

Under the present law, the verdict of guilt or innocence, and, if the verdict of guilty and guilty of first degree murder, the punishment of a defendant is determined by a jury without the assistance of a pre-sentence inquiry. The committee, to inform fully the jury in capital cases, recommends that a procedure analogous to that of non-capital cases should be included in the murder statute. The committee recommends that during the trial all evidence which does not have a bearing on the issue of guilt or innocence be excluded (present practice). However, upon the completion of the presentation of evidence, the jury will retire to deliberate solely upon a verdict of guilt or innocence. Upon the jury's verdict of guilty (a verdict of not guilty naturally would terminate the proceedings), a special and separate trial or hearing would be commenced. During this proceeding both defense and prosecution will present any aggravating or mitigating evidence which the court would deem relevant to the imposition of the penalty, including the nature and circumstances of the crime, the defendant's character, background, history, and mental and physical condition.

The same court and jury are retained for this second proceeding so that evidence relating to the crime will not have to be repeated.

Because of the severity of the maximum penalty allowed for murder (the same reason for the special proceeding), the jury must unanimously fix the penalty. If the sentence of death or life or the indeterminate term of years cannot be agreed upon unanimously, the jury is dismissed, and the court then must sentence the defendant, prescribing the lowest possible penalty. (Unanimity is presently required by the rules of criminal procedure.)

Similar to the death penalty limitation contained in the present law, the jury, under the proposed law, may not set the penalty at death for a defendant found guilty solely upon circumstantial evidence. The present law also prohibits the imposition of the death penalty when the person convicted is 17 years old or younger at the time of conviction. This prohibition is included although the age has been changed from 17 at the time of conviction to 17 at the time of harm inflicted. The former time seems irrelevant.

(4) Abbreviated Proceeding. Upon the entry of a plea of guilty, subject to the provisions of the present statute, the court must impanel a jury to decide whether the killing was murder of the first and second degree and, if first degree, whether or not the death penalty should be chosen as the penalty.

Under the proposed section, a guilty plea also may be entered, and, if so, a jury must be impaneled to determine the penalty -- death, life imprisonment, or a term of ten to 25 years.

It was the consensus of the committee and its advisors that a district attorney knows, immediately prior to the trial, whether or not he is prosecuting a capital murder case. This knowledge may be based on the defendant's age, type of evidence, or on other facts. Thus, the committee felt that if a district attorney were able to inform the court that he does not seek the maximum penalty upon the entry of a plea of guilty, a jury could decide the penalty somewhat quicker, e.g., by having to debate only two-thirds of the possible penalties. In addition, it is conceivable a jury could be impaneled quicker, the district attorney not having to examine prospective jurors on their attitudes toward capital punishment. Most important, however, is the belief that if the defense is aware of the district attorney's lack of a desire to seek the death penalty, it is expected many "not guilty" pleas that are entered only because of the death penalty will be withdrawn and "guilty" pleas entered instead. The net effect of amended pleas would be to reduce the court's time, only the second part of the trial (sentencing) being necessary.

(5) Aggravation and Mitigation. This proposed section, not comparable to anything contained in the present law, lists aggravating and mitigating circumstances that might be present at the time of the murder. During the second part of the two-part trial, either the defense or the prosecution may present any evidence, including but not limited to those items presented in this section, provided the court believes the evidence relevant to the imposition of the penalties, regardless of the admissibility of the evidence under the exclusionary rules of evidence. The court must give the defendant an opportunity to rebut any hearsay evidence.

At least one aggravating circumstance must be present at the time of the murder in order for the jury to consider the death penalty. However, the presence of at least one mitigating circumstance may negate any number of aggravating circumstances.

40-1-2. Voluntary manslaughter. (1) Any person who, with intent to kill or do great bodily harm, kills another without lawful justification commits voluntary manslaughter if, while engaged in the conduct which causes the death:

- (a) He is acting under a sudden and intense passion resulting from provocation by the person killed, or by another whom the offender endeavors to kill but he negligently or accidentally causes the death of the person killed, which provocation is sufficient to excite an intense passion in a reasonable person; however, if there should appear to have been an interval between the provocation given and the killing, sufficient for the voice of reason to be heard, the killing shall be punished as murder; or
- (b) He is acting in the exercise of his privilege of self-defense or defense of others or defense of dwelling or his privilege to prevent or terminate the commission of a felony, in the belief that the circumstances are such that, if they in fact existed, would justify the killing, but his belief is unreasonable.

(2) Whoever commits voluntary manslaughter is guilty of a class _____ felony.

Comment

This section replaces several sections in the present code which define the offense of voluntary homicide, an offense not considered quite as serious as murder in that the killing must occur almost immediately after the intention to kill was formed. It is a lesser grade of homicide than murder.

Present Colorado law (40-2-4, CRS 1963) defines voluntary manslaughter as the killing of another without lawful justification, and:

- (1) without malice, express or implied,
- (2) which results from a sudden heat of passion caused by provocation that is apparently sufficient to make the passion irresistible.

This provocation, in turn, can be caused either by:

- (1) a serious and highly provoking injury inflicted upon the actor, sufficient to excite an irresistible passion in a reasonable person, or
- (2) an attempt by the victim to commit a serious personal injury on the actor.

The killing must be the result of that sudden, violent impulse of irresistible passion; if an interval of time occurs between the provoking act and the killing, sufficient for the actor to collect his wits and reflect upon the seriousness of causing another's death, the homicide constitutes murder and not voluntary manslaughter.

This section essentially restates the present law, although provocation caused by the victim's criminal attempt has been expanded.

Both the present and the proposed sections require the killing to result from provocation which, in turn, must be caused either by the infliction or attempt to inflict serious injury upon the actor.

Completed Act

Cause of provocation. Present Colorado law states that the act or conduct causing provocation must be a serious and highly provoking injury upon the actor. The proposed statute requires only "provocation," and it may be caused either by the victim or, in the case of a death of an innocent bystander, the intended victim. By not requiring an actual and serious injury, the proposed section avoids arbitrarily limiting the nature of the circumstances which provoke the act. Used in this context, the term "provocation" includes any act which mentally or emotionally disturbs the actor.

Degree of provocation. Both present and proposed law require that the provocation must be sufficient to excite passion in a reasonable person. The present law requires the passion to be "irresistible" while that proposed here requires "intense" passion. Either word may indicate "extreme emotional disturbance."

Result of provocation. Both present and proposed laws require that the killing occur as a result of the extreme emotional disturbance. This proposed section requires the killing to result from the actor acting under a "sudden and intense passion," while the present statute requires a "sudden violent impulse of irresistible passion."

The passion must be sudden in order for the homicide to constitute voluntary manslaughter rather than murder. The intent to kill must be formulated quickly after the provocation, and the homicide committed immediately thereafter. Present law states that if the

length of time between the provocation and the killing is sufficient "for the voice of reason and humanity to be heard," the homicide is an act of revenge and constitutes murder. According to case law, the time interval must be of sufficient length so that one thought could follow another. (22 Colo. 53). This "cooling off" provision has been included in this section in essentially the same language.

Attempted Act

Present law states that if the victim, while attempting to commit a serious and personal injury upon the actor is killed, the homicide constitutes voluntary manslaughter if, subject to the defense contained in 40-2-15, CRS 1963, the homicide was not absolutely necessary. (Section 40-2-15 reads in part, "If a person kills another in self-defense it must appear that the danger was so urgent and pressing that in order to save his own life or to prevent his receiving great bodily harm the killing of the other was absolutely necessary.") To be an absolutely necessary homicide, the actor must have tried to prevent, either by retreating or by some other method, any further combat with the victim prior to his death. Colorado courts have ruled that apparent necessity, if well grounded and of such a character as to appeal to a reasonable person, is sufficient to require action and justify the application of the doctrine of self defense to the same extent as actual or real necessity. (47 Colo. 352). When a person has reasonable grounds to believe, and does believe, that danger of death or great bodily harm is imminent, he may kill in order to defend himself, although it may turn out that the belief was false, and he was mistaken as to the extent of the real or actual danger.

This section is essentially a restatement of the present statutory defense, as refined by court interpretation. If a person kills to prevent his own death or serious bodily harm, the homicide constitutes voluntary manslaughter only if he believes "unreasonably" that the "circumstances are such that, if they in fact existed, would justify the killing..." Homicides caused by unreasonable beliefs must be approached as crimes of recklessness or negligence but cannot be considered as serious as intentional or purposeful homicides.

This section also includes homicides caused by the unreasonable belief of the actor that he has no alternative to the defense of another or his home and to the prevention or termination of the commission of any felony offense, which are present justifications.

40-1-3. Involuntary manslaughter. Any person who kills another without intent to do so and without lawful justification commits involuntary manslaughter if his conduct, whether lawful or unlawful, which causes the death creates an unreasonable risk of death or great bodily harm to some person, and he engages in that conduct recklessly but not under circumstances revealing his extreme indif-

ference to the value of human life. Whoever commits involuntary manslaughter is guilty of a class _____ felony.

Comment

This section is similar to the present law with the exception of the definition of the conduct of the actor; both present and proposed sections require the homicide to be committed without lawful justification and without the intent to commit the homicide.

Present Colorado law requires the conduct to be either an unlawful act or a lawful act without "due caution or circumspection." (40-2-4, CRS 1963). The proposed section differs in that the conduct which causes the death:

- (1) must be engaged in recklessly but not under circumstances revealing extreme indifference to the value of human life (an element of murder),
- (2) can be either lawful or unlawful, and
- (3) must create an unreasonable risk of death or great bodily harm to another.

As explained elsewhere, a homicide is considered murder under the proposed murder section if the homicide is the intention of the actor or, without intending to kill, the actor engages in reckless conduct which reveals or is presumed to reveal his extreme indifference to the value of human life. The proposed murder section excludes all other types of felony-homicides (other than those which, when committed, reveal extreme indifference) which constitute second degree murder under present law. These homicides now constitute voluntary manslaughter.

It follows that a homicide committed without the intention to kill and without extreme recklessness should be treated as a crime other than murder. Coverage proposed here includes conduct that is presently an element of voluntary manslaughter:

- (1) legal and reckless conduct that causes a homicide; and
- (2) misdemeanor-homicides;

and conduct that is presently an element of second degree murder:

- (1) felony-homicides, other than those homicides which reveal or presume to reveal extreme indifference.

There is, however, no presumption of recklessness in this section if the conduct which causes death is illegal; the question of whether the actor's conduct demonstrates a "conscious disregard" for the safety of another will have to be decided by the trier of facts in the light of the particular circumstances of the homicide.

40-1-4. Negligent homicide. Any person who kills another without intent to do so and without lawful justification commits negligent homicide if his conduct, whether lawful or unlawful, which causes the death creates an unreasonable risk of death or great bodily harm to some person, and he engages in that conduct negligently. Whoever commits negligent homicide is guilty of a class _____ misdemeanor.

Comment

This section deals with homicides caused by negligent conduct. Under present Colorado law, a homicide caused by negligence and occurring under certain conditions is criminal; no broad, general negligent homicide statute is contained in the present criminal code. These specific crimes include:

"Any person while under the influence of intoxicating liquor... who causes the death of another by operating or driving an automobile...in a...negligent...manner...shall be punished by imprisonment in the state penitentiary for a period of not less than one year nor more than fourteen years." (40-2-10, CRS 1963);

and

"If any lives shall be lost by reason of the willful negligence...to observe the provisions of this article Construction Requirements of Public Buildings, the person through whose default such loss of life was occasioned shall be... punished by a fine not less than one thousand nor more than five thousand dollars, or imprisonment in the penitentiary not less than six months nor more than ten years, or by both such fine and imprisonment in the discretion of the court." (17-1-6, CRS 1963).

The scope of this section is therefore dependent upon the meaning of the term "negligent conduct." The term, as defined in proposed section _____ and in the context of this section, means that the actor causes the death of another by engaging in conduct which constitutes a substantial deviation from the standard of care which a reasonable person would exercise in the situation. The actor need not know his conduct creates a substantial risk that a homicide will follow. A gross deviation from a reasonable person's standard of care, which demonstrates that a substantial and unreasonable risk of death was consciously created, is "reckless conduct," and is an element of involuntary manslaughter.

The scope of this section has been enlarged to include all negligent homicides. It appears there is no need or desirability for

individual, particularized provisions or offenses addressed to fatally negligent conduct in specific areas of activity.

Presumably, this proposed section, carrying only a misdemeanor penalty, would be used for prosecution of the majority of vehicle homicides, although crimes of "recklessness" could be used for more heinous acts. Presently, most prosecutions for vehicle homicides are carried out under the involuntary manslaughter statute, which provides a similar penalty to that proposed here.

40-1-5. Concealing death of child. Any woman who conceals the corpse of any issue of her body with intent to prevent a determination of whether it was born dead or alive commits the crime of concealing the death of a child and is guilty of a class _____ misdemeanor. Nothing herein shall be so construed as to prevent such mother from being prosecuted for the murder or manslaughter of such child.

Comment

This section defines an offense which is committed by any woman who conceals the body of a child to which she has given birth with the intent to prevent a determination of whether it was born dead or alive. This section is substantially a restatement of the present law, and reflects the following changes: 1) immaterial facts, such as whether the child was male or female, have been omitted; 2) the definition has been broadened to include legitimate as well as illegitimate children; and 3) the required intent has been narrowed to require only the intent to prevent a determination of whether the child was born dead or alive. Present law contains a broader intent; i.e., the intent that the issue of her body does not come to light.

Both the present and proposed sections specifically state that a prosecution under this section does not bar a subsequent prosecution for murder, if such is the case.

ARTICLE 2. ASSAULTS AND BATTERIES

40-2-1. Simple assault. Any person who attempts to commit a battery or intentionally places another in reasonable apprehension of receiving a battery commits simple assault and is guilty of a class _____ misdemeanor.

Comment

Under this proposed section, an assault may be committed in two ways:

(1) An assault is defined as an attempt to commit a battery. Consequently, there must be an overt act, a substantial step in the offender's course of conduct, which is planned to culminate in the commission of a battery. An intentional act of force or violence must have begun to be executed but not completed. An intentional and completed act of force or violence against another, of course, constitutes a battery.

(2) An assault is defined also as the intentional placing of another in reasonable apprehension of receiving a battery. This is essentially a restatement of the present definition of assault, i.e., an unlawful attempt coupled with a present ability to commit a violent injury on the person of another (40-2-33, CRS 1963). The committee noted that several newly-revised criminal codes, including the Wisconsin criminal code, define an assault only as an attempt to commit a battery. Indeed, the Wisconsin code makes no mention of assault, relying solely upon its attempt provisions as a remedy. However, the committee agreed that the basis of the present assault offense is the creation of a well-founded fear of immediate peril in the mind of the victim. Also, the committee was aware of the difficulty in practice of drawing a precise line which separates violence that is menaced from violence that is begun to be executed. Consequently, it decided that the unequivocal appearance of an attempt with force or violence to do such an act as will convey to the mind of the victim a "reasonable apprehension" of imminent danger of bodily harm should be retained as an essential element of assault. The reasonableness of the victim's apprehension is a question for the trier of the facts to decide.

