LRB 3370/P2

Adopt new factor/sentence modification analysis for seeking modification of court-imposed ES rules.

Page 2, section 3, creates § 302.113 (7m) which establishes a complicated process for seeking modification of court-imposed ES conditions. It essentially permits each person on ES to challenge his or her court-establishes ES conditions once each year on supervised release. Numerous claims pose the potential to bog down trial and appellate courts, as well as the DOJ Criminal Appeals Unit. Ample case law already exists regarding the right to move to modify a sentence on grounds of a new factor; *see, e.g., State v. Frank/in, 148* Wis. 2d 1, 434 N.W.2d 609 (1989) (new factor warranting sentence modification is "fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties.")

RECOMMENDATION: Codify sentence modification case law to govern modification of ES conditions, specifically on grounds of a change in condition or new fact. The provisions permitting a new petition once a year should be eliminated: they merely invite defendants to make yearly challenges. Instead, require a sentence modification motion based on cause. The provision should also specify that someone cannot petition to modify the same condition which he or she already has challenged unsuccessfully absent a significant change in circumstances.

LRB 3361 /P2
Clarify appeal limits.

Section 13, creating sec. 973.01(2m)(b) at lines IO-I 1 of page 5, and section 15, a non-statutory provision at lines 17-I 9 of page 7 provide that as to both permanent and interim advisory guidelines, there is no right of appeal on the basis of the court's imposition of sentence that does not fall within the guidelines. Some additional clarification is necessary.

RECOMMENDATION #1: Expand these statutory provisions to clarify that there is no right to appeal a sentence on the ground that the length of time of confinement and/or the length of time of extended supervision does not fall within the recommended sentence contained in the guidelines; that the sentence is an erroneous exercise of discretion because it exceeds the guidelines recommendation; that the court did not properly weigh factors or consider whether a factor is aggravating or mitigating as discussed in the sentencing guidelines materials; or that the court failed to properly or fully consider or to articulate on the record that it had considered any factor or factors. This additional language is necessary to fully implement the appropriate limitations found in State v. Halbert, 147 Wis. 2d 123, 432 N.W.2d 633 (Ct. App. 1988) (cautioning that claim is also barred when defendant labeled his challenge something else, but was really complaining that his sentence was greater than that recommended by the guidelines); but see, State v. Speer, 176 Wis. 2d 1101, 1121-I 123 (501 N.W.2d 429 (1993) (Halbert bar does not apply to failure to consider guidelines at all).

RECOMMENDATION #2: To preserve the discretion of sentencing judges and non-mandatory nature of the guidelines, yet ensure that defendants have an avenue to challenge unconstitutional sentences or sentences based on factual errors (and incorporating relevant current case law), LRB should add language providing that a defendant can challenge a bifurcated sentence only on the grounds that the sentence imposed (either the term of confinement in prison or the term of extended supervision) is: (1) In excess of the maximum permitted by statute; or (2) is unconstitutional because a specific constitutionally impermissible factor was considered (e.g. a violation of defendant's first amendment rights); or (3) sentence was based on an erroneous fact or information, with the defendant required to prove by clear and convincing evidence that the information was erroneous and that the trial court actually relied on the information inaccurate information in sentencing. A defendant claiming erroneous facts or information considered at sentencing also should be precluded from subsequent challenge of that sentence if the defendant failed to bring an existing error to the court's attention at sentencing. Consistently with current law, the defendant should be required to make a motion to modify sentence in the trial court; upon review, the appellate

court would consider only whether the trial court erroneously exercised its discretion.

RECOMMENDATION #3: The committee should decide whether the same limits on appeals of sentences also apply to appeals on periods of confinement in prison and ES imposed following revocation of ES; or specify that no appeal of that post-revocation decision by the court is permitted. Appropriate language should then be incorporated into the LRB draft.

ok

LRB 3361/P2
Clearly state that sentencing within the guidelines is not mandatory.

Section 13, page 5, lines 6-9, creates sec. 973.01(2m)(a) which requires a trial court to consider sentencing guidelines adopted by the sentencing commission. Section 15, page 7, lines 10-16 requires courts to consider the temporary guidelines attached to the August 31 Commission report until the sentencing commission promulgates guidelines. These sections do not say that the guidelines are not mandatory. Non-statutory sec. 454(l)(e)(4) and (5) of 1997 Wis. Act 283 as well as the August 10 draft report at page 115 refer to promulgation of "advisory" guidelines.

RECOMMENDATION: To avoid confusion about the advisory nature of the guidelines, add statutory language to § 973.01(2m)(a) in sec. 13 and to the non-statutory provision about temporary guidelines in se. 15 stating that although the court shall consider the guidelines, sentencing within the guidelines is not mandatory.

LRB 2889/p3

Create statutory provision somewhere in ch. 302 stating that new time limits discussed at pages 133-34 of the August 10 draft report are not jurisdictional.

Because new time limits for revocation proceedings are recommended, we recommend that LRB be requested to draft a statute for placement in an appropriate place in Chapter 302, that essentially provides as follows:

could do but needed?

> Failure to comply with any time limits regarding the extended supervision process specified in the department rules or statutes does not deprive the court of personal or subject matter jurisdiction or of competency to exercise jurisdiction or proceed; does not deprive the agency of jurisdiction to proceed; and does not provide grounds to challenge the revocation or the incarceration or extended supervision period imposed by the court as a consequence of revocation.

Include a similar provision for "old world" parole revokees in ch. 304, if the new timelines are to apply to them also as described on page 135 of the August 10 draft report.

LRB 2889/p3

Coordinate certiorari review of administrative decision to revoke ES and appeal of trial court decision on further prison term/ES.

Page 4, line 4 creates § 302.113(9)(d) providing that review of the agency decision shall be by certiorari only. Review of the circuit court's decision regarding length of time for which the person will be returned to confinement in prison will not reviewed by certiorari and will be subject to whatever sentence appeal limits are created. Under former law, there was only the agency decision to review. Now, there will be two decisions and two decision makers. The draft does not make clear how these review rights will interact and how time limits will be calculated. It may be that whether a person really wants to seek review of the revocation decision may depend upon whether the court gives the person a long or relatively short return to prison time. If the person is not returned to court and that decision is not made before his certiorari time runs, he or she might inadvertently forfeit the opportunity to review of the revocation decision. On the other hand, the person might file an unnecessary certiorari that wouldn't have filed just because the person does not know how much prison time he or she faces.

RECOMMENDATION: Amend this section to provide that the time for certiorari does not start running until the person has been to court and the court has determined the additional term of incarceration the person will serve. Alternatively, provide for consolidation in the court of appeals of any appeal from certiorari challenging the revocation decision and any appeal challenging the judge's subsequent imposition of a term of reimprisonment.

PROPOSED CHANGES TO LRB-0590 / §429
SENTENCING AGGRAVATORS

Problem: The Committee converted several sentence enhancers to statutory aggravators. These aggravators appear in LRB-0590 / $429. Like any other aggravating and mitigating factor, a judge should have the discretion to decide whether a particular factor is present and how much weight to place on it.

The proposal requires the court to consider these factors. However, the "shall consider" language may create additional problems that the Committee must address. LRB-0590 / $429 (page 80 at lines 16-18).

a. First, would the state have the right to appeal a sentence if the court failed to consider a statutory aggravator?

b. Second, if a court "shall" consider these factors as aggravating, what rights would a defendant have to challenge a court's determination? Would the defendant have a right to appeal "consideration" of the aggravating factor?

c. Third, if a court "shall" consider a factor, must it then make findings identifying the weight it placed on the aggravating factor?

Solution: Change the word "shall" to "may" such that LRB-0590 / §429 (page 80 at lines 16-1 8) is amended to read as follows

(3) AGGRAVATING FACTORS; GENERALLY. (a) All Crimes. When making a sentencing decision for any crime, the a court ~~shall~~ may consider all of the following as aggravating factors:

no; don't do this

Alternatively, rather than directly requiring the court to consider these specific enhancers, the Committee could change this section so that the sentencing commission (or criminal penalties study committee) expressly incorporates these statutory aggravating factors into the sentencing guidelines. This would result in the following amendment to the language in the proposed sec. 973 .017(3):

(3) AGGRAVATING FACTORS; GENERALLY. (a) All Crimes. All sentencing guidelines prepared under (2) above shall incorporate the following as aggravating factors into any guidelines adopted. ~~When making a sentencing decision for any crime, the a court shall consider all of the following as aggravating factors:~~

no; don't do this

PROPOSED CHANGES TO LRB-0590 / $429
SENTENCING AGGRAVATORS

Problem: In discussing the statutory aggravators (ie. former penalty enhancers), the LRB drafter asks the following question: "Do you want the draft to specify the standard of proof for aggravating factors?" LRB-0590 / $429 (page 85 at lines 21-22). Creation of a standard of proof for establishing aggravating factors represents a broad departure from current sentencing law.

Wisconsin appellate courts have rejected efforts to adopt formal burden of proof requirements for factual findings that will have an impact upon sentencing considerations. "We are satisfied that the present law which places all sentencing under the standard of judicial discretion remains the more practical and workable rule for the trial court when imposing a sentence and the appellate court when reviewing a sentence." State v. Hubert, 181 Wis. 2d 333, 345, 510 N.W.2d 799 (Ct. App. 1993) (declining request to adopt burdens used in federal sentencing proceedings). Of course, while courts have broad sentencing discretion, defendants retain their right to be sentenced by truthful and accurate information. This means that they currently have the right to rebut evidence and other information offered at sentencing proceedings. State v. Damaske, 212 Wis. 2d 169, 194-95, 567 N.W.2d 905 (Ct. App. 1997). By incorporating a standard of proof into the draft, sentencing proceedings will become long drawn out proceedings where courts must make specific factual findings about the presence of certain factors. Failure to do so or misapplication of the standard will result in increased postconviction challenges and appeals.

Solution: The relevant language appearing at LRB-0590 / $429 (page 85 at lines 16-22 should be amended as follows:

(9) AGGRAVATING FACTORS NOT AN ELEMENT OF THE CRIME: The aggravating factors listed in this section are not elements of any crime. A prosecutor is not required to charge any aggravating factor or otherwise allege the existence of an aggravating factor in any pleading. ~~The existence of an aggravating factor does not have to be proved beyond a reasonable doubt for a court to use the existence of the aggravating factor in making a sentencing decision."~~

Yes - do this

In addition, the Committee should adopt language reflecting that it does not wish to alter the informal, judicial discretion approach that allowed for under current law.

LRB **0590/P5**

Clarify that terms of confinement may be consecutive or concurrent, and that terms of ES may be consecutive or concurrent.

> Section 973.15(b) now provides that except for DIS, “the court may impose as many sentences as there are convictions and may provide that any such sentence be concurrent with or consecutive to any other sentence imposed at the same time or previously.
>
> RECOMMENDATION: Amend a provision to this legislative proposal amending existing § 973.15(b) to provide that under bifurcated sentencing, any term of confinement to prison may be consecutive to or concurrent to any other term of confinement to prison imposed at the same time or any prison sentence previously imposed (i.e. can be consecutive to existing “old world” sentence). Further, provide that the court may provide that any term of extended supervision may be consecutive or concurrent to any other term of extended supervision imposed at the same time or to any remaining “old world” parole time.

dealt w/ (in part) in 302.113(4) / all are discrete "sentences"

LRB 0590/P5

Clarify that sections 414 (page 77) and 426 (page 79) concerning minimum and maximum periods of terms of confinement and periods of extended supervision do not apply to terms of confinement and extended supervision imposed as a result of revocation of extended supervision.

RECOMMENDATION: Clarify in sections 414 and 426 that the limits stated in those sections apply only at initial imposition of sentence. If the committee intends limits on the terms of confinement and subsequent ES imposed when ES is revoked, amend. sec. 302.113(9) to specify those limits. If not, amend sec. 302.113(9) to state that the initial prison and ES limits established in sec. 973.01(2)(b)(intro.) [sec. 414 of this legislation] and 973.01(2)(d)(intro.) [sec. 426 of this legislation] do not apply when a court imposes an additional term of confinement following ES revocation.

Wrong? ct. always works w/in confines orig. ES sentence

LRB 0590/P5
Clarify definition of "total length of bifurcated sentence."

Section 413, page 77, revises § 973.01(2)(a) regarding "total length of bifurcated sentence" to provide "The total length of the bifurcated sentence may not exceed the maximum period of imprisonment for the crime." The'meaning is unclear because "imprisonment" is not defined and the remainder of the statute uses the phrase "term of confinement in prison": is that the same as imprisonment? Also, it remains unclear to DOJ readers what the maximum length of the bifurcated sentence would be if ES is revoked and the revokee can be returned to prison for the total period of ES originally available.

I don't think it is unclear. But ...

RECOMMENDATION: Clarify whether or not total bifurcated sentence is the aggregated total of term of confinement and term of extended supervision. Should sec. 973.01(2)(a) provide that "The total length of the bifurcated sentence may not exceed the sum of the maximum term of confinement for the crime as set forth in s. 973.01(2)(b) and the maximum term of extended supervision as set forth in s. 973.01(2)(d).

LRB 0590/P5

Clarify definition of "sentencing decision" in § 973.017.

Page 80, section 429 creating § 973.017, states that "'sentencing decision' means a decision as to whether to impose a sentence or place a person on probation and a decision as to the length of imprisonment, the amount of a fine and the length of a term of probation." Use of the term "length of a sentence of imprisonment" is confusing.

RECOMMENDATION: Change the term "length of a sentence of imprisonment" to "length of a term of confinement in prison" to be consistent with terminology in other sections describing bifurcated sentence; add "and length of a term of extended supervision" to indicate the guidelines are useful in guiding the court in all aspects of imposing a sentence under the new bifurcated sentence system.

ok?.

just refer to bifurcated sentence?

See my change to 973.017

LRB 3370/P2
Clarify that the department may set rules and conditions for ES.

Page 2, line 7 provides in § 302.113(7) that the department may set conditions of ES in addition to the conditions set by the court if the department conditions do not conflict. The previous sentence provides that a person released to ES is subject to all rules and conditions of supervised release. A similar situation occurs in § 302.114(8) which is not amended by this proposal.

RECOMMENDATION: Add the word "rules" in §§ 302.113(7) and 302.114(8) so those sections state that the department may set conditions and rules of extended supervision that do not conflict with the coutt's. This will avoid having to litigate whether the department has such authority or not

LRB 2889/p3

Create authority for "time outs," ES holds pending revocation, etc.

The draft report at pages 130-33 discusses recommendations for how extended supervision should operate, including specific provisions regarding alternatives to revocation, creation of a new "time out" alternative, and new time limits for revocations proceedings. The Committee's intent appears to be that these proposals would be the subject of DOC administrative rules. Appendix G to the August 10 draft report contains some suggested changes to existing administrative rules but these do not appear to cover extended supervision. Will the committee provide specific recommended rule changes?

Does a statute need to be drafted/enacted giving DOC authority to enact any of these new rules, particularly "time out"?

Does it need to be made clear, in either statute or rule, that DOC can place a person on an extended supervision hold, just as they can now place a person on a parole hold, pending revocation?

we're doing this

Check w/ Hammer

57.11
good time
Look @ old change to parole
unless enhanced (?)

(1) Class I attempt → Class A misd.