40-2-2. Aggravated assault. Any person who commits simple assault with a dangerous weapon commits aggravated assault and is guilty of a class _____ felony.

Comment

Aggravated assault, as defined in this section, is the doing of those acts within the scope of simple assault, coupled with the presence and use of a dangerous weapon.

Aggravated assault may be either an attempt to commit a battery with a dangerous weapon, e.g., shooting at another with an intent to injure, or the placing of another in reasonable apprehension of receiving a battery with a dangerous weapon, e.g., the pointing at another of an unloaded firearm or a firearm that, because of an absence of a firing pin or some other necessary part, is incapable of being discharged. The shooting at another, if coupled with the intent to cause the other's death, should not be prosecuted under this section. Such an act constitutes an attempt to murder and should be prosecuted under the general criminal attempt provisions.

This section, by replacing the present assault with a deadly weapon provision (40-2-34, CRS 1963), eliminates the requirement of the specific intent to commit upon the person of another, with a deadly weapon, instrument or other thing, a bodily injury where no considerable provocation appears or where the circumstances of the assault show an abandoned and malignant heart. Under the present law, the placing of another under a reasonable apprehension of receiving an injury with the use of a deadly weapon that is incapable of being fired constitutes only a simple assault, a misdemeanor offense.

This section also replaces the present assault with intent to commit larceny, mayhem, murder, rape or robbery provision (40-2-34, CRS 1963). This present section, because of its limited scope, does not cover assaults to commit other equally serious offenses, such as sodomy, also, it appears unfair to subject a convicted offender to a possible 14-year term of imprisonment for merely placing another in reasonable apprehension of being a victim to one of these offenses. For these reasons, the committee agreed that an assault to commit any of these offenses should be prosecuted under either:

- (1) the proposed simple assault section, if the offender was not armed with a dangerous weapon and no overt act was performed; or
- (2) the proposed aggravated assault section, if the offender was armed with a dangerous weapon and no overt act was performed; or
- (3) the general criminal attempt section regardless of whether or not the offender was armed with a dangerous weapon, if an overt act was performed.

40-2-3. Simple battery. Any person who intentionally uses force or violence upon another or intentionally administers a poison or other noxious liquid or substance to another commits simple battery and is guilty of a class _____ misdemeanor.

Comment

Under the present law, assault and battery, defined as a single offense, is the unlawful beating of another (40-2-35, CRS 1963).

Under this proposed section, a battery is 1) the intentional use of force or violence upon another, and 2) the intentional administration of a poison or some other toxic item. This section covers all forcible and violent contact, irrespective of the degree of force or violence. Any forcible contact is sufficient and no physical harm or injury need result. Force upon another may be achieved by grabbing another's arm as well as "beating" him. Administering a poison to another is considered here as being equally harmful as the use of force or violence. If, however, the poison is administered with the intent to cause the victim's death, the offender should be prosecuted under the general criminal attempt statute for an attempt to commit murder. Thus, a battery may be committed either directly or indirectly. A battery must be the intention of the offender; no specific intent to injure is required. Injury or harm caused by the offender's recklessness or negligence is outside the scope of this section. Consent of the victim is no defense since consent of the victim is not element of the offense of simple battery.

40-2-4. Aggravated battery. Any person who commits a simple battery with a dangerous weapon commits aggravated battery and is guilty of a class _____ felony.

Comment

Aggravated battery is simple battery committed with a dangerous weapon. It is essentially a new offense in that it replaces no present section other than mayhem. Aggravated battery is considered a more serious offense than simple battery because of the higher probability of the offender causing death, serious disfigurement, and permanent or protracted loss or impairment of a function of a bodily member or organ. Aggravated battery must be the intention of the offender; no specific intent to injure, etc., is required. Injury or harm caused by the offender's reckless or negligent use of a dangerous weapon is outside the scope of this section. Also, consent of the victim is not a defense to prosecution.

ARTICLE 3. KIDNAPING

40-3-1. False imprisonment. Any person who intentionally confines or detains another without the other's consent and without proper legal authority commits false imprisonment and is guilty of a class _____ misdemeanor.

Comment

This section is a restatement of the present offense defined in 40-2-42, CRS 1963. The present offense is defined as the unlawful violation of the personal liberty of another, and consists in confinement or detention without sufficient authority.

40-3-2. Simple kidnaping. Any person who intentionally does any of the following acts commits simple kidnaping and is guilty of a class _____ felony:

- (1) Forcibly seizes and carries any person from one place to another without his consent and without lawful justification; or
- (2) Takes, entices or decoys away, for an unlawful purpose, any child not his own and under the age of 18 years, without the consent of its parent or guardian.

Comment

Simple kidnaping is aggravated false imprisonment. It requires a confinement or restraint without consent and without proper legal authority plus some aggravating factor, other than an intent to extort a ransom.

In subsection (1)(a), force is used to overcome the victim's refusal to consent to the carrying from one place to another. This subsection covers a normal case of kidnaping where the victim is overpowered and is lifted or forced at gun point into an awaiting car. A special situation where force is not required is covered in subsection (1)(b). The offender need not have a special motive to kidnap, with the exception of extorting ransom. Kidnaping for ransom is considered the most heinous offense which violates personal liberty, and is dealt with accordingly in proposed section 40-3-3. It is essential under this subsection that the victim is moved from one place to another, although this definition is broad enough to cover a situation

in which the victim is carried or forced to move from one room to another, a distance of only a few feet. It is not essential that the victim is an adult or a juvenile and is harmed or unharmed. These facts are some of the aggravating and mitigating circumstances which obviously should be considered by the court following the defendant's conviction and prior to his sentencing.

In subsection (1)(b), force is not required, but the victim must be a juvenile. Children under the age of 18 can be taken away without the use of force because they are too young to understand what is happening: an offer of candy to a child can be just as persuasive as a point of a gun is to an adult. The actor must have an intent to commit an unlawful act, harmfulness which corresponds to the danger of force required in subsection (1)(a). Usually, this will be an intent to commit a sex offense. However, the language is sufficiently broad enough to include any unlawful act. The child enticed away must not be the offender's child. This exclusion covers cases where a parent takes his child who is in the legal custody of the other parent -- conduct which, although undesirable, is not kidnaping under this proposed section and is covered by proposed section 40-3-4.

The victim's age, the actor's method and degree of enticement, and the seriousness of the intended unlawful act are aggravating or mitigating circumstances, as the case may be, and should be weighed by the court upon the defendant's conviction but prior to his sentencing.

40-3-3. Aggravated kidnaping. (1) Any person who does any of the following acts with the intent thereby to force the victim, or some other person, to give up anything of value in order to secure a release of the person under the offender's actual or apparent control commits aggravated kidnaping:

- (a) Forcibly seizes and carries any person from one place to another; or
- (b) Entices or persuades any person to go from one place to another; or
- (c) Imprisons or forcibly secretes any person.

(2) Whoever commits aggravated kidnaping is guilty of a class _____ felony if any person kidnaped shall have suffered bodily harm; provided, that no person convicted of aggravated kidnaping shall suffer the death penalty if at the time of the offense he was under the age of 18 years, if he was convicted on circumstantial

evidence alone, or if each person kidnaped was liberated alive prior to his conviction.

(3) Whoever commits aggravated kidnaping is guilty of a class ___ felony if, prior to his conviction, each person kidnaped was liberated unharmed.

Comment

This section defines the offense of simple kidnaping and false imprisonment with the intent to extort a ransom. It increases the penalty for kidnaping when it is done for ransom. If a person does any of the acts in subsections (1)(a), (1)(b) or (1)(c) with the intent to demand a ransom in return for the release of his victim, he is guilty under this section. Although ransom will usually be money, the broader term "anything of value" is used to cover things like jewels or other valuables.

To maximize his incentive to return the victim unharmed, a number of penalties may be imposed on a convicted kidnaper, depending on two aggravating factors: the harm inflicted upon the victim, and whether or not the victim was released prior to his conviction. The maximum penalty is death if the victim is not released and harmed, life imprisonment if the victim is released harmed, and _____ years if the victim is released unharmed.

Two additional facts may also bar the death penalty from being imposed: the kidnaper was convicted solely on circumstantial evidence or the kidnaper was under the age of 18 at the time of the commission of the offense. These two defenses are contained in the present law. Except for the change that the actor must be under 18 at the time of the offense rather than at the time of his conviction (the latter time being irrelevant), these two defenses are essentially restatements of the defenses contained in the present law, and are identical to the defenses contained in the proposed murder statute:

40-3-4. Violation of custody. (1)(a) Any person, including a natural or foster parent, who, knowing that he has no privilege to do so or heedless in that regard, takes or entices any child under the age of eighteen years from the custody of its parent, guardian, or other lawful custodian shall be guilty of a class _____ felony.

(b) Any parent or other person who violates an order of any district or juvenile court of this state, granting the custody of a child under the age of eighteen years to any person, agency, or institution, with the intent to deprive the lawful custodian of the custody

of a child under the age of eighteen years, shall be guilty of a class _____ felony.

(2) It shall be an affirmative defense either that the offender reasonably believed that his conduct was necessary to preserve the child from danger to its welfare, or that the child, being at the time not less than fourteen years old, was taken away at its own instigation without enticement and without purpose to commit a criminal offense with or against the child. Knowledge or disregard of the fact that a child is below the age of fourteen years shall be presumed.

Comment

This section is new law, designed to meet a situation which not infrequently arises and for which there is at present no proper remedy.

Under present Colorado law, no felony offense is committed if a divorced parent, who was not granted the custody of his child or children, takes his child from its lawful custodian. If the parent having the unlawful custody of his child remains in Colorado, the court could convict the parent under a kidnaping provision which provides a misdemeanor penalty. If he leaves the state, however, the court is powerless: a commission of a misdemeanor is not a sufficient ground for extradition. Generally, there are only two remedies available to a parent granted the custody of a child when the other parent unlawfully removes them from Colorado: 1) "re-kidnap" the child and return to Colorado, or 2) ask a court of proper jurisdiction in which the children are now residing to hold a custody hearing.

Violation of lawful custody of children requires special legislation, notwithstanding its similarity in some respects to kidnaping. The interest to be protected is not freedom from physical danger or terrorization by abduction, since this is covered elsewhere, but rather the maintenance of parental custody against all unlawful interruptions, except if the child is 14 years of age or older and is a willing, undeceived participant in the attack on this interest of its parent. The problem is further distinguishable from kidnaping by the fact that the offender here will often be a parent or another person favorably disposed toward the child.

Subsection (1)(a) covers situations in which a person, including a parent, intentionally entices or takes a child away from the parent or other person to whose custody it has been awarded, i.e., he must know that the custody of the child has been awarded to that parent or other person. If the enticement is for an immoral or other criminal purpose, of course, prosecution will be carried out under another appropriate section of this code. Subsection (1)(b) covers a situation in which a parent or other person intentionally deprives the

lawful custodian of the custody of the child. Such a situation would occur where a parent, not the lawful custodian, is awarded visitation rights and fails to return the child to its lawful custodian.

Both subsections (1)(a) and (1)(b) provide a felony penalty. However, it is not the committee's intent for penitentiary sentences to be imposed each time a violation of this section occurs; it is the intent that an adequate ground (commission of a felony) be established for extradition.

The age of 18 is selected as the limit of parental interest in custody, to be protected by criminal law, since this is the age at which a child begins to move into the relative independence of self-support or higher education.

Subsection (2) provides two broad defenses to prosecution which will tend to bar a conviction in most prosecutions, and which reflect the committee's desire of keeping convictions to a minimum. No crime is committed if the child, 14 years of age or older, is principally responsible for its determination to leave home. It is unfair to punish a parent who merely fell in with the child's plan. Subsection (2) provides also the defense that the actor enticed or fails to return the child in the belief that to do so would endanger the child's welfare. Both defenses are questions of fact.

PART B. OFFENSE DIRECTED AGAINST PROPERTY

ARTICLE 4. ARSON

40-4-1. Aggravated arson. Any person who intentionally sets fire to, burns, causes to be burned, or aids the burning of, or by the use of any explosive, damages or destroys, causes to be damaged or destroyed or aids in the damage or destruction of, any building or occupied structure of another and without his consent, commits aggravated arson and is guilty of a class _____ felony.

Comment

This section replaces a major portion of the present offense of first degree arson, and has substantially altered the elements of the present offense (see also proposed section 40-4-4).

The example of recently enacted revised codes of other states has been followed in that the concept of arson has been enlarged to include exploding as well as burning. The criminologic considerations are quite similar: likelihood of extensive property destruction accompanied by danger to life. Also, explosions frequently lead to fires, just as fires sometimes cause explosions.

The proposed section requires the property to be that of another (the present crime requires that the property must be that of "himself or of another"). Other proposed sections deal with situations in which a person, exploding or burning his own property, causes injury to other property (see sections 40-4-4, reckless burning and exploding, and 40-4-2, simple arson).

To burn down a building owned and occupied by the actor may or may not be recklessness in relation to other people's safety or valued property, depending on the isolation of the premises and the degree of care taken, but the actor's poor choice of means to get rid of his own property does not mark him as the same kind of dangerous character as one who burns his own buildings to defraud an insurer, or another's building to wreck vengeance.

The definition of the type of structure that is burned or exploded has been narrowed. This section, the most serious arson offense, covers only arson in which valued property is destroyed or imperiled and the life of any person is placed in jeopardy. Burning or exploding other property (property other than a building or occupied structure) may endanger life to some extent, as firefighters and spectators are drawn to the scene. This danger, however, is not considered as serious as that to which the owner or occupants of the building are exposed. In principle, the burning of a dilapidated and deserted house unsuited for occupancy should be no more than simple criminal damage to property (proposed section 40-6-2 or reckless

burning and exploding (proposed section 40-4-4). But the probability that a building is used by human beings in ways that make it dangerous to burn or explode is so high that it seems pointless to require the prosecution to charge and prove occupancy in every case. Occupied structures include ships, sleeping cars, mobile homes and offices but not ordinary passenger cars, trucks or freight cars (see proposed section 40-4-5).

40-4-2. Simple arson. Any person who intentionally sets fire to, burns, causes to be burned, or aids the burning of, or by the use of any explosive, damages or destroys, causes to be damaged or destroyed, or aids in the damage or destruction of, any property of another and without his consent, other than any building or occupied structure, commits simple arson and:

- (1) Is guilty of a class ____ felony, if the damage exceeds the value of one hundred dollars;
- (2) Is guilty of a class ____ misdemeanor, if the damage does not exceed one hundred dollars in value; or
- (3) Is guilty of a class ____ felony, if the damage does not exceed one hundred dollars in value and the person has been previously convicted of simple arson, aggravated arson, reckless burning or exploding or arson to defraud.