(2) Clarify fleeing revo for felony only

(2.5) Add language to misd. fleeing re: included

(3) RP enhancers per 12/31/99 & modify 973.017 accordingly

(4) Check w/ Hammer on list of add'l. crimes

ok (5) ~~Clarify ½ of fine for attempt~~

(6) ~~Clarify that revo for fleeing is for felony only~~

(7) Credit card aggregation ? Just cover all ?

(8) Order of penalty enhancers → Okay
→ 961.46 ? 961.49 ? (.48 → .62)

(9) Chem. castration — leave out

(10) RP; HTO enhancer (351....)

(11) Clarify that 25% floor for ES trumps penalty enhancer

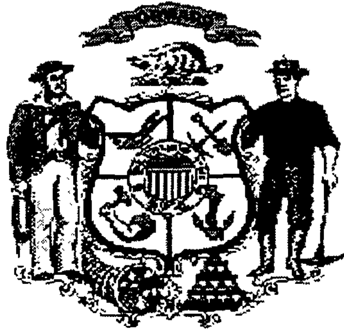
Brennan

(12) Search "sentencing court"
(or court that sentenced etc
follow cert.
circuit court — then they assign ?

Done (13) DOJ staff

(13) ~~CS IEC Sentences~~

August 10, 1999 DRAFT



CRIMINAL PENALTIES STUDY COMMITTEE

FINAL REPORT

Respectfully Submitted,
August 31, 1999, by:

Thomas Barland, *Chair*
Thomas Hammer, *Reporter*
Nicholas Chiarkis
Walter Dickey
Greg Everts
Matt Frank
Patrick Fiedler
Brad Gehring
Joanne Huelsman
Stephen Hurley
William Jenkins
Elsa Lamelas
Michael Malmstadt
Michael McCann
Barbara Powell
Linda Pugh
Diane Sykes
Lee Wells

***Staff*:**
Michael Brennan, *Counsel*
Jennifer Dubberstein, *Program and Planning Analyst*

FORWARD AND ACKNOWLEDGEMENTS

The magnitude of the tasks given this Committee and the short time limits within which to accomplish them have resulted in an extraordinary effort by many highly qualified and capable people. While we relied greatly upon the experience of other states who have preceded us in Truth-in-Sentencing, we believe we have produced a product that is unique to Wisconsin and which will tide the state over the transition from determinate to indeterminate sentencing without bankrupting the state. Our work, if adopted by the legislature, should give the sentencing commission which we propose sufficient time to carry out its initial organizational work and begin to undertake the promulgation of permanent sentencing guidelines.

An issue that has been present throughout our Committee's work is the ever-increasing corrections population. We cannot guarantee that there will not be a continued increase in the number of prisoners in the state prison system, but we are confident that such increases as may occur can, with adequate education of the prosecution, public defenders, the judiciary and especially the public, be made more gradual, provided that community corrections is greatly strengthened.

There are two critical components to solving the burgeoning prison population in Wisconsin. One is reducing the extent of social dysfunction in Milwaukee County. The County has just 18.3% of the state's population, but produces 47% of the state's prisoners. Milwaukee's problems are truly the problems of the state. More attention needs to be given by the state to assisting Milwaukee in reducing drug related crimes.

In doing that, we cannot overlook the problem of racial disparity in our society. Fifty-seven percent of our state prisoners are members of racial minorities. Three percent of all African-Americans in Wisconsin are now in prison. The comparable figure for whites is .17% - a shocking difference which compels us to ask "Why has this occurred?" Neither I nor this Committee can answer that question, but if the state wishes to further reduce crime and the prison population it must be willing to undertake a study of that "Why" question and then attempt to ameliorate the causes.

The second critical component is the need to strengthen community corrections. Those states which have succeeded in putting the lid on their prison populations have done so in major part by creating an alternative to prison known as intermediate sanctions. This approach involves short term incarceration with strict monitoring and supervision once one is released from incarceration. Wisconsin's traditional system of probation is not an appropriate disposition option for many criminals who are not so violent or dangerous that they must be locked up for many years in the prison system. Yet they need some term of lock-up coupled with treatment, usually drug and alcohol, and strict controls when released from incarceration and treatment. Only with such a system in place and working well, will judges then consider probation for those many defendants who do not now truly fit in prison or traditional probation. Until the perception that incarcerative probation is effective will judges cease to send defendants to prison in such numbers that our prison population is

increasing at the present rate of approximately 65 offenders per week' or which has tripled in 10 years under our present indeterminate sentencing system.

These are the conclusions of the chair of this Committee, who has been immersed in these problems the past 13 months.

I am confident that the transition measures we recommend, if adopted by the legislature, will work. That it will, will be due to the devotion to duty and the teamwork of the very capable members of this committee, each of whom has brought a unique talent or insight to our work. First to be acknowledged are our two full-time staff persons Mike Brennan, Committee Counsel, and Jennifer Dubberstein, Research Analyst. Mike brought an incisive mind and a wide range of experience in the criminal and civil law, besides computer knowledge and good writing ability. Jennifer showed a strong ability to analyze raw data, organize it and then present it intelligibly through computer generated charts and graphs.

Each of our committee members devoted many ours of unpaid time to our work. A special commendation must be given to our unpaid Reporter, Professor Tom Hammer of the Marquette Law School. He chaired the Code Reclassification Subcommittee which had the difficult and painstaking task of bringing rational order to the 585 felonies and Class A misdemeanors now on the statute books. This required extensive research and detailed analytical work on his part, much of which was done on weekends and late at night. Finally, he drafted part II of this report which was only slightly revised by the Committee.

Judge Elsa Lamelas of Milwaukee County had the difficult task of chairing the Sentencing Guidelines Subcommittee. This proved to be the most difficult area of our work in which to obtain consensus because of the competing philosophical approaches to sentencing guidelines and the nebulous nature of the subject matter. She ably carried through with grace and patience until consensus was reached all the while spending many hours and weekends preparing the detail for the guidelines.

Judge Patrick Fiedler of Dane County chaired the Extended Supervision Subcommittee which carefully worked through the complex revocation process, streamlining it and preparing statutory and administrative code changes necessary to do so. He brought his broad experience as a criminal sentencing judge and past head of the Department of Corrections.

Professor Walter Dickey of the University of Wisconsin Law School chaired the Computer Modeling Committee. It had the nearly impossible task of coming up with a computer population and cost analysis program in a short time. He brought vast insight in criminal behavior to the committee. He also served on the Sentencing Guidelines Subcommittee. He was ably assisted by Professor Michael Smith, also of the University of Wisconsin Law School, who is a research genius and specialist in criminal sentencing. It was his insights that permitted us to come up with a workable computer cost model. He also

[1] Average of Department of Corrections adult institutions for 5 week period from July 9, 1999 through August *6, 1999.*

sat in for Professor Dickey when he was called to Washington for his national committee work.

Judge Diane Sykes of Milwaukee County chaired the Education Subcommittee which made several presentations at judicial and prosecution education seminars. Her committee's work has just begun. In addition she sat in on both the Code Reclassification Subcommittee. She brought a considerably deep knowledge of the criminal law and much experience in sentencing some of Milwaukee's toughest criminals.

Several members of our Committee served on more than one subcommittee. These included criminal defense attorney Steve Hurley, who was ever mindful of costs and who was especially helpful in working through the sentencing guideline problem. He served on three committees. Assistant Attorney General Matthew Frank served on the Code Reclassification and Computer Modeling Subcommittees. To each he brought a strong analytical ability and the means to often suggest solutions troubling the committees. Bill Jenkins, a health organization executive, served on two committees. He was our only public member not having had any relationship with the court system. That proved valuable when he acted to bring the Committee back to earth in its discussions.

Attorney Greg Everts of Madison ably assisted Judge Lamelas in developing sentencing guidelines and in working through the Committee's differences. Milwaukee County District Attorney E. Michael McCann graphically set forth for the committee the problems of law enforcement in Milwaukee and its impact upon the state. Assisting in that effort were Linda Pugh of the Milwaukee Women's Center and Barbara Powell head of the Robert Ellsworth Correction Center and representative of the DOC.

Judges Michael Malmstadt and Lee Wells, both of Milwaukee County, brought many years of experience on the criminal bench as well and considerable prosecution experience. Each made enormous contributions at critical times.

Sheriff Bradley Gehring of Outagamie County was our only law enforcement officer. He proved valuable in giving us considerable insight into how the state's actions effect county jails.

State Public Defender Nicholas Chiarkas called the Committee's attention to a number of effective treatment programs that should be considered by the state when it enhances community corrections. He was ably represented by Mike Tobin at Code Reclassification Subcommittee meetings as well as full committee meetings.

This Committee would not have been able to successfully complete its work, if it were not for the critical insights furnished by Senator Joanne Huelsman of Waukesaha County. She was our only legislator. She conscientiously attended all meetings, including those of the Code Reclassification Subcommittee, except when she could not because of the legislature, and then she sent one of her staff members. She had the knack of being able to suggest problem solving compromises at critical times.

The Committee had the assistance of many Wisconsin public servants, some of whom attended nearly all meetings and provided valuable information and insight. Further, the committee had the full cooperation of the Departments of Corrections and Administration. Those who deserve special mention include:

Governor Tommy G. Thompson, as well as Stewart Simonson, and Mark Grapentine of the Governor's office.

Secretary Mark Bugher, Linda Seemeyer, George Lightbourn, Ed Main, and Patti Reardon, all of the Department of Administration.

Secretary Mike Sullivan, Secretary Jon Litscher, Bill Grosshans, Shiva Sathisivam, Mark Loder, Rick Geithman, David Albino, and Bob Pultz all of the Department of Corrections.

Jefren Olsen and Mike Dsida of the Legislative Reference Bureau.
Jere Bauer, Jr. of the Legislative Fiscal Bureau.

Ed Eberle of Rep. Dean Kaufert's office, formerly of Rep. Scott Walker's office.
Ray Sobocinski of Sen. Joanne Huelsman's office.

David Schwarz and William Lundstrom of the Department of Administration division of hearings and appeals.

Lee Pray and Chuck Hoomstra of the State Attorney General's office

Robert Brick of the director of state court's office.

Jean Bosquet and Ken McKelvey of the Circuit Court Automation Project.

Alison Poe & Pete Nelson of the Department of Administration, Bureau of Justice Information Services.

Pat Kenney and Karen Loebel of the Milwaukee County District Attorney's office.

Jim Gleason, Therese Dick, and Kim Heller-Marotta of the Milwaukee unit of the State Public Defender's office.

Gwen McCutcheon of Premium Business Services

Hari Hariharan, Russ Lutz, and Bob Tyllo of Systems Seminar Consultants, Madison, Wisconsin.

Respectfully submitted,

Thomas H. Barland, Chair

Criminal Penalties Study Committee Final Report

Executive Summarv

Conclusions:

Code Reclassification:

1. The current 6 class classification scheme in Wisconsin (A, B, BC, C, D, and E) does not provide sufficient variety in penalties for Wisconsin's 484 felonies. See PP. x-y.

2. To consolidate all crimes into a single criminal code would result in unnecessary confusion. See pp. x-y.

3. The maximum fines in the current penalty structure are too low; See pp. x-y.

4. Act 283 permits offenders to receive periods of extended supervision ("ES") longer than necessary to supervise an offender properly upon release from prison. See pp. x-y.

5. Certain penalty enhancer statutes, which must be pleaded and proved to add extra prison time to the end of a crime's statutory maximum, are rarely if ever used, and others are better considered as aggravating factors at sentencing. See pp. x-y.

6. Mandatory and presumptive minimum sentences should be repealed because they reduce judicial and prosecutorial discretion. See pp. x-y.

7. There is no benefit to continue to incarcerate in prison certain elderly, unhealthy criminals who prove no risk to the community. See pp. x-y.

Temporary Advisory Sentencing Guidelines

8. No other state's sentencing guideline system satisfied the Committee as best for Wisconsin. See pp. x-y.

9. Given time constraints, the Committee developed sentencing guidelines for only those 11 crimes that consume the majority of corrections resources. See pp. x-y.

10. For those crimes for which there are not sentencing guidelines, a conversion table is necessary to understand the relationship between current indeterminate

sentence lengths and Truth-in-Sentencing determinate sentence lengths. See pp. X-Y.

Sentencing Commission

11. Various state departments and agencies do not communicate well regarding corrections and criminal justice issues. Communication on these issues also must be improved between the legislature and the Department of Corrections ("DOC"). See pp. x-y.

12. A Sentencing Commission is needed to bridge the gaps among various state departments and agencies concerning corrections and criminal justice issues and to act as a central clearing house for and to do research on such issues. See pp. x-y.

Extended Supervision and its Revocation

13. In the "new world" of Truth-in-Sentencing, ES should consist of differing levels of supervision based upon an offender's behavior. See pp. x-y.

14. A greater panoply of sanctions is necessary for violations of the conditions of ES. See pp. x-y.

15. There should be a sanction which includes incarceration, but which is more punitive than an alternative-to-revocation but less punitive than full revocation. See pp. x-y.

16. The parole and extended supervision revocation process should be shortened. See pp. x-y.

17. The current revocation system, in which administrative law judges (ALJ's) make the revocation decision, adjudicates hundreds of cases per year, relieving circuit courts of that burden. See pp. x-y.

Computer Modeling

18. Wisconsin's law enforcement and corrections computer systems are inadequate tools to use when discussing criminal justice and corrections policies. The Committee found it difficult to get answers to basic statistical questions. These computer systems are not linked, as they should be, and no offender identifying number exists across these systems. See pp. x-y.

19. Wisconsin uses an overly simplistic, inaccurate method to forecast corrections population. See pp. x-y.

20. A corrections population projection mechanism is necessary to consider the impact of different criminal justice and corrections policies. See pp. x-y.

21. **[Inserts tentative #'s concerning population projections and costs?] See** pp. x-y.

Education of the Bench, the Bar, and the Public

22. Educating the bench, the bar, and the public about Truth-in-Sentencing is most important to ensure that Truth-in-Sentencing succeeds. See pp. x-y.

Issues for Further Study

23. Milwaukee judges and prosecutors do not have confidence in the effectiveness of probation and parole supervision. See pp. x-y.

24. The DOC-Division of Community Corrections has implemented experimental programs in Racine and Dane Counties which could be of use to address this problem. See pp. x-y.

25. States that have implemented Truth-in-Sentencing, imprisoned violent and dangerous offenders for longer periods of time, but also addressed their prison overcrowding problems, have increased state funding of probation and parole supervision, as well as funded and implemented alternatives-to-incarceration. See pp. x-y.

Recommendations:

Code Reclassification

1. The present system of 6 classes should be expanded to 9 classes (A through I). This will allow for closure of the large gaps between classes that exist in the current system. It also will allow for more precise and discriminating classification of the several hundred felonies which occupy the middle and lower ranges of the spectrum. See pp. x-y.

2. The 484 felonies within the criminal code, outside of the criminal code, and in the drug code, should be classified in the Class A-Class I system as recommended. See pp. x-y.

3. All felonies in the Wisconsin statutes should remain in their current locations in the statutes, rather than be consolidated into a single criminal code. See pp. x-y.