Comment

This section also reflects the concept of arson broadened to include exploding. It replaces the present second and third degree arson laws. It requires the property to be that of another. The ownership provision in the present law requires that the property may be that of "himself or of another" (second degree arson) or "of another person" (third degree arson). Again, other proposed arson sections pertain to those situations in which a person causes injury to other property while exploding or burning his own property in a reckless fashion.

This section broadens the type of property to include both real and personal property, other than a building or occupied structure. Thus, any type of property covered by the wording in the proposed aggravated arson section is precluded from this section. An intentional act of arson which is not a violation of the proposed aggravated arson section is a violation of this proposed section.

The value of the property required under the present third degree arson statute distinguishes whether the act of burning is an offense of arson or malicious mischief; third degree arson requires the damage to exceed \$25 in value, while lesser valued damage is an act of malicious mischief. This section has increased the value of property from \$25 to \$100 to reflect contemporary values. This section also covers all types of arson, regardless of value, but, as mentioned below, the severity of the penalty for violating this section depends on the value of the damage. The value of the property is a factor to be considered only by the court in sentencing the convicted offender. Value does not determine whether or not simple arson has been committed.

Two penalties are provided in this section. Simple arson is a felony offense if the damage exceeds \$100 dollars in value or the actor has been convicted previously of simple arson, aggravated arson, reckless burning or exploding or arson to defraud, regardless of damage value. Simple arson is a misdemeanor offense if the value of the damage does not exceed \$100.

40-4-3. Arson to defraud. Any person who, by means of fire or explosives, intentionally damages any property with intent to defraud, commits arson to defraud and is guilty of a class ____ felony.

Comment

This section is substantially a restatement of the present statute. Again, the concept of arson has been expanded to include exploding as well as burning of property.

40-4-4. Reckless burning and exploding. Any person who intentionally starts a fire or causes an explosion, whether on his own property or that of another, and thereby recklessly does any of the following acts commits reckless burning and exploding and is guilty of a class ____ felony:

- (1) Places another in danger of death or bodily injury; or
- (2) Places any building or occupied structure of another in danger of damage or destruction.

Comment

Reckless burning and exploding contains minor elements of first degree arson that have been expanded. Where aggravated arson requires intent, reckless burning and exploding requires recklessness.

This section deals with three situations presently dealt with by first degree arson:

(1) the burning of one's own property under circumstances where there is a high risk that the fire will spread to property of another. This situation is usually treated as severely as setting fire to another's property. The present first degree arson section defines that offense as the "malicious" burning of a dwelling and related structures whether the property of himself or of another;

(2) the burning of lesser forms of property in close proximity to the specially valued categories, also treated as first degree arson ("...or any kitchen, shop, barn, stable or other outhouse that is parcel thereof, or belonging to or adjoining thereto..."); and

(3) other recklessness in relation to special categories of highly regarded property, such as setting fire to a pile of trash near a home, where no burning of the home occurs.

40-4-5. Definition. As used in this article, the term "occupied structure" includes a tent, boat, trailer, sleeping car, or any other vehicle adapted for overnight accommodation of persons or for carrying on business therein, whether or not a person is actually present. If a building or structure is divided into separately occupied units, any unit not occupied by the actor is an occupied structure of another.

Comment

This designation of the property protected by the proposed arson sections is narrower than that contained in the present laws. By restricting the aggravated arson offense to buildings and occupied structures, the offense is confined to the fire and explosions which are the most dangerous. Occupancy is to be distinguished from "presence" of a person because the presence or absence of a person in a structure which is normally occupied may be purely a matter of chance so far as the arsonist is concerned. On the other hand, the arsonist should be able to judge whether the structure is a dwelling, store, factory, warehouse, or other place for the conduct of human affairs. It is unnecessary to prescribe that "buildings" be occupied, since buildings are generally employed by humans in ways that amount to occupancy. In the case of structures other than buildings, such as a mine shaft, prosecution would have to prove occupancy as part of its case. The requirement of occupancy is significant chiefly in relation to vehicles. It serves to exclude from aggravated arson the burning of freight cars, motor vehicles other than house trailers or mobile offices, ordinary small water craft and the like.

The provision as to separate or occupied portions of buildings and structures takes care of the situation of apartment houses, office buildings, etc., where occupancy is by unit. It is a unit rather than a structure which must be safeguarded, even against the occupants of other units in the same structure.

ARTICLE 5. BURGLARY

40-5-1. Burglary. Any person who without authority enters or remains in any building or enclosed portion of any vehicle or craft, whether movable or immovable, or who being lawfully within any building or enclosed portion of any vehicle or craft, whether movable or immovable, enters into any room, apartment, or enclosed portion of the same building, vehicle, or craft, with the intent to commit any felony or theft therein commits burglary and is guilty of a class _____ felony.

Comment

This section essentially restates the present law, 40-3-5, CRS 1963, but it proposes one major change. Under the present law, a person who breaks and enters must have the intention to commit any felony or misdemeanor in order to be convicted of burglary. This section proposes to limit the required intent to any felony and misdemeanor-theft.

40-5-2. Aggravated burglary. Any person who commits burglary and:

- (1) Is armed with a dangerous weapon and intends to inflict bodily injury if discovered; or
- (2) After entering arms himself with a dangerous weapon and intends to inflict bodily injury if discovered; or
- (3) Uses, or possesses with intent to use, any explosive substance, commits aggravated burglary and is guilty of a class _____ felony.

Comment

This section is substantially new law in that it defines an offense that parallels the classification of robbery offenses. Any burglar who is armed with a dangerous weapon, either before or subsequent to his unlawful entry, is guilty of an offense under this section. Under present law, this aggravating feature of burglary is prosecuted under the assault with a deadly weapon section. This section also includes a restatement of the present use of dynamite in burglary statute 40-3-6, CRS 1963.

40-5-3. Possession of burglary tools. Any person who possesses any key, instrument, device, or any explosive substance suitable for use in breaking into any building, vehicle, craft, or any depository designed for the safekeeping of anything of value, or any part thereof, with intent to commit burglary, commits possession of burglary tools and is guilty of a class ___ felony.

Comment

This section replaces 40-3-7, CRS 1963, and proposes no major changes.

40-5-4. Coin-box burglary. Any person who, with intent to commit theft, enters or breaks into any coin-operated vending machine or other coin-operated contrivance, apparatus, or equipment used for the purpose of providing lawful amusement, sales of goods, services, or other valuable things, or telecommunications, when punishment therefor is not otherwise provided, upon a first conviction, is guilty of a class ___ misdemeanor. Upon a second or subsequent conviction, any such person is guilty of a class ___ felony.

Comment

This section is designed to cover vending machine burglaries. Under present law, this conduct may be prosecuted under either the present burglary section or the section on damage or destruction of property belonging to another.

ARTICLE 6. DAMAGE AND TRESPASS TO PROPERTY

40-6-1. Criminal damage to property involving danger to the person. Any person who intentionally damages any property, real or personal, by any means other than fire or explosion, and thereby recklessly places another person in danger of death or bodily injury commits criminal damage to property involving danger to the person, and is guilty of a class ____ felony.

Comment

This proposed section defines an offense of property destruction that, regardless of the value of the property destroyed, creates a dangerous situation for another. This section defines an offense that cannot be committed with fire or explosives. Essentially it covers all conduct outside the scope of arson.

40-6-2. Simple criminal damage to property. (1) Any person who intentionally damages any property, real or personal, of another, without the consent of the owner, by any means other than fire or explosion, commits simple criminal damage to property.

(2) Any person who commits simple criminal damage to property, where the damage done does not exceed one hundred dollars, upon a first conviction, is guilty of a class ____ misdemeanor. Upon a second or subsequent conviction, any such person is guilty of a class ____ felony.

(3) Any person who commits simple criminal damage to property, where the damage done exceeds one hundred dollars, is guilty of a class ____ felony.

(4) Any person who commits the crime of simple criminal damage to property, where the damage is done to any public utility or common carrier and the damage done directly interferes with or interrupts any common carrier, pipe line, gas, electrical, telephone, telegraph or water service, or makes inoperable any facility or

equipment directly used in furnishing any such service, no matter what the amount of damage done, is guilty of a class ____ felony.

Comment

This proposed section restates the major elements of the offense defined in 40-18-1, CRS 1963, i.e., unlawful damage or destruction of personal or real property of another.

40-6-3. Damage to property with intent to defraud. (1) Any person who damages or destroys any property, real or personal, by any means other than fire or explosion, with intent to defraud commits damage to property with intent to defraud.

(2) Any person who commits damage to property with intent to defraud, where the damage or destruction exceeds one hundred dollars, is guilty of a class ____ felony.

(3) Any person who commits damage to property with intent to defraud, where the damage or destruction does not exceed one hundred dollars, upon first conviction, is guilty of a class ____ misdemeanor. Upon a second or subsequent conviction, any such person is guilty of a class ____ felony.

Comment

This proposed section is the counterpart of the proposed arson to defraud section 40-4-3.

40-6-4. Criminal trespass. Any person who enters or remains upon the lands of another, knowing that the consent to enter or remain is denied or withdrawn by the owner, the person having lawful possession thereof, or any agent of such owner or possessor, commits criminal trespass and is guilty of a class ____ misdemeanor; provided, that this section shall not apply to any reasonable entry seeking safety, shelter, or information.

Comment

This section proposes to consolidate offenses involving crimi-

nal trespass. Present trespass statutes that this section replaces include:

40-3-8, CRS 1963 -- Trespass on Premises of Another.
40-18-12, CRS 1963 -- Trespass to Injure Dam or Embankment.
40-18-13, CRS 1963 -- Trespass Upon Garden or Orchard.

ARTICLE 7. FORGERY

40-3-10. Forgery. (1) Any person who, with intent to defraud, knowingly:

- (a) Makes or alters the signature or any part of any document apparently capable of defrauding another in such manner that it purports to have been made by another, at another time, with different provisions, or by authority of one who did not give such authority; or
- (b) Issues or delivers such document knowing it to have been thus made or altered, commits forgery and is guilty of a class ___ felony.

(2) An intent to defraud means an intention to cause another to assume, create, transfer, alter, or terminate any right, obligation, or power with reference to any person or property.

(3) A document apparently capable of defrauding another includes, but is not limited to, a writing by which any right, obligation, or power with reference to any person or property may be created, transferred, altered, or terminated.

Comment

The key to this section is that the offender must, with the use of a document, knowingly cause another either to assume, create, transfer, alter or terminate any right, obligation or power. This section replaces the present and general forgery statute, 40-6-1, CRS 1963, and other statutes defining forgery offenses, including:

13-6-42, CRS 1963 -- Altering or Using Altered Certificates.
13-7-35, CRS 1963 -- Forging Ability to Respond in Damages.
40-6-12, CRS 1963 -- Forging or Defacing Official Seals.
59-21-7, CRS 1963 -- Forgery of Ballot

ARTICLE 8. THEFT

40-8-1. Theft. Any person who knowingly does any of the following commits theft:

- (1)(a) Obtains or exerts unauthorized control over anything of value of another; or
- (b) Obtains by deception control over anything of value of another; or
- (c) Obtains by threat control over anything of value of another; or
- (d) Obtains control over any stolen thing of value knowing the thing of value to have been stolen by another; and
- (2)(a) Intends to deprive another permanently of the use or benefit of the thing of value; or
- (b) Knowingly uses, conceals, or abandons the thing of value in such manner as to deprive another permanently of such use or benefit; or
- (c) Uses, conceals, or abandons the thing of value knowing such use, concealment, or abandonment probably will deprive another permanently of such use or benefit.

(3) Any person who commits theft where the value of the thing involved does not exceed one hundred dollars, and any person who commits theft twice or more within a period of six months and from the same person, where the aggregate value of the things involved does not exceed one hundred dollars, is guilty of a class ___ misdemeanor.

(4) Any person who commits theft where the value of the thing involved exceeds one hundred dollars, and any person who commits theft twice or more within a period of six months and from the same person, where the aggregate value of the things involved exceeds one hundred dollars, is guilty of a class ___ felony.

(5) Any person who commits theft from the person of another, regardless of the value of the thing involved, is guilty of a class ___ felony.

Comment

This section combines the major crimes of larceny, embezzlement, confidence game, obtaining goods or services by false pretenses, and buying and receiving stolen goods. The distinctions between these crimes are technical and have historical significance only.

In combining these crimes, this section makes three major changes.

(1) It abolishes the distinction between these crimes, such as whether or not the actor had possession of the property before he misappropriated it, which is the distinction between larceny and embezzlement; whether he obtained title to it or just possession of the property, which is the distinction between larceny by bailee and obtaining goods and services under false pretenses; and whether the false representation was a visible token, symbol or device, which is the distinction between obtaining goods or services under false pretenses and confidence game.

(2) The criminal intent required for each of the present crimes varies. For example, the present crime of larceny requires the intent to deprive the owner permanently of his property. If the actor did not intend to keep the property permanently but intended to return it, he is not guilty of larceny. (A special situation, "joyriding," is treated separately in the present and proposed law (see proposed section 40-8-2). Joyriding requires an intent to deprive the owner temporarily of his property.) In embezzlement, the intent to return the property is not a defense to prosecution, even though that intent existed at the time of the conversion. All that is required in embezzlement is a fraudulent or criminal conversion. It is well established Colorado law that only a person with custody of property can commit larceny of it. In addition, the larceny by bailee provision covers larceny by persons in possession of the property. The result is that, although each has the same intent, one person is guilty and another is not guilty, depending on the section under which he is prosecuted.

(3) A number of the present sections were necessitated by the fact that the subject matter of larceny, i.e., the property which could be stolen, had been limited at common law to personal goods of another, so that deeds to land, things which were affixed to land, and things which grew on the land were outside the scope of larceny. This has caused many specific enactments adding to the things which might be stolen. A partial list of special Colorado enactments includes:

- 40-5-3 Stealing of a Dog
- 40-5-4 Stealing of Ore or Minerals from a Mine
- 40-5-5 Stealing of Ore from a Reduction Mill
- 40-5-6 Stealing Fixtures from a House
- 40-5-7 Stealing from Realty
- 40-5-8 Stealing Livestock
- 40-5-9 Stealing a Motor Vehicle
- 40-5-13 Larceny by Bailee
- 40-5-14 Stealing Bedding, Furniture, etc., from a Lodging
- 40-5-29 Shoplifting

Embezzlement is not a common law offense. It is common law larceny extended by statute. Colorado statutes contain several embezzlement statutes, including:

- 40-5-15 What Constitutes Embezzlement
- 40-5-16 Embezzlement of Public Property
- 40-5-17 Embezzlement by Public Officers
- 40-5-18 Embezzlement by Carriers and Warehousemen
- 40-5-19 Embezzlement of Landlord's Share of Crops

In all, this proposed section replaces some 50 separate sections which define and provide penalties for some type of "stealing" or "misappropriation."

This proposed section can not be violated unless the actor's conduct is described in one paragraph of both subsections (1) and (2). Subsection (1) lists four methods which may be used to accomplish the misappropriation, and subsection (2) describes a state of mind which is either evident or presumed.

Presumption of the actor's intent is reflected in the manner in which he uses the stolen thing of value. Subsection (1) describes the required criminal act, and subsection (2) describes the required criminal state of mind.

In subsection (1), property is defined as "anything of value" to be sure that its scope is as broad in stealing as it is elsewhere in the law, and the specific provisions are no longer needed.

"Anything of value" is sufficiently broad in its coverage to include real and personal property, and tangible and intangible property.

Subsection (1)(a) covers a situation where present Colorado larceny and embezzlement statutes are now applicable. This section deals with the problem of appropriation of property without the consent of the owner or other authorization. The offense may be committed by a person snatching the property out of the owner's hands, such as a purse snatcher, or by a person entrusted with the property as agent, bailee or otherwise. It is immaterial what relationship to the owner or to the property the actor had.

Subsection (1)(b) covers conduct which is now covered by confidence game and false pretenses statutes. If the deception is effective to cause the victim to part with anything of value, it is, in general, no defense that a reasonable person would not have been misled. The actor must intend to create an impression for the purpose of inducing the owner to part with it. Deception can be accomplished by the actor in reinforcing the victim's false belief, preventing the victim from acquiring information which could influence his decision, failing to disclose all pertinent information to the victim or by using symbols, tokens or any other visible instrument to deceive the victim.

Subsection (1)(c) deals with situations where coercion rather than deception is the method employed to make the victim transfer his property. This method is covered by the present blackmail or extortion statute.

The threat may be either express or implied. It is sufficient, for example, that the actor asks for money in exchange for his promise not to inflict physical harm, or in exchange for "protection" from harms where the actor intends to convey the impression that he will in some fashion instigate the harm from which he proposes to "protect" the victim.

The threatened harm may be lawful or unlawful. The actor may be privileged or even duty-bound to inflict the harm which he threatens; yet if he employs the threat of harm to coerce a transfer of property for his own benefit he clearly is guilty. For example, a policeman who is under a duty to make an arrest threatens an arrest unless his victim pays him money.

Threats need not be made especially to the actor. Threats can be threats to anyone. If the threat is in fact the effective means of compelling another to give up anything of value, the character of the relationship between the victim and the actor whom he chooses to protect is immaterial. Whether a threat to injure a third person, unrelated to the victim, was intended to intimidate or was effective for that purpose can be decided by the trier of the facts.

In addition to the threat of bodily harm, this section includes a threat to physical confinement, to commit any criminal offense, to accuse any person of a criminal offense, to expose any person to hatred, contempt or ridicule, and to harm a person's credit or business repute.

Subsection (1)(d) incorporates the present crime of buying and receiving stolen goods. This subsection broadens the present crime by eliminating the necessity that the property comes into the receiver's

hands from an act of burglary, larceny or robbery. Also, the present statute excludes from its coverage situations where the property transferred is valued at less than \$50. This proposed subsection includes anything of value. By incorporating the crime, this subsection makes it impossible to convict of two offenses based on the same transaction, which can happen under present law, where a person is held guilty as a principal to the original act of theft because he helped plan the offense, and also of a separate offense of receiving because he took his share of the proceeds.

Subsection (2) requires the actor, after a thing of value has been misappropriated, to act either knowingly or intentionally in such a manner so as to deprive the owner of such thing of value. The actor must have either the intention to deprive permanently the owner of such thing of value or knowingly act in such a manner that he exhibits a knowledge that his conduct will cause, in all likelihood, the owner to lose permanently such thing of value. The criminal state of mind in subsection (2)(a) is permanent deprivation, while subsections (b) and (c) describe conduct which is engaged in knowingly and which presumes the intent of permanent deprivation.

Subsections (3) and (4) provide penalties for the offense of theft. The grading of penalties is essentially the same as now provided in the larceny statute. The distinction between misdemeanor and felony punishment is determined by the value of the items taken and the frequency of the offenses. The value distinction has been raised from \$50 to \$100, however, to reflect contemporary values.

Subsection (3) makes theft a high misdemeanor if the value of the thing misappropriated is \$100 or less in value or the actor has committed theft two or more times within six months from the same victim and the value of all things taken does not exceed \$100.

Subsection (4) makes theft a low grade felony if the value of the thing taken exceeds \$100 in value or the actor has committed theft two or more times within six months and the value of all things misappropriated exceeds \$100 dollars in value.

Subsection (5) covers cases where the thing misappropriated, regardless of value, is taken from the person of another. It is a restatement of the present law. Essentially, it is an act of "stealing," without circumstances of force or violence as would constitute robbery, where the thing stolen is on the person on whom the theft is made. Nevertheless, taking something of value from a person involves some degree of danger to the victim which is not present during other theft offenses, and accordingly is punished more severely than other types of theft offenses. Pocket-picking is an example of conduct covered here.

40-8-2. Joyriding. (1) Any person who knowingly takes possession of, or drives, or propels, or takes away, any motor vehicle or craft, the property of another, without authority or consent of the owner thereof or his duly authorized agent, with the intent to

temporarily deprive the owner of the possession, use, or benefit of the same, or who knowingly aids, abets, or assists another in so doing, commits joyriding.

(2) Any person who commits joyriding for the first time is guilty of a class ___ misdemeanor.

(3) Any person who commits joyriding a second or subsequent time is guilty of a class ___ felony.

Comment

This section restates the present joyriding statute -- 13-13-2, CRS 1963.

ARTICLE 9. ROBBERY

40-9-1. Simple robbery. Any person who takes anything of value from the person or presence of another, with the intent to deprive the owner permanently of his property or interest therein, by the use of force or by threatening the use of force commits simple robbery and is guilty of a class ___ felony.

Comment

This proposed section proposes no major changes, and is a restatement of 40-5-1(1), CRS 1963. One minor change is recommended, that of stating the offender must have the intent to deprive permanently the owner of his property. This is essentially that required under the present statute: "Robbery is the felonious and violent taking..."

40-9-2. Aggravated robbery. Any person who commits simple robbery and during the act of robbery:

- (1) Is armed with a dangerous weapon and intends to inflict bodily injury if resisted;
- (2) Inflicts bodily injury with a dangerous weapon; or
- (3) Has present an accomplice who is armed with a dangerous weapon and who intends to inflict bodily injury if

resisted, commits aggravated robbery, and is guilty of a class ___ felony.

Comment

This proposed section replaces the armed or aggravated robbery provisions contained in the present law, 40-5-1(2), CRS 1963, and proposes no major changes.

40-9-3. Sentencing. Any person convicted of robbery or aggravated robbery who is under the age of twenty-one years at the time of the offense, may be sentenced to confinement in the state reformatory, or the state penitentiary, in the discretion of the court; and, if sentenced to the state penitentiary, such person shall be deemed guilty of a class ___ felony.

Comment

This section restates the special penalty clause of the present statute, 40-5-1(3), CRS 1963. However, it proposes that where the offender is under 21 year of age at the time of the offense, rather than at the time of his conviction, he may be sentenced to the state reformatory. No felony penalty is provided for a reformatory sentence. All sentences to the state reformatory under the present law are for an indeterminate number of years.

PART C. OFFENSES AFFECTING PUBLIC DECENCY

SUB-PART I. SEXUAL OFFENSES

ARTICLE 10. RAPE

40-10-1. Rape. (1) Any male who has sexual intercourse with a female not his wife commits rape if:

- (a) He compels her to submit by force or by threat of imminent death, serious bodily harm, extreme pain or kidnaping, to be inflicted on anyone; or
- (b) He has substantially impaired her power to appraise or control her conduct by administering or employing without her knowledge drugs, intoxicants or other means for the purpose of preventing resistance; or
- (c) The female is unconscious; or
- (d) The female is less than 12 years old.

(2) Rape is a class _____ felony unless in the course thereof the offender inflicts serious bodily harm upon anyone, or the victim was not a voluntary social companion of the offender upon the occasion of the crime and had not previously permitted him sexual liberties, in which cases the offense is a class _____ felony.

Comment

Under this section, a man must have sexual intercourse with a woman he knows is not his wife under circumstances where it is clear that she has not consented to intercourse and where her resistance is overcome by the use or threat of force, or she is unable to give effective consent because she lacks mental capacity or responsibility. Restricting liability to males under this section does not preclude the conviction of a female who acts as an accomplice, however. Forcible sexual conduct, other than intercourse is covered under proposed article 11.

The situations covered by subsection (1)(a) are the classic rape cases. This subsection substantially restates subsection (3) and a major portion of subsection (4) of the present law. The victim's resistance must be overcome either by force or by a threat of death, serious bodily harm, extreme pain or kidnaping to be inflicted upon

anyone. The phrase "to be inflicted upon anyone" extends the range of threats of harm to a member of the victim's family, her friends, or anyone. Whether the threat is sufficient to undermine her will to resist and whether the threat is in fact a "bargain," however, must be determined by the trier of the facts.

Subsection (1)(b) covers situations now covered by subsections (6) and (7) and a portion of subsection (4) of the present statute. Cases in which the victim is unwittingly drugged or intoxicated should be treated as being equal to forcible rape because, in both cases, the victim's will to resist is undermined.

Subsection (1)(c) covers situations where the female is unconscious. Her unconsciousness may or may not be brought about by the offender, but she is powerless to consent or resist.

Subsection (1)(d) covers the statutory rape situation now covered by section (1) of the present law, which requires the female to be under 18 and the male over 18 years of age. Consent of the female is immaterial under the present law. This proposed section covers only intercourse with a child under the age of 12. The age of the offender and whether or not the child gave consent are immaterial facts. Sexual activity involving adolescents and adolescents and adults is covered in proposed article 13.

Subsection (2) provides two penalties for rape. A lesser penalty is to be imposed if the rapist does not harm the victim or anyone, or if the victim has previously permitted the rapist sexual liberties and was at the time of the offense a voluntary social companion of the rapist. The most severe penalty should only be imposed in situations which are the most brutal or shocking, and evoke a threat to public security, e.g., where the victim suffers physical injury or where in effect she is attacked by a stranger. A lesser penalty should be imposed in the latter case where the offender commits forcible rape upon a female with whom he has already been intimate. In this situation, there is clearly less outrage to the female sense of virtue which is the basis for the offense of rape.

40-10-2. Gross sexual imposition. Any male who has sexual intercourse with a female not his wife commits gross sexual imposition and is guilty of a class _____ felony if:

- (1) He compels her to submit by any threat that would prevent resistance by a woman of ordinary resolution; or
- (2) He knows that she suffers from a mental disease or defect which renders her incapable of appraising the nature of her conduct; or
- (3) He knows that she is unaware that a sexual act is being

committed upon her or that she submits because she
falsely supposes that he is her husband.

Comment

This section deals with sexual intercourse under circumstances which are not considered as aggravating as those covered in the proposed rape section. Forcible sexual activity other than intercourse is covered under proposed article 11.

Subsection (1) covers situations where the male compels her to submit to intercourse by threats, other than threats of death, serious bodily harm, intense pain or kidnaping to be inflicted on anyone. Lesser threats of harm to be inflicted only upon the victim warrant a lesser penalty than that provided for in subsection (1)(a) of the proposed rape section.

Subsection (2) of this proposed section deals with sexual intercourse under circumstances in which the victim is unable to give effective consent because of her mental incapacity. It must be proved that the woman was so seriously mentally ill or deficient, that her mental illness or deficiency rendered her incapable of understanding the nature of the act, and that the offender knew of her incapacity in order to obtain a conviction under this subsection. Proof that the offender knew of her incapacity will usually be made by showing the circumstances in which the act was accomplished. If the woman was an inmate of an institution for the mentally ill or deficient, that in most cases will be sufficient proof that the offender knew of her incapacity.

Intercourse under these conditions does not warrant the imposition of the heavy penalty for rape. This type of intercourse does not lead to a general sense of insecurity in the community, as does forcible rape, and the harm done is not as great, if outrage to the feelings of the victim is considered the essential harmfulness of non consensual sexual intercourse.

Subsection (3) covers situations where intercourse is accomplished by means other than by force, and where consent of the victim is present. A female who submits to intercourse but is unaware that a sexual act is being committed upon her is covered in this subsection. This situation rarely occurs and usually results from a doctor-patient relationship. Where a doctor has intercourse with the victim who has been led to believe that she must submit to intercourse as necessary treatment, the female is not forcibly ravished, although she has been deceived. Subsection (3) also covers situations where the offender impersonates the victim's husband, and where the offender stages a mock marriage in reliance on which the victim engages in sexual intercourse with him.

ARTICLE 11. DEVIATE SEXUAL INTERCOURSE

40-11-1. Deviate sexual intercourse by force or imposition.

Any person who engages in deviate sexual intercourse with another person, or who causes another to engage in deviate sexual intercourse, commits deviate sexual intercourse by force or imposition and is guilty of a class _____ felony if:

- (1) He compels the other person to participate by force or by threat of imminent death, serious bodily harm, extreme pain or kidnaping, to be inflicted on anyone; or
- (2) He has substantially impaired the other person's power to appraise or control his conduct, by administering or employing without the knowledge of the other person drugs, intoxicants or other means for the purpose of preventing resistance; or
- (3) The other person is unconscious; or
- (4) The other person is less than 12 years old.

40-11-2. Deviate sexual intercourse by other imposition.

Any person who engages in deviate sexual intercourse with another person, or who causes another to engage in deviate sexual intercourse, commits deviate sexual intercourse by other imposition and is guilty of a class _____ felony if:

- (1) He compels the other person to participate by any threat that would prevent resistance by a person of ordinary resolution; or
- (2) He knows that the other person suffers from a mental disease or defect which renders him incapable of appraising the nature of his conduct; or
- (3) He knows that the other person submits because he is unaware that a sexual act is being committed upon him.

Comment

Sections 40-11-1 and 40-11-2 replace Colorado's present crime against nature statute. In general, these proposed sections parallel the proposed rape and gross sexual imposition sections. Present Colorado law is broader in its scope than is proposed here in that it extends its coverage into a married couple's bedroom when there is a departure from an accepted standard of sexual conduct. By paralleling sections 40-10-1 and 40-10-2, these deviate sexual intercourse sections proposed here exclude from their coverage all deviate sexual practices not involving force, adult corruption of minors, or conduct offensive to the public. The scope of these sections is limited to unnatural sexual intercourse accomplished by force or its equivalent. Conduct other than unnatural sexual intercourse is covered by other proposed sections. The scope of these sections covers unnatural sexual intercourse between two persons of the same sex, between two persons of the opposite sex, and between a person and an animal. Proposed section 40-13-1 covers situations where the victim is 12 years of age and older but has not reached majority, and the offender is at least four years older than the victim.