4. The new, higher maximum fines in the recommended Class A-Class I system should be adopted. See pp. x-y.

5. ES terms should be capped as recommended. See pp. x-y.

6. The current 19 penalty enhancers, which must be pleaded and proved to add extra prison time to a crime's statutory maximum, should be reduced to 5 penalty enhancers. The remaining penalty enhancers should become aggravating factors considered at sentencing and be repealed, as respectively recommended. See pp. x-y.

7. Statutes mandating minimum and presumptive mandatory sentences should be repealed (except for those contained in operating a vehicle while intoxicated crimes) to give judges and prosecutors maximum discretion in resolving such cases. See pp. x-y.

8. A geriatric clause should be enacted which, if strict criteria are met, would allow certain elderly prisoners to be released from prison but remain on ES for the remainder of their sentences. See pp. x-y.

Temporary Advisory Sentencing Guidelines

9. Rather than adopt another state's sentencing guidelines system, the Committee recommends using the sentencing guideline worksheets and notes it has developed for statewide use for the 11 crimes that consume a majority of the state's corrections resources. See pp. x-y.

10. The conversion table that the Committee has developed should be used when there is no sentencing guideline for a crime. See pp. x-y.

Sentencing Commission

11. The new Sentencing Commission should:

    a. monitor sentencing practices to modify sentencing guidelines according to public safety needs and changes in sentencing practices, and to compile data regarding anticipated needs;

    b. inform the legislature and other agencies of anticipated needs in corrections;

    c. work with the state legislature's budget office to cost out the impact of any proposed new criminal laws and changes such that the legislature make an informed decision on same;

    d. teach the new sentencing guidelines;

    e. issue statistics publishing what sentences offenders received, on which crimes, both statewide, and by geographic area, which reports should be distributed to all judges. See pp. x-y.

12. The new Sentencing Commission should have 17 voting members, and 3 ex officio members. A term of service on the Sentencing Commission should be for 3 years, the terms should be staggered, and there should be no limit on the number of terms that a member may serve. See pp. x-y.

13. The new Sentencing Commission should have a staff of 6 and a budget of approximately $400,000 per annum. See pp. x-y.

Extended Supervision and its Revocation

14. The strict supervision model recommended by the Governor's Intensive Sanctions Review Panel should be adopted for the initial stage of ES, and offenders may earn their way into lesser degrees of supervision as a result of good behavior. See pp. x-y.

15. Sanctions for violations of ES conditions should include: (a) alternatives-to-revocation, (b) "Time out," and (c) revocation. See pp. x-y.

16. "Time out" will involve confinement for a period of time not to exceed 90 days in an ES regional detention facility, if available, or if not available, county jail. Regional ES detention facilities should be constructed to house such offenders. See pp. x-y.

17. The revocation process should be shortened from an average of 84 days to an average of 71 days. See pp. x-y.

18. The administrative law judge ("ALJ"), who currently conducts revocation hearings and makes the revocation decision, should continue in that capacity. If the ALJ decides the offender on supervision should be revoked, a circuit judge should determine an appropriate time period for the offender to return to prison. See pp. x-y.

19. The current writ of certiorari process to challenge a revocation decision should not be altered. See pp. x-y.,

20, Judges should be able to change the conditions of ES. See pp. x-y.

Computer Modeling

21. The new Sentencing Commission should use and build upon the computer model which this Committee developed to discuss policy and forecast corrections population and costs. See pp. x-y.

Education of the Bench, the Bar, and the Public

22. The Committee should continue its planned education efforts throughout the state before and after December 3 1, 1999, the effective date of Truth-in-Sentencing. See pp. x-y.

Issues for Further Study

23. The DOC-Division of Community Corrections' Racine and Dane County experiments strengthening probation and parole supervision should be implemented in Milwaukee. See pp. x-y.

24. Increased corrections resources should be directed toward strengthening probation and parole supervision. See pp. x-y.

25. Alternatives-to-incarceration should be developed, funded, and implemented to relieve prison overcrowding and to decrease corrections costs. See pp. x-y.

26. Corrections costs may be controlled in the "new world" of Truth-in-Sentencing through:

a. education of the bench and the bar such that proper "new world" sentences are given;

b. strengthening probation and parole supervision and creating alternatives to prison to reduce the number of offenders sentenced to prison due to a lack of confidence in probation supervision; and

c. use of sentencing guidelines to funnel cases into their proper sentencing ranges. See pp. x-y.

27. The state should examine the racial misrepresentation within the corrections system. See pp. x-y.

I. The Legislation that enacted Truth-in-Sentencing, this Committee's Charges, and this Committee's Working Structure

A. 1997 Act 283, the original "Truth-in-Sentencing" law

Truth-in-Sentencing became law in Wisconsin on June 15, 1998 through 1997 Act 283. Act 283 does a number of things. The act:

1. Establishes a truthful system of sentencing (e.g., a 1 year sentence means 1 year in prison).

2. Abolishes parole.

3. Establishes extended supervision ("ES") for all offenders released from prison, and expands the penalty ranges to allow for ES.

4. Directs that prompt action be taken against those who violate conditions of their ES.

5. Eliminates intensive sanctions as a prison option.

6. Calls for the creation of a sentencing commission.

7. Establishes the Criminal Penalties Study Committee to make recommendations to the legislature and the governor necessary to implement Truth-in-Sentencing.

Act 283 also does not affect a number of things. The act:

1. Does not affect those offenders who commit crimes before December 3 1, 1999. They will be sentenced under the current law and be eligible for parole.

2. Does not affect probation as an option for criminal offenses.*

3. Does not redefine crimes.

4. Does not address fines, surcharges, and assessments.

Certain legislative policies are clear from Act 283. Wisconsin desires:

1. Truthful sentences (e.g., a 1 year sentence means 1 year in prison).

---

[2] Current law remains that probation is not an option for violation of a Class A felony.

2. Stricter supervision of every inmate upon release from prison.

3. Prompt action when those on extended supervision violate their terms of supervision.

4. A uniform system for classifying all Wisconsin felonies, including those in the criminal code, those not in the criminal code, and those in the drug code.

Some major changes to Wisconsin's criminal law by Act 283 are:

1. A new, bifurcated sentence structure has been created. Sentences will consist of a term of confinement in prison, followed by a term of extended supervision ("ES") in the community.

2. The maximum sentence lengths for all felonies is increased by 50%, or 1 year, whichever is greater, and the maximum term of confinement and extended supervision for all felonies under a bifurcated sentence is set as follows:

Class	Maximum Confinement	Maximum Extended Supervision	Statutory Maximum
A			Life
B	40	20	60
BC	20	10	30
C	10	5	15
D	5	5	10
E	2	3	5

3. The extended supervision portion of the bifurcated sentence may not be less than 25% of the length of the term of confinement in prison. The court may impose conditions on the ES term. An offender serving a bifurcated sentence is not eligible for parole, and must serve the entire term of confinement in prison without reduction for good behavior.