Penalties provided in these two proposed sections are less than those provided in proposed sections 40-10-1 and 40-10-2. The reduction is justifiable on the ground that, in most cases, the harm done to a woman by forcible, normal intercourse is graver than that involved in homosexual or deviate heterosexual assault. Also, the possibility of pregnancy, the physical danger in case abortion is required, and the impairment of her marital eligibility are factors that need not be considered here.

40-11-3. Definition. "Deviate sexual intercourse" means sexual intercourse per os or per anum between human beings who are not husband and wife, and any form of sexual intercourse with an animal.

Comment

Deviate sexual intercourse is defined in proposed section 40-11-3 as mouth-genital and anus-genital intercourse between human beings, and any form of intercourse between a human being and an animal. Sexual intercourse, defined elsewhere by statute, requires penetration, however slight. It does not require emission. This definition includes only those acts of conduct which simulate normal intercourse. Indecent assaults that do not take this special form of mock intercourse are covered in other proposed sections.

ARTICLE 12. SEXUAL ASSAULT

40-12-1. Sexual assault. Any person who subjects another not his spouse to any sexual contact commits sexual assault and is guilty of a class ___ misdemeanor, if:

- (1) He knows that the contact is offensive to the other person; or
- (2) He knows that the other person suffers from a mental disease or defect which renders him or her incapable of appraising the nature of his or her conduct; or
- (3) He knows that the other person is unaware that a sexual act is being committed; or
- (4) He has substantially impaired the other person's power to appraise or control his or her conduct by administering or employing without the other's knowledge drugs, intoxicants or other means for the purpose of preventing resistance; or
- (5) The other person is less than 21 years old and the offender is his guardian or is otherwise responsible for general supervision of his welfare; or
- (6) The other person is in custody of law or detained in a hospital or other institution and the offender has supervisory or disciplinary authority over him.

Comment

This proposed section defines circumstances under which a sexual assault has been committed. Under present Colorado law, a person who commits a sexual assault upon another who is 16 years of age or older is prosecuted under the present assault and battery section.

The circumstances enumerated under this section are intended to cover all situations wherein, if a sexual contact is made, an offense has been committed. Each circumstance requires the element of

non consent. Under subsection (1), the offender must know that the sexual contact is offensive to the victim. Under subsection (3), the offender must know that the sexual contact is known only to himself or to others but not to the victim. Under the remaining circumstances, a presumption is made that the victim is aware of the contact but is incapable of resisting; either the victim has not consented or the offender, in some manner other than by force, has overcome the victim's ability to resist.

The definition of what constitutes a sexual contact is contained in proposed section 40-12-3.

A married party may not be convicted of sexually assaulting his or her spouse, unless the contact involves another party, either human or animal, and the spouse-victim has not given his or her consent. Since this section requires non consent of the victim, consensual homosexual as well as heterosexual non intercourse, and non deviate intercourse relations do not fall within its scope. This exclusion parallels other sections defining sexual offenses and reflects the committee's decision not to punish consensual sexual relations between adults, regardless of the gender of the parties involved and the type of sexual activity, unless the activity is open and notorious.

Acts of sexual aggression, other than sexual intercourse and deviate sexual intercourse, involving an adolescent or an adult and a child or two adolescents whose ages are at least five years apart, regardless of the gender of the parties, are covered under the proposed sexual assault on children section.

40-12-2. Sexual assault on children. Any person who subjects another not his spouse to any sexual contact commits sexual assault on children and is guilty of a class ___ felony, if:

- (1) The other person is less than twelve years old; or
- (2) The other person is less than sixteen years old and the offender is at least four years older than the other person.

Comment

The conduct which constitutes an offense under this proposed section is treated under present law as 1) an assault (an unlawful attempt coupled with the present ability to commit a violent injury on the person of another (40-2-33, CRS 1963)) on a child under 16 years of age and the taking of indecent and improper liberties with the child, or 2) the enticement, allurement or persuasion of any child under the age of 16 into any room, or office, or to any other place for the purpose of taking immodest, immoral, and indecent liberties with the child, or 3) the taking of immodest, immoral, and indecent liberties with the person of a child under 16 at any place (40-2-32, CRS

1963). Thus, under the present law, the victim must be under 16 while the offender may be of any age, although it is conceivable that the offender could be the same age as or younger than the victim. The victim's consent or lack of consent is immaterial.

This recommended section proposes several substantial changes in defining what constitutes an offense in this area of "indecent" activity.

(1) As defined under proposed section 40-12-3, actual contact of the victim, either directly or indirectly by the offender, must be accomplished. "Enticement, allurement, and persuasion" are not elements of the offense as proposed in this section, and, if considered substantially enough conduct to constitute an overt act which, unless frustrated, would culminate in the commission of a sexual contact, will be prosecuted under the general criminal attempt sections as an attempt to commit sexual assault on children.

(2) No offense has been committed under the proposed section unless the victim is under 16 and the offender is at least four years older. (Subsection (2) which covers situations in which the victim is 11 years or younger and the offender is any age is discussed below.) Thus, if the victim is 13 and the offender is 16, or if the victim is 15 and the offender is 18, no offense has been committed.

It is the committee's intention not to punish sexual activity, other than sexual intercourse and deviate sexual intercourse, which is engaged in by consenting adolescents, irrespective of whether the activity is homosexual or heterosexual in nature. The committee's intent is based on the following:

(a) The basis of the present offense, retained as the basis for the present offense, is i) the attack on the moral standards of the community, and, perhaps more importantly, ii) the danger of the possibility of distortion of the psychosexual growth of a child. Neither of these bases are present in any significant degree by sexual activity between consenting adolescents, perhaps prompted more by normal curiosity rather than any other reason.

(b) It is imperative that the offender not be, in actuality, the victim. Some children and adolescents are more promiscuous than others. Under the present law, an offender need be any age but the victim must be under 16 to constitute an offense. A sexual contact made by a 35 or 40-year-old paedophile upon a 15-year-old adolescent should not be considered by the law as equal to the mutual, consensual fondling practiced by a 16-year-old and his 15-year-old date. Conceivably, a situation may arise wherein the victim is 15 and the offender 13, and, in such a situation, it is difficult to decide exactly who is the "victim" and who is the "victimizer." Indeed, it is even possible that the offender, in actuality, is the real "victim." Consequently, it was decided that an offense is committed only where there is a significant age differential between the victim and the offender, and this differential, coinciding with that recommended in the Model Penal Code, was set at four years. The committee does not intend to protect the immature from the immature, where no physical harm results.

(3) If the victim is 11 years of age or younger and, with or without consent, is sexually contacted by another, irrespective of the other's age, an offense has been committed under subsection (2). It is realistic to consider a child not yet having reached complete adolescence as the true victim of an assault.

40-12-3. Definition. As used in this article, sexual contact is any touching of the sexual or other intimate parts of the person of another for the purpose of arousing or gratifying the sexual desire of either party.

Comment

The key to the proposed provisions on sexual assault and sexual assault on children is this proposed definition of sexual contact.

This definition requires actual contact; indecent exposure, abusive and obscene proposals, and other offensive gestures and language are treated elsewhere in this code. Sexual contact is the touching of another's sexual organs or other intimate parts of the human body. This definition, however, is sufficiently broad enough to include the touching of another's sexual parts through clothing as well as removing undergarments. Also, it includes the subjecting of another to sexual contact with an animal.

The touching must be for the purpose or intention of arousing or gratifying sexual desire of either the victim or the offender. Sexual intercourse and deviate sexual intercourse are treated elsewhere, if accomplished under circumstances constituting an offense in this code, although these acts do fall within the scope of touching another for sexual gratification. Any touching of another without the intent or purpose of arousing or satisfying sexual desire is not a sexual contact and is outside the scope of this definition.

Present Colorado statutory law does not define the term "indecent liberties." However, case law has declared that "indecent" is something that is unfit to be seen and is offensive to modesty and delicacy. The common sense of the community is sufficient to apply the statute to each particular case, and point unmistakably what particular conduct is rendered criminal by it (44 Colo. 525).

ARTICLE 13. CORRUPTION OF MINORS AND SEDUCTION

40-13-1. Corruption of minors and seduction. Any person who does any of the following commits corruption of minors and seduction:

- (1) Any male who has sexual intercourse with a female not his wife, or any person who engages in deviate sexual

intercourse or causes another to engage in deviate sexual intercourse, if:

- (a) The other person is less than sixteen years old and the offender is at least four years older than the other person; or
 - (b) The other person is less than twenty-one years old and the offender is his guardian or otherwise responsible for general supervision of his welfare; or
 - (c) The other person is in custody of law or detained in a hospital or other institution and the offender has supervisory or disciplinary authority over him; or
 - (d) The other person is a female who is induced to participate by a promise of marriage which the offender does not mean to perform.
- (2) Any female who has sexual intercourse or engages in deviate sexual intercourse with a male not her husband, if:
- (a) The male is less than eighteen years old; or
 - (b) The male is of good repute, and the female is a prostitute.

An offense under subsection (1)(a) is a class ___ felony.

Otherwise an offense under this section is a class ___ misdemeanor.

Comment

This section proposes to define conduct involving sexual intercourse and deviate sexual intercourse which is accomplished under circumstances not considered as aggravating as those contained in the proposed sections on rape, gross sexual imposition, deviate sexual intercourse by force or imposition, and deviate sexual intercourse by other imposition. This section, which defines circumstances under which the less serious acts of intercourse are accomplished, is the least serious sexual offense involving intercourse, other than

prostitution (commercial intercourse) and adultery and fornication (where intercourse is open and notorious and, in effect, constitutes an offense of public indecency).

Intercourse under this section must be accomplished with mutual consent, and it is the presence of consent which reduces the penalty to that of a misdemeanor in the majority of the subsections. Intercourse under this section may be either normal or deviate. Since consent is an element, there appears no reason to make a distinction between the two types of intercourse in establishing this section's penalty.

Subsection (1)(a), in effect, replaces Colorado's present statutory rape provision, i.e., an act of sexual intercourse with an unmarried female who is under, and the male who is over, the age of 18 years (40-2-25(1)(b), CRS 1963). It also replaces 40-2-25(1)(j), i.e., where both the male and the female are under the age of 18, and a portion of 40-9-7, CRS 1963, which defines the offense of seduction, i.e., any male who, without promise of marriage, seduces and has illicit connection with an unmarried female of previous chaste character under the age of 16 years. Respectively, the maximum terms of imprisonment for the commission of the foregoing acts of intercourse, irrespective of the presence of the female's consent, are imprisonment for life, five years, and ten years. The minimum terms of imprisonment are considerably less and depend, in addition to the leniency of the court, on the age and reputation of the offender: commitment for an indeterminate term to the reformatory, commitment for an indeterminate term to the Lookout Mountain School for Boys or the Mount View School for Girls, and commitment to the penitentiary for one day.

Since the basis of the offense of statutory rape or statutory seduction is the victimization of the immature, it appears extremely harsh to subject a 19-year-old male who has consensual sexual intercourse, normal or deviate, with his 17-year-old sweetheart to a possible imprisonment in the penitentiary for life. Likewise, it appears equally harsh to subject a 16-year-old male who has consensual sexual intercourse with his 15-year-old "steady" to a possible \$1,000 fine and five-year term of imprisonment (third degree rape), or to a possible ten-year term of imprisonment if, prior to the act of intercourse, she was of chaste repute. The committee believes that not only are these possible maximum penalties unrealistic and that, in actuality, they are seldom imposed, but the conduct described should not be considered criminal. As stated elsewhere, it is not the committee's belief that criminal law should protect the immature from the immature. The best way to avoid this unreasonable protection and, at the same time, protect the immature from being exploited by the mature is to provide an age differential between the victim and the victimizer. Identical to the number of years set under the proposed sexual assault on children section, the committee has set the age differential under this section at four years.

Under this proposed subsection, a low grade felony has been committed, if the female is 15 years old and the male 19. If the female is 16 years of age and the male is of any age, no offense has been committed. However, if the consensual intercourse was accomplished openly and notoriously (fornication) or falls within the circumstances included within the scope of other subsections of this section, a

misdemeanor offense has been committed.

Special bars to conviction under the present seduction statute, i.e., marriage of the offender and his victim is contracted prior to conviction, testimony of the seduced female is unsupported by other evidence, and the information is filed later than two years after the act of intercourse, are discussed under other sections in sub-part I, Sexual Offenses.

Under subsection (1)(b) the victim must be 20 years of age or younger and the offender, regardless of his or her age, must be the victim's guardian or otherwise responsible for the general supervision of welfare of the victim. A father who has sexual intercourse with his daughter who is under 21 years is also subject to prosecution under the proposed aggravated incest section and another who has sexual intercourse with her son who is under 21 years is also subject to prosecution under the proposed incest section. Cohabitation, wherein either normal or deviate intercourse is presumed, may also be prosecuted under the respective incest sections or this section. Furthermore, any guardian, if he or she is an ancestor, a brother or sister, or an uncle, aunt, nephew, or niece of the whole blood, is liable for prosecution under this or the proposed incest sections. Other non-related guardians must be prosecuted under this section.

Consensual intercourse under this subsection is not considered as serious as the circumstance defined under subsection (1)(a) in that the victim's age will range from 16 to 20 years. If the victim's age ranges from 12 to 15 years and the guardian's is at least four years older than the victim, prosecution may be pursued under this subsection or subsection (1)(a).

Subsection (1)(c) is similar to (1)(b) in that the offender has authority over the victim. In this subsection, the age of the victim is immaterial.

Subsection (1)(d) defines a specific type of circumstance under which an act of intercourse is an offense that is similar to that contained in the present code, i.e., the seduction and illicit connection, under promise of marriage, with an unmarried female of previous chaste character, irrespective of the age of either party concerned (40-9-7, CRS 1963).

Under both the present and proposed sections, prosecution must prove that it was the male's promise of marriage which induced the female to yield. For this reason, the committee agreed that a promise of marriage intentionally made in bad faith, and not, as the present law requires, a promise of marriage whether made in good or bad faith, should be required. The latter type of promise seems to open the door to the possibility of blackmail.

This proposed subsection makes no mention of the previous reputation held by the victim. Requiring a victim to be of chaste character prior to the act of intercourse that is induced by the promise of marriage, which is the excuse for prosecution, seems to indicate that an "experienced" woman cannot be deceived by a false promise of marriage. Moreover, it seems to indicate that no harm is accomplished if the female held an unchaste reputation previous to

the act. The committee agreed that sexual intercourse resulting from deception should be the basis for the offense, rather than intercourse with a female of good repute. It should be the method in which intercourse was induced rather than the result which occurred; the "how" rather than the "what." Also, this proposed section does not require the female to be unmarried. She may in fact be married, legally separated or divorced. And, if she is married and the intercourse induced by the offender's false promise, the offender may be prosecuted under this section or under the proposed adultery section.

Because of the difficulty that may be encountered by a defendant in proving that his promise was made in good faith, and because a district attorney may not know for certain whether he is prosecuting a legitimate seducer or a "victim" of a disappointed and angry ex-fiance, the penalty of this offense has been reduced to the misdemeanor level. It is common knowledge that many seductions end in marriage, and the majority of seductions, whether ending in marriage or otherwise, do not come to the attention of law enforcement authorities.

Marriage of the victim and the seducer, subsequent to the information or indictment but prior to conviction, bars a conviction under the present law. Although a marriage during this time seems to indicate a promise made in good faith, it also seemingly gives a felony incentive to the seducer to marry his victim. Moreover, it provides an angry father an opportunity to retaliate against the seducer for the unfavorable publicity given his family and daughter by denying to his daughter his permission to marry, albeit she and her seducer wish to marry. For these reasons, marriage as a bar to conviction is omitted in this proposed subsection.

Subsection (2) is a restatement of the present offense defined in 40-2-25(k), CRS 1963.

ARTICLE 14. PROVISIONS GENERALLY APPLICABLE TO ARTICLES 10 THROUGH 13

40-14-1. Mistake as to age. Whenever in articles 10 through 13 the criminality of conduct depends on a child's being below the age of twelve, it is no defense that the actor did not know the child's age, or reasonably believed the child to be older than twelve. When criminality depends on the child's being below a critical age other than twelve, it is a defense for the actor to prove that he reasonably believed the child to be above the critical age.

40-14- 2. Spouse relationships. Whenever in articles 10 through 13 the definition of an offense excludes conduct with a spouse,

the exclusion shall be deemed to extend to persons living as man and wife, regardless of the legal status of their relationship. The exclusion shall be inoperative as respects spouses living apart under a decree of judicial separation. Where the definition of an offense excludes conduct with a spouse or conduct by a woman, this shall not preclude conviction of a spouse or woman as accomplice in a sexual act which he or she causes another person, not within the exclusion, to perform.

40-14-3. Sexually promiscuous complainants. It is a defense to prosecution under article 13 and sections 40-12-1(5), 40-12-1(6), and 40-12-2(2) for the alleged offender to prove by a preponderance of the evidence that the alleged victim had, prior to the time of the offense charged, engaged promiscuously in sexual relations with others.

40-14-4. Prompt complaint. No prosecution may be instituted or maintained under this article unless the alleged offense was brought to the notice of public authority within three months of its occurrence or, where the alleged victim was less than sixteen years old or otherwise incompetent to make complaint, within three months after a parent, guardian or other competent person specially interested in the victim learns of the offense.

40-14-5. Testimony of complainants. No person shall be convicted of any felony under articles 10 through 13 upon the uncorroborated testimony of the alleged victim. Corroboration may be circumstantial. In any prosecution before a jury for an offense under articles 10 through 13, the jury shall be instructed to evaluate the testimony of a victim or complaining witness with special care in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private.

Comment

Generally, all sections contained in articles 10, 11, 12, and 13 of this proposed code are based on those sections recommended in the Model Penal Code, Proposed Official Draft.¹ Article 14 is also based on the Model Penal Code's provisions.

Mistake as to age. Concerning this defense, the Model Penal Code's reporters commented that:

It is generally provided or held under present law that even a reasonable mistake as to the age of the girl does not exculpate or mitigate the offense. Ploscowe has severely criticized this legislative and judicial attitude in cases where the girl is over 10 years old, on two grounds: (1) over the age of 10, the sexual act begins to lose its abnormality and physical danger to the victim; (2) bona-fide mistakes in age can be made more easily by men who are not essentially dangerous where the girl is physically more developed. He recommends that a reasonable belief that the girl was above the age of consent be permitted as a defense to the charge of "statutory rape."

[This section]... follows existing law in denying the defense of mistake as to age, when the victim is in fact under 10, for the reason that any error that is at all likely to be made would still have the young girl victim far below the age for sexual pursuit by normal males.

[Also, under this section]... the actor escapes even third degree liability if he reasonably believed the girl to be over 16. Pursuit of females who appear to be over 16 betokens no abnormality but only a defiance of religious and social conventions which appear to be fairly widely disregarded.²

The committee adopted this provision recommended in the Model Penal Code but, where the criminality of conduct depended on the child being below the age of 10, the committee agreed that this minimum age should be raised to 12.

Spouse Relationships. In explaining the justification for this section, the Model Penal Code's reporters stated that:

Coercion of a wife to submit to conjugal embrace is not rape under existing law. The husband may, however, be convicted as an accomplice in the rape of

1. Model Penal Code, American Law Institute, Philadelphia, Proposed Official Draft, May, 1962.

2. Model Penal Code, American Law Institute, Philadelphia, Tentative Draft No. 4, April 1955, p. 253.

his wife, where he compels or helps compel her to submit to another man. In England a husband probably may be convicted as a principal on a count of common assault upon his wife for having intercourse with her against her will. A 1949 English decision held that a judicial separation order containing a non-cohabitation provision revoked the marital consent of the wife, making a husband liable for rape. The mere filing of a divorce petition, which is in the process of being heard, will not open the door to a rape conviction in England. A related problem arises where the parties are living together as husband and wife although not legally married. These problems are resolved in the text by defining "wife" as including a woman living with the accused as his wife, regardless of the legal validity of their marital status, but not including a woman living apart under a decree of judicial separation. Under the proposed statute a rape prosecution is not possible where the spouses have been living apart without benefit of a judicial order. We take this position because of the substantial possibility of consent in the resumption of sexual relations in this situation, coupled with the special danger of fabricated accusations.

Under the general provisions of this Code there could be no liability for rape unless the accused knew that the victim was not his wife or was reckless in this regard. Some such requirement seems important particularly in cases where rape liability can be imposed for consensual relations, e.g., with girls below the age of 16. A man who married a young girl, without knowing that she was already married to another, might find himself charged with statutory rape for sleeping with his supposed wife. The question is not often explicitly dealt with in present law; but the new Wisconsin Code, for example, specifies that the man must know that the woman is not his wife.

[This section]... takes care of situations where the accessorial liability of a husband for rape of his wife is not otherwise clear, i.e., where the actual perpetrator is an unwilling participant. Under the reasoning that threat of violence or other compulsion which negates female acquiescence in intercourse ought to be punishable, it would make little difference whether the actual penetration was accomplished by the actor or by another functioning as the actor's tool. Where the actor is the husband and his own penetration would not be punishable, the degradation of the marriage relationship brought about by forcing his wife to have intercourse with another man is sufficient to remove his immunity and to suggest that outrage to the female sense of virtue which

is a basis for the offense of rape.³

The committee agreed with this reasoning and, accordingly, adopted this section.

Sexually Promiscuous Complainants. This proposed section broadens the defense now available under the present Colorado seduction statute, 40-9-7, CRS 1963, and applies it to all sections of articles 10 through 13. Under the present Colorado seduction statute, no conviction can be had unless the victim was of "previous chaste character." Chastity is also material under other "corruption" statutes, including 40-9-8 and 40-9-9, CRS 1963. Again, the committee agreed with the reasoning of the Model Penal Code's reporters:

At common law, prior unchastity of the female was not a defense to either forceful or "statutory" rape; a minority of American jurisdictions make the female's virtue an issue in prosecutions for consensual intercourse with female children. Virtue, in this connection, is likely to be defined as absence of previous sexual intercourse. In Pennsylvania, the defendant is guilty only of fornication if the girl under 16 was "not of good repute."

Inquiries of this character may be justified in cases involving older adolescent girls where the essence of the offense is the defendant's corruption of innocent but capable females. If, however, we proceed on the hypothesis that girls under 16 lack capacity for judgment in this area, it is something of a farce to inquire into their virtue. Previous sexual experience in this situation might well be token previous victimization, which should not be a defense to a subsequent victimizer. However, one can envision cases of precocious 14 year old girls and even prostitutes of this age who might themselves be the victimizers.... It is believed that in the rare instance of prostitution or promiscuity in girls under 10, the aberration evidenced by the male in his desire for gratification with the child, is a sufficient menace to the community to warrant the penalty irrespective of the abnormal sex habits of the girl.⁴

Present seduction legislation commonly requires that the woman be of "previously chaste character" or "innocent and virtuous"; e.g., Minnesota, North Carolina. These terms are generally construed to mean the real moral qualities of a woman; she must be of good conduct and pure thought. This does not necessarily mean, however, that she must be a virgin

3. Ibid., pp. 244-246.

4. Ibid., p. 254.

in the physical sense, for a woman once fallen and now reformed may be "chaste" within the meaning of the statutes. A minority of the sample jurisdictions adopt the test of the woman's "reputation" for morality rather than her physical virginity or actual chaste character; e.g., Indiana, New Jersey

The rationale of these requirements would appear to be either that an "experienced" woman cannot be easily imposed upon, i.e., that her story is unworthy of belief, or that no important "harm" is done to such a victim. The correlation between credibility and chastity is uncertain; it may even be that emotional factors attending an initial experience involve a special tendency to distortion. In any event, cross-examination and the requirement of corroboration would appear sufficient safeguards on this account. "Harm" of the sort which is our present concern, can be done to those who have had previous sexual experience; the girl once seduced may be the readier victim of him who now proposes marriage. Also, deterrent and reformatory considerations would seem to call for the application of penal measures to the male who practices these deceptions, regardless of his victim's character or reputation. In lieu of the virtue requirement there is proposed a defense against complaints by prostitutes and the like.

Although two-thirds of the sample states require that the woman be single, we recommend that this circumstance not be made determinative. Indeed, if the actor was aware of her marital state, this might well be regarded as a matter of aggravation. In some cases, it is true, the fact that the woman was married may indicate that she could not have relied on a promise of marriage which must be contingent on her divorce (as it might be contingent on his, were he married). But considering the frequency and ease of divorce in this country, there seems to be no justification for an absolute immunity for seduction of married women on promise of marriage.⁵

Prompt Complaint. The present Colorado seduction statute comes close to the scope of that which is proposed under this section. Section 40-9-7, CRS 1963, provides that "No conviction shall be had under this section...unless the indictment shall be found, or the information laid, within two years after the commission of the offense." The committee, by adopting the Model Penal Code's recommended section, implicitly agreed with its purpose:

At common law, "a strong, but not a conclusive presumption against a woman" was raised by her

5. Ibid., pp. 259-260.

failing to complain of rape within a reasonable time after the fact. In the absence of statutory provision, failure to make prompt complaint is not a bar to prosecution for rape. However, evidence of prompt complaint is admissible to repel a suggestion that the complaint was insincere. Some jurisdictions have provided special statutes of limitation for rape cases, so that complaint would have to be made within that limited time. The specific requirement under ...[this section]... that the offense be brought to the attention of the public authorities within six months is an innovation in Anglo-American law. A prosecutor would, however, hesitate to institute prosecution on a stale complaint. The possibility that pregnancy might change a willing participant in the sex act into a vindictive complainant, as well as the sound reasoning that one who has, in fact, been subjected to an act of violence will not delay in bringing the offense to the attention of the authorities, are sufficient grounds for setting some time limit upon the right to complain. Likewise, the dangers of blackmail or psychopathy of the complainant make objective standards imperative. A specific possibility of extension of time is made in the case of young children and incompetents for the obvious reason that if such individuals, under our rationale, do not possess the judgment and capacity necessary to become "willing" participants in an act of sexual intercourse, their deficiency may also blind them to the need for complaint. Fear of parental anger or confusion as to the significance of the act might well encourage silence in this situation. Hence the ... [three] ... month period for complaint does not begin to run, for such individuals, until after a competent person specially interested in the victim learns of the offense.⁶

Testimony of Complainants. Again, the only related statutory provision to that which is proposed here is found in the present Colorado seduction statute, 40-9-7, CRS 1963, i.e., "No conviction shall be had under this section on the testimony of the female seduced, unsupported by other evidence..." The reporters of the Model Penal Code justified this recommended section on the following grounds:

Seduction statutes usually, and rape statutes occasionally, require... that the prosecutrix' story be corroborated, conviction being barred if her testimony is "unsupported by other evidence." Wigmore disapproves of corroboration requirements on the ground that they are unnecessary because (1) jurors are naturally suspicious of such complaints,

6. Ibid., pp. 264-265.

and (2) the purpose of the rule is already attained by the court's power to set aside a verdict for insufficient evidence. This, he says, is being done in jurisdictions having no statutory rule upon the same evidence which would not be sufficient in jurisdictions having the statutory rule of corroboration. The most important issue raised by the differences among present laws is whether corroboration in seduction cases shall be required only of the promise of marriage (e.g., Missouri, Pennsylvania), or of all the material elements of the offense (e.g., Indiana). For example, New York's statute says the testimony of the woman must be supported by other evidence, but decisions have held this to require corroboration of the promise of marriage and the intercourse only; there is no need for corroboration that the girl is single or that she is chaste. Sometimes under the statutes which require corroboration without further specification, the language of the opinions suggests that what is desired is not so much independent evidence of particular elements of the offense, but rather a basis for believing that the "testimony given by the woman . . . is worthy of credit and belief." A common formulation with regard to corroboration of the promise of marriage is that the circumstances must be such as usually accompany the relationship of engaged couples.

The text requires corroboration, but does not attempt to particularize as to its nature. A general caution to the authorities against convicting on the bare testimony of the prosecutrix may be desirable in view of the probable special psychological involvement, conscious or unconscious, of judges and jurors in sex offenses charged against others. The only rational alternative would be to require corroboration as to every element of the crime, since there is no reason to believe that complainant is more likely to lie or deceive herself on one point rather than another. A requirement as broad as that would impose an impracticable burden on the prosecutor, especially considering that the offense under subsection...[40-13-1(1)(d)]... requires proof that the defendant did not intend to perform his promise, and is otherwise narrowly circumscribed and lightly punished.⁷

7. Ibid., pp. 263-264.

SUB-PART II. FAMILIAL OFFENSES

ARTICLE 15. ABORTION

40-15-1. Abortion. (1) Any person who uses any instrument, medicine, drug, or other substance whatever, with the intent to procure a miscarriage of any woman, commits abortion and is guilty of a class ___ felony. It shall not be necessary in order to commit abortion that such woman be pregnant or, if pregnant, that a miscarriage be in fact accomplished.

(2) If any woman by reason of such abortion shall die, the person administering or causing to be administered such medicine, drug, or other substance whatever, or using or causing to be used any instrument as aforesaid, shall be guilty of murder and punished accordingly.

(3) It shall be an affirmative defense to abortion that the abortion was performed by a physician licensed to practice medicine and surgery in all its branches and in a licensed hospital or other licensed medical facility because it was necessary for the preservation of the woman's life or the prevention of serious and permanent bodily injury to her.

Comment

This section is a restatement of the present abortion offense defined in 40-2-23, CRS 1963, with the exception of one proposed change, that of including within the coverage of this proposed section "pretended" abortions.