It is important to note that until Act 283 passed, Wisconsin operated under an **"indeterminate"** sentencing system. Under such a system, the sentence length imposed by a judge includes both time in prison and on parole. Offenders sentenced to prison, other than those sentenced to life, must serve a minimum of the greater of six months or 25% of the court-imposed sentence before becoming eligible for parole ("parole eligibility date"). The use of "good time" credit also affects the length of time an offender is imprisoned. The decision to grant discretionary parole (release from prison at any time between the parole eligibility date and the mandatory release date) is made by the Parole Commission. If discretionary parole is granted, the parolee is placed under DOC supervision for a period not to exceed the court-imposed sentence, less time already

served. Offenders who reach their mandatory release date without being paroled are also placed under parole supervision for a period not to exceed the court-imposed sentence.[3]

When Act 283 was enacted, a **"determinate"** sentencing system was implemented. Under the new structure, courts impose a bifurcated (two-part) sentence. The sentence will consist of a term of confinement in prison followed by a term of extended supervision in the community. The offender must serve the entire length of the bifurcated sentence, and is not eligible for parole.[4]

This 18-member Criminal Penalties Study Committee was created and charged with making recommendations concerning six topics:

a. Creation of a uniform classification system for all felonies, including felonies outside of the criminal code.

b. Classification of each felony and Class A misdemeanor in a manner that places crimes of similar severity into the same classification.

c. Consolidation of all felonies into a single criminal code.

d. Creation of a sentencing commission to promulgate advisory sentencing guidelines for use by judges when imposing a bifurcated sentence.

e. Development of temporary advisory sentencing guidelines for use by judges when imposing a bifurcated sentence.

f. Changing the administrative rules of the Department of Corrections to ensure that a person who violates a condition of ES is returned to prison promptly and for an appropriate period of time. [5]

Originally, this Committee was required to submit its report and recommendations to the legislature in the manner provided under Wis. Stat. sec. 13.172(2), and to the governor, no later than April 30, 1999. The report was to include any proposed legislation that is necessary to implement the recommendations made by the committee in its report.

The Committee found the original deadline unrealistic in light of the magnitude of the tasks assigned to it. There were a total of 585 crimes to be reclassified: 264 felonies within the criminal code; 220 felonies outside the criminal code; and 10 1 Class A

---

[3] See Legislative Fiscal Bureau Informational Paper # 55 pp. 2-4.
[4] Id. at pp. 4-7.
[5] A synopsis of 1997 Act 283 may be found at Wisconsin Legislative Council Information Memorandum 98-1 1, and Wisconsin Legislative Fiscal Bureau Informational Paper # 55, "Felony Sentencing and Probation," pp. 4-8

misdemeanors. Temporary sentencing guidelines took considerable time to develop; indeed, the former Wisconsin Sentencing Commission had taken more than five years to develop guidelines for 16 crimes. Further, it took other states between two and five years to do what this committee was asked to do in nine months, with a much smaller staff. Moreover, the committee had great difficulty in securing adequate and reliable data from the Department of Corrections ("DOC") and the Circuit Court Automation Project ("CCAP") to use as the committee studied. Finally, predicting the effect of changes to criminal classifications and sentencing guidelines was extremely complex. It took until late June 1999 to develop a satisfactory working computer model to predict the future number of prisoners, probationers, parolees, offenders on extended and the cost of incarceration and supervision.

For all of these reasons, the Committee requested a deadline extension from April 30th to August 3 1st, 1999. This request became Assembly Bill 200. On March 16, 1999, AB 200 passed the Assembly by a vote of 89 to 8. On May 27, 1999, AB 200 was recommended for approval by the Joint Finance Committee by a vote of 16 to 0. The Senate has not yet considered AB 200.

B. The Committee's Working Structure

To fulfill its statutory charges, the Committee was subdivided into five subcommittees:

Code Reclassification
Sentencing Guidelines
Extended Supervision Revocation
Computer Modeling
Education

Some Committee members served on more than one subcommittee.[6]

The purpose of the subcommittee structure was to efficiently complete the Committee's work. The first three subcommittees were formed to do the work to fulfill the six legislative charges. The **Code Reclassification Subcommittee** worked on creating a new classification system and arraying within that scheme crimes from the criminal code, the drug code, and crimes outside of the criminal code. The **Sentencing Guidelines Subcommittee** developed temporary advisory guidelines for the most litigated crimes, and recommended the format for a sentencing commission. The **Extended Supervision Revocation Subcommittee** studied the revocation process, and recommended how it can be improved and streamlined.

The last two subcommittees were formed to address challenges which arose during **the** committee's work. **The Computer Modeling Subcommittee** worked to develop computer software to accurately forecast the impact of certain policies on prison

[6] A list of which committee members served on each subcommittee is found at Appendix A.

population and cost. The **Education Subcommittee** has presented and will be presenting programs to government leaders, judges, the bar, and the public about Truth-in-Sentencing and this committee's report and recommendations.

At the second full Committee meeting in October 1998, it was agreed that the subcommittees would do the initial work on each charge, and bring back their recommendations to the full Committee for review and consideration. The full Committee would either approve the subcommittee's work or direct the subcommittee to continue its work given the full Committee's reactions. This process continued throughout the Committee's one year existence.

The full Committee met 19 times, including three 2-day meetings. Full committee meeting time totaled approximately 115 hours. The full Committee always met in person, usually in Madison, Wisconsin at the State Capitol.[7] Each full Committee meeting was transcribed, and minutes of each meeting were prepared and distributed to the committee members and any other interested persons.[8]

The subcommittees met individually, some more than others, depending on the scope of their task. At least 40 subcommittee meetings were held, often in person, but sometimes via videoconference or telephone conference call.

Each full Committee and subcommittee meeting was properly noticed pursuant to the open meetings law, Wis. Stat. ch. 19. An opportunity for public comment was provided for at each meeting. The Committee heard from some members of the public concerning its statutory charges, including law enforcement officials, representatives of the public defender's office, and victim's rights representatives.

The Committee employed one full-time attorney and one program and planning analyst. Employees from all areas of state government, including the Governor's office, the Legislative Reference and Fiscal Bureaus, individual legislators and their staffs, the Department of Administration, especially its Division of Hearings and Appeals, the Department of Corrections, especially its Bureau of Technology Management, the State Public Defender's Office, and the Department of Justice helped the Committee complete its work. Numerous outside consultants, paid by the Committee as well as paid for by federal grants, also helped the Committee complete its work. Without the help of these individuals, the Committee could not have fulfilled its statutory charges.

In the first stages of the Committee's work, it heard from representatives of a variety of different states about their experience in implementing Truth-in-Sentencing. These states included Minnesota, North Carolina, Virginia, Delaware, and Ohio.[9] These presentations educated Committee members on the ways other states had implemented

---

[7] A list of the full Committee meeting dates and places can be found at Appendix B.

[8] The transcripts of the Committee's meetings and copies of the committee's minutes are available for review in the Committee's offices at 819 N. 6th St., Rm. 834, Milwaukee, WI 53202, and will be transmitted to the State Historical Society.

[9] The vast majority of the cost and expenses associated with these visits were paid for through a federal technical assistance grant.

their versions of Truth-in-Sentencing. These reports took place at the Committee's October and November 1998 meetings. The Committee also heard special presentations concerning Wisconsin's drug code in December 1998, on probation and parole revocation procedures in January 1999, and on strengthening community corrections and what extended supervision should look like in July 1999.

At Committee meetings from February through July, subcommittees reported back on their work to the full Committee for review and consideration by Committee members. The conclusions of the Committee's study and its recommendations are related in subsequent sections of this report.