The present practice of district attorneys is to prosecute an alleged abortionist under the present abortion and false pretenses or confidence game sections which, in effect, forces the alleged abortionist to plead guilty under one of the two sections. However, there does remain the possibility that in less populous judicial districts, where the offense of abortion is seldom prosecuted, a district attorney may prosecute only under the abortion statute and be surprised after the trial has begun when the defendant claims he knew, in fact, that the female was not pregnant. To avoid this remote possibility, "pretended" abortions are brought within the scope of the section.

40-15-2. Distributing abortifacients. Any person who sells or distributes any drug, medicine, instrument, or other substance whatever which he knows to be an abortifacient and which is in fact an abortifacient to or for any person other than licensed physicians commits distributing abortifacients and is guilty of a class ___ misdemeanor.

40-15-3. Advertising abortion. Any person who advertises, prints, publishes, distributes, or circulates any communication through print, radio, or television media advocating, advising, or suggesting any act which would be a violation of this article commits advertising abortion and is guilty of a class ___ misdemeanor.

Comment

These two proposed sections restate the present and identical offenses now defined under 66-3-65 to 67, CRS 1963.

ARTICLE 16. BIGAMY

40-16-1. Bigamy. Any person having a husband or wife who subsequently marries another or cohabits in this state after such marriage commits bigamy and is guilty of a class ___ felony, unless at the time of the subsequent marriage:

- (1) The accused reasonably believed the prior spouse to be dead; or
- (2) The prior spouse had been continually absent for a period of five years during which time the accused did not know the prior spouse to be alive; or
- (3) The accused reasonably believed that he was legally eligible to remarry.

Comment

This section proposes no major changes in the definition of the offense of bigamy now contained in 40-9-1, CRS 1963. The defenses available to a charge of bigamy also are restatements of the present law, with one minor proposed change contained in subsection (3). This defense, which replaces the defense that the former marriage ended in divorce or otherwise was declared void, is intended to reach circumstances wherein the alleged bigamist reasonably believed that he was legally eligible to remarry. Such wording is intended to avoid confusing situations arising under foreign divorces, compounded by the question of their validity, which have caused many different court opinions.

40-16-2. Marrying a bigamist. Any previously unmarried person who knowingly marries another under circumstances known to him which would render the other person guilty of bigamy under the laws of this state, or who cohabits in this state after such marriage, commits marrying a bigamist and is guilty of a class ___ felony (misdemeanor).

Comment

This section replaces the present offense of marrying a spouse of another, 40-9-2, CRS 1963, and proposes no major changes.

40-16-3. Cohabitation after discovery of bigamous marriage. Either party to a bigamous marriage who continues to cohabit with the other party to a bigamous marriage after he or she has discovered that said marriage is bigamous commits cohabitation after discovery of bigamous marriage and is guilty of a class ___ misdemeanor.

Comment

This section proposes new law. The committee agreed that in any proposed bigamy sections, there should be a provision making the spouse of a bigamist also guilty of an offense when he or she discovers that the marriage, entered into in good faith, is bigamous. Often, a wife who discovers after her marriage that her husband has another wife will literally blackmail him, asking for unfair property settlements, etc., in turn for her silence. Both parties in such a situation should be guilty of an offense.

ARTICLE 17. INCEST

40-17-1. Incest. Any person who knowingly marries or co-habits with or has sexual intercourse with an ancestor or descendant, a brother or sister of the whole or half blood, or an uncle, aunt, nephew, or niece of the whole blood, commits incest and is guilty of a class ___ felony.

40-17-2. Aggravated incest. Any father who cohabits or has sexual intercourse with his daughter commits aggravated incest and is guilty of a class ___ felony.

40-17-3. Definition. As used in sections 40-9-8 and 40-9-9, the word "cohabit" means to live together under the representation or appearance of being married. The relationships referred to herein include blood relationships without regard to legitimacy, and the relationship of parent and child by adoption.

Comment

These sections propose no major changes and replace the present definitions contained in 40-9-4 to 6, CRS 1963.

SUB-PART III. COMMUNITY OFFENSES

ARTICLE 18. OBSCENITY

40-18-1. Obscenity offenses. Any person who, with knowledge of the nature or content thereof, does any of the following commits obscenity:

- (1) Sells, delivers, or provides, or offers or agrees to sell, deliver, or provide any obscene writing, picture, record, or other representation or embodiment of the obscene; or
- (2) Presents or directs an obscene play, dance, or other performance or participates directly in that portion thereof which makes it obscene; or
- (3) Publishes, exhibits, or otherwise makes available anything obscene; or
- (4) Performs an obscene act or otherwise presents an obscene exhibition of his body for gain; or
- (5) Creates, buys, procures, or possesses obscene matter or material with intent to disseminate it in violation of this article, or of the penal laws or regulations of any other jurisdiction; or
- (6) Advertises or otherwise promotes the sale of material represented or held out by him to be obscene.

Any person who commits obscenity for the first offense is guilty of a class ___ misdemeanor, and for a second or subsequent offense is guilty of a class ___ felony.

40-18-2. Obscenity defined. A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex, or excretion, and if

it goes substantially beyond customary limits of candor in description or representation of such matters. A thing is obscene even though the obscenity is latent, as in the case of undeveloped photographs.

40-18-3. Interpretation of evidence. Obscenity shall be judged with reference to ordinary adults, except that it shall be judged with reference to children or other specially susceptible audience if it appears from the character of the material or the circumstances of its dissemination to be specially designed for or directed to such an audience. In any prosecution for an offense under this article evidence shall be admissible to show:

- (1) The character of the audience for which the material was designed or to which it was directed;
- (2) What the predominant appeal of the material would be for ordinary adults or a special audience, and what effect, if any, it would probably have on the behavior of such people;
- (3) The artistic, literary, scientific, educational, or other merits of the material, or absence thereof;
- (4) The degree, if any, of public acceptance of the material in this state;
- (5) Appeal to prurient interest, or obscene thereof, in advertising or other promotion of the material;
- (6) Purpose of the author, creator, publisher, or disseminator.

40-18-4. Prima facie evidence. The creation, purchase, procurement, or possession of a mold, engraved plate, or other embodiment of obscenity specially adapted for reproducing multiple copies, or the possession of more than three copies of obscene material shall be prima facie evidence of an intent to disseminate.

40-18-5. Exceptions. It shall be an affirmative defense to obscenity that the dissemination:

- (1) Was not for gain and was made to personal associates other than children under eighteen years of age;
- (2) Was to institutions or individuals having scientific or other special justification for possession of such material.

Comment

The key to any offense involving obscenity, e.g., possession and dissemination, is the definition of obscenity. In a 1957 decision (Roth v. United States, 354 U.S. 476), the United States Supreme Court defined obscene material as material which deals with sex in a manner appealing to prurient interest, that is, material having a tendency to excite lustful thoughts. This definition is included under this proposed article. The proposed sections presented here are based on the similar provisions of the new criminal code of Illinois that was enacted in 1961. Coverage of obscenity offenses provided here is essentially that which is provided under present Colorado law.

ARTICLE 19. PROSTITUTION

40-19-1. Prostitution. Any person who performs, offers, or agrees to perform any of the following with any person not his spouse for money commits prostitution and is guilty of a class ___ misdemeanor:

- (1) Any act of sexual intercourse; or
- (2) Any act of deviate sexual intercourse.

Comment

This proposed section defines an act of prostitution which the present law, by relying on a common law definition, does not. An act of prostitution, as defined here, is committed by a person when he or she performs, offers to perform or agrees to perform an act of intercourse, whether normal or deviate, with another who is not his or her spouse and in consideration for which is the payment of money.

Under this section, a male as well as a female can be convicted. Although one may expect the majority of the offenders under this section or under the present section to be females, prostitution is not exclusively a crime of women.

An act of prostitution, however, cannot be committed if the two parties are married to each other, or, if the two parties are not married to each other, where there is the payment of anything of value, other than money, in consideration for which there is an act of intercourse. Since this article is directed toward commercialized prostitution, it is intended to exclude a female who rewards her date with intercourse in consideration for a night on the town, and other similar non-marital rewards, whether the agreements are explicit or implicit. Similarly, an act of intercourse in consideration of the payment of money involving a married couple is excluded from the coverage of this section.

40-19-2. Soliciting for a prostitute. Any person who performs any of the following commits soliciting for a prostitute and is guilty of a class ___ misdemeanor:

- (1) Solicits another for the purpose of prostitution; or
- (2) Arranges or offers to arrange a meeting of persons for the purpose of prostitution; or
- (3) Directs another to a place knowing such direction is for the purpose of prostitution.

Comment

This section broadens the coverage of the two present provisions which it replaces. This section replaces 40-9-14, CRS 1963, i.e., any prostitute, courtesan or lewd woman who, by word, gesture or action, shall endeavor to ply her vocation upon the streets, or from the door or window of any house, or in any public place in any city or town in this state, or who for such purpose shall make a bold and meretricious display of herself, and 40-9-11, CRS 1963, i.e., any male over the age of 18 years who acts or engages himself as a pimp, or solicits for any prostitute.

The basis of this offense is the promotion of prostitution. An offense under this section is a misdemeanor and can be committed by a customer, prostitute or a third party, e.g., a bellboy, an elevator operator, or a bartender. An offense can be committed irrespective of whether the offender is male or female, whether the solicitation is open or discreet, and whether the solicitation was made within a town or city or within an unincorporated area.

40-19-3. Pandering. (1) Any person who does any of the following for money commits pandering:

- (a) Compels a female to become a prostitute; or

(b) Arranges or offers to arrange a situation in which a female may practice prostitution.

(2) Any person convicted of pandering under paragraph (a) of subsection (1) of this section is guilty of a class ___ felony. Any person convicted of pandering under paragraph (b) of subsection (1) of this section is guilty of a class ___ misdemeanor.

Comment

This proposed section replaces the present offense defined under 40-9-10, CRS 1963, i.e., the encouraging, persuading, influencing, inducing, or procuring a female of chaste character to have illicit sexual intercourse with any male by any person over the age of 18 years. A person convicted under this present section may be punished by a one to five-year term of imprisonment in the penitentiary.

Under proposed subsection (1)(a), an offense of which constitutes the only felony penalty provided in this article, a person can be convicted of pandering only if he or she compelled the female to become a prostitute. If the female is offered a situation in which she can practice prostitution or if such an arrangement is actually made, whether she accepts or refuses, a misdemeanor offense under subsection (1)(b) has been committed. However, the mere encouragement, inducement or persuasion of a female to become a prostitute without actual compulsion or, in the absence of compulsion, the offer to or actual arrangement of a situation in which she can practice prostitution, is not an offense under this section.

If the panderer's conduct conforms to that described by either subsection (1)(a) or (1)(b) but he has not acted for the purpose of financial gain, no offense has been committed under this section.

40-19-4. Keeping a place of prostitution. Any person who has or exercises control over the use of any place which offers seclusion or shelter for the practice of prostitution and who performs any one or more of the following commits keeping a place of prostitution and is guilty of a class ___ misdemeanor:

- (1) Knowingly grants or permits the use of such place for the purpose of prostitution; or
- (2) Grants or permits the use of such place under circumstances from which he could reasonably know that the

place is used or is to be used for purposes of prostitution; or

- (3) Permits the continued use of a place after becoming aware of facts or circumstances from which he should reasonably know that the place is being used for purposes of prostitution.

Comment

This proposed section replaces several provisions now contained in the law: 1) the keeper or proprietor of any house of ill fame or bad repute or any assignation house into which an unmarried female is enticed shall be deemed guilty of a misdemeanor as principal (40-9-9, CRS 1963); 2) any male person over the age of 18 years who engages or assists in operating or managing any room, house, or building for the purpose of carrying on prostitution shall be deemed guilty of a felony (40-9-11, CRS 1963); and 3) any person who maintains or keeps a lewd house or place for the practice of fornication, or keeps a common, ill-governed and disorderly house, to the encouragement of idleness, gaming, drinking, fornication or other misbehavior is guilty of a misdemeanor (40-9-15, CRS 1963).

This section proposes to combine these present offenses under one section and to penalize any person, irrespective of the person's age or sex, who has or exercises control over any place which he knows or should reasonably know offers seclusion or shelter for the practice of prostitution.

40-19-5. Patronizing a prostitute. Any person who performs any of the following with a person not his spouse commits patronizing a prostitute and is guilty of a class ___ misdemeanor:

- (1) Engages in an act of sexual intercourse with a prostitute; or
- (2) Engages in an act of deviate sexual conduct with a prostitute; or
- (3) Enters or remains in a place of prostitution with intent to engage in an act of sexual intercourse or deviate sexual conduct.

Comment

This section proposes a new offense, that of promoting prostitution through the patronization of prostitutes. Under the present law, a man who engages a prostitute commits no offense unless the engagement is an open flout of the community standards of morality. Since prostitution could hardly flourish without customers, it is recommended here that the patronization of prostitutes be treated no different than other conduct deemed criminal under this article, which involves the promotion of prostitution, e.g., pandering, soliciting for a prostitute, and keeping a place of prostitution.

This section penalizes customers and intended customers of prostitutes, whether the intercourse is normal or deviate. Delivery men, telephone repair men, and others who enter a place of prostitution for legitimate business purposes are excluded from the coverage of this section.

40-19-6. Pimping. Any person who receives money or other property from a prostitute, not for a lawful consideration, knowing it was earned in whole or in part from the practice of prostitution, commits pimping and is guilty of a class ___ misdemeanor.

Comment

This proposed section replaces one of the present offenses defined under 40-9-11, CRS 1963, i.e., any person 18 years of age or older who knowingly lives on or is supported or maintained in whole or in part by the money or other valuable consideration realized, procured or earned by any female through her own prostitution or the prostitution of other females is guilty of a felony.

This section, reflecting the changes proposed in other sections of this article, including the ability of a male to commit prostitution, proposes to penalize pimping in more realistic terms. The wording of the present law can be construed in such a manner as to subject to a felony penalty a grocer or other storekeeper who knowingly sells to a prostitute, and to the prostitute's 19 or 20-year-old son and daughter who knowingly receives financial support from his prostitute-parent to meet tuition and other college expenses. The Model Penal Code's reporters criticized felony punishment for this offense for another reason:

It is obvious that such [pimping offense] laws were evolved to help prosecutors convict men believed to be engaged in promoting prostitution, often of their wives. If there were sufficient evidence, the man might be convicted of soliciting for the woman. But where evidence of soliciting or other actual complicity in prostitution is lacking, conviction can be had on proof merely that she supports him "in whole or in part."

Such legislation is insupportable in principle and goes well beyond any pragmatic justification which might be urged for it. In no other instance is criminal liability based on the bare fact that one is supported by another person who gains his livelihood illegally. True, a high statistical probability favors the inference that a man without other means of support must be collaborating in the prostitution of the woman who supports him. But this hardly warrants more than the presumption [of promoting prostitution] provided by subsection (4).⁸

40-19-7. Testimony of witness to prostitution. In any investigation or prosecution of any violation of the provisions of this article, or any attempt thereof, no person shall be excused from giving testimony or producing documentary or other evidence material to such investigation or prosecution on the ground that the testimony or evidence required of him is or may be incriminating; provided, that any person who so testifies or produces evidence concerning such offenses shall be immune to prosecution or conviction for any such violation about which he may testify or produce evidence.

Comment

This section is a restatement of the existing witness immunity section, 40-9-12, CRS 1963, and proposes no major changes.

8. Model Penal Code, Tentative Draft No. 9, The American Law Institute, Philadelphia, 1959, p. 180.

ARTICLE 20. PUBLIC INDECENCY

40-20-1. Adultery. Any person who cohabits or has sexual intercourse with another not his spouse commits adultery and is guilty of a class _____ misdemeanor, if the behavior is open and notorious, and:

- (1) The person is married and the other person involved in such intercourse is not his spouse; or
- (2) The person is not married and knows that the other person involved in such intercourse is married.

Comment

The present Colorado adultery crime leans on the common law definition of adultery for a description of the unlawful conduct. At common law, adultery consisted of an act of sexual intercourse by a man, whether single or married, with a married woman not his wife, performed in such an open and notorious manner as to be a public nuisance.

This section proposes to define adultery also by statute law. It is the same conduct which constitutes fornication and performed by a person who is married and knows the other person, whether married or single, is not his spouse, or by a single person who knows that the other person is married. If the person believes that the other person is single, when in fact the other person is married, the conduct constitutes fornication.

40-20-2. Fornication. Any person who cohabits or has sexual intercourse with another not his spouse commits fornication and is guilty of a class _____ misdemeanor, if the behavior is open and notorious.

Comment

Present Colorado law does not define the crime of fornication. It relies on the common law definition, i.e., an act of private sexual intercourse by a man, either married or single, with a consenting, unmarried woman, as modified by the phrase "Any man or woman..."

This section proposes to define fornication by statute law. It is cohabitation or a single act of sexual intercourse by an unmarried person, either male or female, with an unmarried person of the opposite sex, in a non-private manner. Where one party is married, the

conduct, if criminal, constitutes adultery. Cohabitation, of course, implies one or more acts of sexual activity and does not require a special definition. Prosecution does not have to prove a specific act of sexual intercourse occurred if the parties were living together under circumstances that makes it obvious that a continuing sexual relationship existed between them. Furthermore, prosecution does not have to prove an act of sexual intercourse occurred -- any type of sexual activity, normal or deviate, is covered.

Following the present statute's exclusion of bedroom conduct, the act of sexual intercourse or cohabitation must occur under circumstances which reveal the conduct to the public. Only when sexual activity between consenting adults is so "open and notorious" that it offends the public's morals is it criminal.

40-20-3. Loitering to solicit deviate sexual relations.

Any person who loiters in or near any public place for the purpose of soliciting or being solicited to engage in deviate sexual relations commits loitering to solicit deviate sexual relations and is guilty of a class _____ misdemeanor.

Comment

Section 40-20-3 covers deviate behavior which requires treatment somewhat similar to "open and notorious" heterosexual relationships. However, the problem is different in that a strong inference of sexual relations follows from "cohabitation" of a man and woman, and if it is known that they are not married the cohabitation constitutes an open flouting of widely held standards of morality. This is not the case when two people of the same sex live together, however strong the suspicion may be of a sexual relation between them. Accordingly, section 40-20-3, similar to subsection (2) of the present Colorado law, 40-2-31, CRS 1963, reaches the problem by prohibiting solicitation of strangers in public places.

By reducing the penalty for solicitation of sodomy and by requiring the solicitation to be accomplished only in public places, the danger of abuse of the law by blackmailers is reduced.

40-20-4. Public indecency. Any person of the age of 17 years and upwards who performs any of the following in a place where the conduct may reasonably be expected to be viewed by others commits public indecency and is guilty of a class ____ misdemeanor:

- (1) An act of sexual intercourse; or
- (2) An act of deviate sexual intercourse; or

- (3) A lewd exposure of the body done with intent to arouse or to satisfy the sexual desire of the person; or
- (4) A lewd fondling or caress of the body of another person of the same sex.

Comment

This section defines the undefined crime of open lewdness now contained in 40-9-15, CRS 1963, i.e., "If any person shall be guilty of open lewdness, or other notorious act of public indecency, tending to debauch the public morals, ... [he shall] be fined not exceeding one hundred dollars, or imprisoned in the county jail not exceeding six months." At common law, which the present statute relies upon for a definition, "open lewdness" means open and public indecency, and in order to amount to an indictable offense it must always amount to a common nuisance, committed in a public place, and seen by two or more persons lawfully at that place.

This section requires that one of four acts of conduct must be committed in a public place by a person 17 years of age or older. A public place is defined as any place where the prohibited conduct may reasonably be expected to be seen by others. This definition includes public parks during the daylight and early evening hours as well as any office waiting rooms during normal business hours. It is a question for the trier of the facts to decide if the place is a public place, depending on the circumstances under which the conduct was performed. The age of 17 years was selected under this particular section as the division of responsibility of offenders. A child, 17 years of age or younger, may or may not be expected by society to exercise discretion in choosing his arena for promiscuity, depending on his age, but a person over the age of 17, generally considered an adult in this code, is expected to exercise some judgment.

Four acts are considered indecent under this section, if done publicly by adults.

Subsections (1) and (2) define two acts of public indecency. The prohibited conduct may be conduct which, if done in a proper place, is lawful but which is prohibited when done in the presence of others, i.e., an act of sexual intercourse between a man and his wife, or the conduct may be unlawful and prosecuted under this section or under the section which defines the prohibited conduct, i.e., an act of sexual intercourse between an unmarried man and woman.

Subsection (3) requires lewd exposure coupled with an intent to arouse or to satisfy the carnal appetite of a viewer. Most often prosecution under this subsection will involve the genital exposure of an exhibitionist. This subsection does not apply to members of nudist camps, persons appearing nude in public showers, nor persons attired in brief beach wear, since there is no lewd exposure coupled with the specific intent of sexual arousal or gratification..

Subsection (4) is similar to the other three subsections in that a gross flouting of community standards in respect to sexuality is exhibited.

PART D. OFFENSE AFFECTING PUBLIC HEALTH AND SAFETY

ARTICLE 21. LIBEL

40-21-1. Libel. (1) Libel is the malicious defamation expressed either by printing, or by signs, or pictures or the like, tending:

- (a) To blacken the memory of one who is dead; or
- (b) To impeach the honesty, integrity, virtue or reputation, or publish the natural defects of one who is alive, and thereby expose him to public hatred, contempt or ridicule.

(2) Any person who commits libel is guilty of a class ___ misdemeanor.

40-21-2. Justification. In all prosecutions for libel, the truth thereof may be given in evidence in justification, except libels tending to blacken the memory of the dead or expose the natural defects of the living.

Comment

These two proposed sections constitute a restatement of the present offense of libel defined under 40-8-12, CRS 1963.

ARTICLE 22. CLAIRVOYANCY

40-22-1. Practicing clairvoyancy. Any person who practices or advertises a practice of clairvoyancy, palmistry, mesmerism, fortune telling, astrology, seership, or like crafty science, readings, sittings or exhibitions of a like character, for which a fee or charge is made or accepted, commits practicing clairvoyancy and is guilty of a class ___ misdemeanor.

Comment

This section combines and restates the definitions and penalty contained in 40-24-1, 40-24-2, and 40-24-3, CRS 1963.

ARTICLE 23. BRIBERY IN SPORT CONTESTS

40-23-1. Bribery of sports participants and officials. Any person who does any of the following acts commits bribery of sports participants and officials and is guilty of a class ___ felony:

- (1) Gives, offers or promises to any participant in any contest of skill, speed, strength or endurance any gift or gratuity whatever with intent thereby to influence such participant to refrain from exerting his full degree of skill, speed, strength, or endurance, in such contest; or
- (2) Requests or accepts a gift or gratuity or promises to make a gift or promise to do an act beneficial to himself, under an agreement or with an understanding that he shall refrain from exerting his full degree of skill, speed, strength or endurance in such contest; or
- (3) Gives, offers, or promises to any person who is or will be an umpire, referee, judge or other official at any such contest with the intention or understanding that such person will corruptly or dishonestly umpire, referee, judge or officiate at any such contest so as to affect or influence the result thereof; or
- (4) Requests or accepts a gift or gratuity or promises to make a gift or promise to do an act beneficial to himself, when he is or expects to be an umpire, referee, judge or other official at any such contest, under an agreement or understanding that he shall corruptly or dishonestly

umpire, referee, judge or officiate at any such contest.

(2) As used in this section, "participant" includes any person who is selected or who expects to be selected to take part in any such contest.

Comment

This section is a restatement of the offenses presently defined in 40-12-2, 40-12-3, 40-12-4, CRS 1963.

ARTICLE 24. CRUELTY TO ANIMALS

40-24-1. Cruelty to animals. (1) Any person who does any of the following acts commits cruelty to animals and is guilty of a class ___ misdemeanor:

- (a) Intentionally tortures any animal, or without justification kills any domestic animal of another without the owner's consent; or
 - (b) Abandons or fails, without reasonable excuse, to provide necessary food, care or shelter for any animal in his custody; or
 - (c) Intentionally poisons any domestic animal of another without the owner's consent or places poison in any place with intent that it be taken by a domestic animal of another; or
 - (d) Intentionally transports or confines any animal in a cruel manner; or
 - (e) Intentionally participates in the earnings of any place for baiting or fighting animals or intentionally maintains or allows any place to be used for such purpose.
- (2) As used in this section, "torture" does not include bona

fide experiments carried on for scientific research or normal and accepted veterinary practices.

Comment

This section, by combining the essential criminal conduct defined in many statutes, is a restatement of present law. Present Colorado statutes to be replaced by this proposed section include:

- 40-20-1, CRS 1963 -- Overdriving and Starving Animals.
- 40-20-2, CRS 1963 -- Improper Care of Impounded Animals.
- 40-20-4, CRS 1963 -- Keeping Fowls or Animals to Fight.
- 40-20-16, CRS 1963 -- Shepherd Abandoning Sheep Without Notice.
- 40-20-18, CRS 1963 -- Unlawful to Dock a Horse's Tail.
- 40-20-22, CRS 1963 -- Killing Animals in a Contest.

40-24-2. Influencing dog and horse races. (1) Any person who influences, conspires with or has any understanding or connivance with any owner, jockey, groom or other person associated with or interested in any stable, kennel, horse or dog, or any race in which any horse or dog participates or is expected to participate, to pre-arrange or predetermine the results of any such race, or any person who stimulates or depresses a dog or horse for the purpose of affecting the results of a race commits influencing dog and horse races and is guilty of a class ___ felony.

(2) Nothing in this section shall prohibit the normal treatment of such animals by veterinarians when the purpose of such treatment is not primarily designed to stimulate or depress such animals in order to affect the results of a race.

Comment

This section is a restatement of the present law, 40-20-27, CRS 1963.

ARTICLE 25. DISORDERLY CONDUCT

40-25-1. Disturbance of the peace by telephone. (1) Any person who does any of the following commits disturbance of the peace by telephone and is guilty of a class ___ misdemeanor:

- (a) Disturbs or tends to disturb the peace, quiet, or right of privacy of any person or family to whom the call is directed by repeated and continued anonymous or identified telephone messages intended to harass or disturb;
or
- (b) By a single call or repeated calls uses obscene, profane, indecent, or offensive language or suggests any lewd or lascivious act over or through a telephone; or
- (c) Attempts to extort money or other thing of value from any person or family by means or use of the telephone;
or
- (d) Threatens any physical violence or harm to any person or family; or
- (e) Repeatedly or continuously causes the telephone of any person or family to ring with intent to disturb or harass such person or family.

(2) The normal use of a telephone for the purpose of requesting payment of debts or obligations or for other legitimate business purposes does not constitute a violation of this section.

Comment

This section restates the present offenses defined in 40-4-23, CRS 1963.

40-25-2. Disturbance of the peace. Any person who shall maliciously or willfully disturb the peace or quiet of any neighborhood

or family, by loud or unusual noises, or by tumultuous or offensive carriage, threatening, traducing, quarreling, challenging to fight, or fighting, commits disturbance of the peace and is guilty of a class ___ misdemeanor.

Comment

This proposed section is a restatement of the present offense defined in 40-8-1, CRS 1963, as amended by Chapter 39, 1964 Session Laws.

40-25-3. Unlawful assembling. Any person who assembles with another for the purpose of disturbing the peace, or committing any unlawful act, and does not disperse on being desired or commanded so to do by a judge, sheriff, coroner or other public officer, commits unlawful assembling and is guilty of a class ___ misdemeanor.

Comment

This proposed section is a restatement of the present offense defined in 40-8-3, CRS 1963, as amended by Chapter 39, 1964 Session Laws.

40-25-4. Riot. Any person who meets with another to do an unlawful act with force or violence against the person or property of another, with or without a common cause of quarrel, or even does a lawful act in a violent or tumultuous manner commits riot and is guilty of a class ___ misdemeanor.

Comment

This proposed section is a restatement of the present offense defined in 40-8-6, CRS 1963.

40-25-5. Disturbing worship. Any person who by menace, profane swearing, vulgar language, or any disorderly or immoral conduct, interrupts and disturbs any congregation or collection of citizens assembled together for the purpose of worshiping Almighty God commits disturbing worship and is guilty of a class ___ misdemeanor.

Comment

This proposed offense is a restatement of the present offense defined in 40-8-15, CRS 1963.

40-25-6. Vagrancy. (1) Any person who loiters or prowls in a place at a time, or in a manner not usual for law-abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity commits vagrancy and is guilty of a class ___ misdemeanor.

(2) Among the circumstances which may be considered in determining whether such alarm is warranted is the fact that the person takes flight upon appearance of a peace officer, refuses to identify himself, or manifestly endeavors to conceal himself or any object. Unless flight by the person or other circumstance makes it impracticable, a peace officer shall prior to any arrest for an offense under this section afford the person an opportunity to dispel any alarm which would otherwise be warranted, by requesting him to identify himself and explain his presence and conduct. No person shall be convicted of an offense under this section if the peace officer did not comply with the preceding sentence, or if it appears at trial that the explanation given by the person was true and, if believed by the peace officer at the time, would have dispelled the alarm.

Comment

This section proposes a substantial deviation from the present vagrancy statute, 40-8-19, CRS 1963, as amended by Chapter 39, 1964 Session Laws, and is based on the Model Penal Code's recommended statute. The complete analysis of this Model Penal Code section, as stated by the Code's reporters, is as follows:

The proposals here made to penalize what might be called "suspicious loitering," are all that would be left in the law of that ancient protean offense designated "vagrancy," if indeed even this much should be retained in a code of substantive penal law. The reasons for doubt on that score are that a statute which makes it a penal offense for a person