II. The Classification of Crimes

Statutory charges:

"*a. Creation of a uniform classification system for all felonies, including felonies outside of the criminal code.*

b. Classification of each felony and Class A misdemeanor in a manner that places crimes of similar severity into the same classification.

c. *Consolidation of all felonies into a single criminal code."*[10]

A. The History of Crime Classification in Wisconsin

1. 1977 Penalty Classification Legislation

The State of Wisconsin first undertook the process of uniform crime classification more than twenty years ago." In legislation which was passed in 1977 and which took effect on June 1, 1978, crimes and forfeiture offenses codified in the Wisconsin Criminal Code were placed in one of several uniform penalty classes.[12] Offenses codified elsewhere in the Statutes were not affected by the law.[13]

The 1977 law created five classes of felonies, three classes of misdemeanors, and four classes of forfeitures. The penalty structure for felony and misdemeanor classes was as follows:[14]

CLASS	MAXIMUM TERM OF IMPRISONMENT	MAXIMUM AMOUNT OF FINE
Class A Felony	Life	---
Class B Felony	20 years	---
Class C Felony	10 years	$ 10,000
Class D Felony	5 years	$ 10,000
Class E Felony	2 years	$ 10,000
Class A Misd.	9 months	$ 10,000
Class B Misd.	90 days	$ 1,000
Class C Misd.	30 days	$ 500

[10] See 1997 Wis. Act 283 sec. (l)(e)l-3.
[11] See 1977 Wis. Laws 173.
[12] The 1977 legislation classified all Criminal Code offenses with the exception of abortion (Wis. Stat. sec. 940.04) and removal of shopping cart (Wis. Stat. sec. 943.55). The latter was a new forfeiture offense that had been enacted earlier in the 1977 legislative session. Both of these offenses remain unclassified to this day.
[13] To this day Wisconsin Statutes employs a classified crime system for Criminal Code felonies and misdemeanors and a non-classified system for the scores of crimes codified elsewhere in the Statutes.
[14] See Wis. Stat. secs. 939.50 to 939.52 (1977).

The Legislative Council Notes to the 1977 penalty classification bill [15] articulate the organizing principles used to place crimes and forfeitures into the new penalty classes. Critical to the placement process was the degree of actual or potential harm involved in the commission of crime:

> Persons guilty of crimes resulting in death or serious physical harm to others are subject to heavy punishments. Other offenses involving less serious harm to persons have generally been considered more serious than crimes against property alone. However, given an equal degree of physical harm to persons, crimes involving actual or potential harm to both persons and property are punished more severely than offenses resulting in harm only to persons. Also, crimes involving actual or potential harm to a number of people or to the general public have been considered more serious than other offenses with a similar degree of harm but more limited in scope or application. [16]

2. Attributes of Classified Crimes

When the attributes of the 1977 crime classification system are analyzed, several features of that system may be observed:

- In each class provision is made for a maximum period of incarceration.
- Except for Class A and Class B felonies, provision is made in each class for a maximum fine.
- Except for Class A felonies, there are no mandatory penalties.
- There are no minimum penalties (presumptive or otherwise). [17]
- Except for Class A felonies, probation is an option for all felonies and misdemeanors.

An examination of the 1977 Criminal Code further reveals that, when the legislature enacted the penalty classification bill, there were no Chapter 939 penalty enhancers except for habitual criminality.'* Aggravating circumstances attending the

---

[15] S.B. 14 (1977).
[16] S.B. 14 at 4-5 (1977).
[17] The 1977 legislation specifically ridded the Criminal Code of minimum penalties. See, e. g., Wis. Stat. sec. 940.02 (1975) (penalty expressed as imprisonment for not less than five nor more than25 years).
[18] Wis. Stat. sec. 939.62 (1977). Concealing identity existed but was codified at Wis. Stat. sec. 946.62 (1977) and classified as a crime.

commission of any crime were matters argued by the prosecutor and considered by the court when imposing sentences within the statutory maximum for the crime of conviction.

3. Impact of Subsequent Legislation on the 1977 Crime Classification System

The Criminal Code today looks very different from that which was classified in 1977. In the twenty-plus years since Wisconsin first undertook the process of classification, a surge of criminal law legislation has been enacted which has greatly increased the number of crimes that have had to be placed into the relatively few classes of felonies and misdemeanors. While it is true that a new felony class was added to the original five (Class BC), it has been used to classify but five offenses.

Beyond the exponential growth in the number of crimes, the Criminal Code today looks very different from that into which crime classification was introduced in 1977 on a number of additional fronts. Wisconsin has participated in the national trend of enacting countless penalty enhancers which increase the maximum punishment for the underlying crime. Add to that the introduction (or in some cases reintroduction) of provisions for minimum mandatory penalties, presumptive minimum penalties, "three strikes," "two strikes," penalty doublers, mandatory consecutive sentences, parole eligibility determinations made by the court, lifetime supervision of certain sex offenders, etc. and the conclusion is inescapable that the world of penalties today is vastly different and enormously more complex than that envisioned when crime classification first came to Wisconsin. It is in this context that the legislature enacted Act 283 and gave to the Criminal Penalties Study Committee the task of bringing some uniformity to the process of crime classification and the penalty structures that attach to the various classifications.

B. Act 283 Mandates for Crime Classification

Among the charges given to the Criminal Penalties Study Committee by the Wisconsin legislature are the following:

- Creating a uniform classification system for all felonies, including felonies outside of the criminal code. [19]
- Classifying each felony and Class A misdemeanor in a manner that places crimes of similar severity into the same classification.[20]

In the text which follows the Committee responds to these legislative mandates. First, it proposes a whole new system for classifying felony offenses. Next it describes the method used to convert almost 600 crimes to the new system. Finally, it proposes a specific crime classification for each of these offenses.

[19] 1997 Wis. Act 283 sec. 454(1)(e)1.
[20] 1997 Wis. Act 283 sec. 454(1)(e)2.

With regard to misdemeanor offenses, the limitations of Act 283's mandates should be noted. The legislature directed the Committee to study the penalties "for all felonies and Class A misdemeanors."[21] Further, it charged the committee to classify "each felony and Class A misdemeanor in a manner that places crimes of similar severity into the same classification."[22] However, it did not speak to the classification of misdemeanors that are presently unclassified. The latter, which constitute a large number of offenses, are scattered throughout the Wisconsin Statutes other than in the Criminal Code.

Given the magnitude of its other duties and a challenging time frame within which to conclude them, the Committee did not venture beyond its charge to explore the classification of unclassified misdemeanors. This means that even if all of the Committee's recommendations regarding the classification of crimes are implemented, there will still be a considerable number of offenses (non-Criminal Code misdemeanors) that will remain unclassified. Classifying them may be a worthy endeavor for the future so that all Wisconsin crimes (wherever codified in the Statutes) are classified in a uniform system of crime classification.

C. Proposal for a New Felony Classification System

1. The Need for a New Classification System

As the Committee undertook the process of classifying nearly 500 felony offenses, it quickly became clear that current law does not have enough felony classes. There are only six felony categories (A, B, BC, C, D and E) and, as a practical matter, the vast majority of Criminal Code felonies are classified in only four of them (B, C, D and E). Given the number of crimes that must be placed in these few classes, the result is that a given category will have felonies classified within it which address considerably different kinds of behavior causing (or potentially causing) considerably different harm. For example, the present Class C category (10 years or $10,000 or both) contains robbery, burglary and forgery.

Another problem with the present classification system is that the penalty differences among them are too great. As a result of various changes enacted since the original penalty classification system was adopted in 1 977,[23] the structure of felony classes (before treatment by 1997 Act 283) now appears as follows:

[21] 1997 Wis. Act 283 sec. 454(l)(e).
[22] *1997* Wis. Act 283 sec. 454(1)(e)2.
[23] [Need to list these changes.]

CLASS	MAXIMUM TERM OF IMPRISONMENT	MAXIMUM AMOUNT OF FINE
Class A Felony	Life	---
Class B Felony	40 years	---
Class BC Felony	20 years	$ 10,000
Class C Felony	10 years	$ 10,000
Class D Felony	5 years	$ 10,000
Class E Felony	2 years	$ 10,000

While it may appear that this system has a nicely graduated approach to felony penalties, some of its infirmities become clear when the allocation of offenses to each category are examined. Under current law only five felonies are assigned to Class BC. As a practical matter this means that for purposes of classifying mid-level and more serious felonies (not including those for which life imprisonment is the penalty), there is a 30-year gap between the maximum for Class C and that for Class B.

The five-year gap between Class D and C may not seem unreasonable in the current world of indeterminate sentencing; however, as the move is made to the determinate approach of Truth-in-Sentencing, this gap too is considerable. The classification system needs more categories in order to fill these gaps and allow the legislature's charge to "place crimes of similar severity into the same classification"[24] to be fulfilled.

Finally, given the legislature's charge to classify the more than 200 felonies which are codified other than in the Criminal Code, the need for more classifications becomes even starker. For example, drug delivery and possession with intent to deliver are penalized according to the amount of the drug delivered or possessed. The legislature has created numerous amount categories and assigned specific penalties for each. To classify these numerous graduated offenses in a uniform classification system requires more felony classes than are available under present law. Beyond drug offenses are the more than 150 miscellaneous felonies scattered throughout the Statutes. Most of these are lower end felonies but the need to distinguish severity among them requires more felony categories on the lower end of the classification system.

For all of these reasons the Committee recommends that the present system of six felony classes be expanded to nine classes. This allows for closure of the large gaps that exist in present law. It also allows for the more precise and discriminating classification of the several hundred felonies that occupy the middle and lower ranges of the spectrum. In the chart which follows the proposed penalties for each class are presented.

---

[24] 1997 Wis. Act 283 sec. 454(1)(e)2.

2. Proposed Penalty Structure:

THE A-I FELONY CLASSIFICATION SYSTEM

In the terminology of 1997 Act 283, the maximum term of confinement plus the maximum period of extended supervision equals the maximum period of time that a person could be imprisoned on a sentence.

FELONY CLASS	MAXIMUM TERM OF CONFINEMENT	MAXIMUM EXTENDED SUPERVISION	MAXIMUM FINE	MAXIMUM PROBATION
A	Life		---	---
B	40 years	20 years	---	40 years
C	25 years	15 years	$100,000	25 years
D	15 years	10 years	$100,000	15 years
E	10 years	5 years	$50,000	10 years
F	7.5 years	5 years	$25,000	7.5 years
G	5 years	5 years	$25,000	5 years
H	3 years	3 years	$10,000	3 years
I	18 mos.	2 years	$10,000	3 years

3. Observations About the New A-I Classification System

Terms of Confinement. Whenever a court sentences a person to prison for a felony committed on or after December 3 1, 1999, it must (except in the case of a life imprisonment felony or one involving application of the persistent repeater law[25]) bifurcate the sentence, specifying both a term of confinement and a term of extended supervision. In the system proposed by the Committee, the maximum terms of confinement are graduated rather evenly through the spectrum of felony offenses. With the exception of Class A felonies, there is no minimum period of confinement in any category. This means that in the exercise of judicial discretion probation is an option in Classes B through I. However, if the court sentences the defendant to prison, the minimum period of confinement is one year.[26]

Fines. When the Wisconsin legislature classified Criminal Code felonies and misdemeanors in 1977, it provided for $10,000 maximum fines for felonies in Class C, D and E and for misdemeanors in Class A. No fines were established for felonies in Class A and B. When the new BC felony class was added years later, the same maximum fine was made applicable to it as well. The $10,000 maximum has never been adjusted.

The Committee recommends that maximum fines in the A-I classification system be established in the following amounts:

Class A felony	No provision for a fine
Class B felony	No provision for a fine
Class C felony	$100,000 maximum fine
Class D felony	$100,000 maximum fine
Class E felony	$50,000 maximum fine
Class F felony	$25,000 maximum fine
Class G felony	$25,000 maximum fine
Class H felony	$10,000 maximum fine
Class I felony	$10,000 maximum fine
Class A misdemeanor	$10,000 maximum fine

The Committee acknowledges that fines play no role in the disposition of most felony cases. However, it believes that the schedule depicted above should be implemented for several reasons. First, it acknowledges the differing severity of the crimes in the various felony categories. Second, it reflects the changing value of money over time. Third, it addresses concerns that a $10,000 fine for certain more serious crimes is simply not enough for certain offenders, for example, corporations convicted of reckless or negligent homicide (of which there have been several). Finally, it recognizes

[25] Wis. Stat. sec. _________ (not to be confused with regular repeater law).
[26] Wis. Stat. sec. 973.01(2)(b).

that with the classification of drug offenses, it is necessary to have sufficient fine exposure for higher-end offenses.

Certain felonies codified outside the Criminal Code have much higher fines than those in the proposed schedule. In specific instances the Committee has recommended that those higher fines be maintained.[27]

Extended Supervision. The Committee recommends that statutory caps be placed on the maximum amount of extended supervision time the judge may impose at sentencing as follows:

Class A felony	---[28]
Class B felony	20 years
Class C felony	15 years
Class D felony	10 years
Class E felony	5 years
Class F felony	5 years
Class G felony	5 years
Class H felony	3 years
Class I felony	2 years

The Committee believes that a fair reading of Act 283 would in some instances allow for much longer periods of extended supervision. Class B felonies are a useful example. Under Act 283 the maximum possible imprisonment for these felonies is 60 years in prison, but not more than 40 years of initial confinement absent revocation.[29] While at first blush this appears to leave 20 years for extended supervision, the act does not limit extended supervision to 20 years. Thus a court could theoretically sentence a person to one year in prison followed by 59 years of extended supervision.

This possibility may not have been intended; yet Act 283 seemingly permits it. The Cotnmittee suggests that limits be placed on extended supervision that allow for sufficient supervision given the nature of the crimes proposed for inclusion in each of the felony classes and the public safety and offender rehabilitation goals that underlie the notion of supervision upon release from prison. The Committee believes these purposes of extended supervision can realistically be accomplished within the proposed limits without consuming the resources of supervision so far into the future that no one knows what they will even be.

---

[27] See, e.g., Part II.F.2, pp. _ _ _

[28] When a court sentences a person for a Class A felony, it must make an extended supervision eligibility date determination. See 1997 Wis. Act 283 sec. 424. However, no such determination will be made for persons sentenced under the persistent repeater law (Wis. Stat. sec. 939.62(2m)) because they are not eligible for extended supervision. See 1997 Wis. Act 283 sec. _______

[29] *See* 1997 Wis. Act 283 secs. 322 and 4 19.

Act 283 makes no provision for extended supervision for misdemeanants who are sentenced to prison. The Committee believes that those misdemeanants who are dangerous enough to be sent to prison should be subject to supervision upon release from prison. Both community safety and offender rehabilitation goals would be advanced by such supervised transitioning upon release from prison. Correcting legislation is attached to this report.

Probation. Current law provides that the original term of probation for a person convicted of a felony shall be for not less than one year nor more than either the statutory maximum term of imprisonment for the crime or three years, whichever is greater.[30] If the defendant is convicted at the same time of two or more crimes, including at least one felony, the maximum original term of probation may be increased by one year for each felony conviction.[31] There is also a specific schedule of original terms of probation for those convicted of one or more misdemeanors.[32]

Act 283 did not amend the statutes regulating maximum original terms of probation. The Committee has considered them and recommends that the maximum original term of probation for Class B, C, D, E, F, G, and H felonies be linked to the maximum term of confinement for crimes in those classes. Probation is not an option for Class A felonies and therefore Class A is omitted from the list in the preceding sentence. With regard to Class I felonies, the Committee recommends that that the maximum original term of probation be three years.[33] No change is recommended in the statute requiring that a term of probation in a felony case be for a minimum of one year. Nor is there any recommendation for amending the statutes governing the length of probation in misdemeanor cases.

If the Committee's recommendations are adopted, the maximum original term of probation for a single felony would be as follows:

Class A felony	---[34]
Class B felony	**40 years**
Class C felony	**25 years**
Class D felony	15 years
Class E felony	10 years
Class F felony	**7.5 years**
Class G felony	**5 years**
Class H felony	3 years
Class I felony	**3 years**

[30] Wis. Stat. sec. 973.09(2)(b)1.
[31] Wis. Stat. sec. 973.09(2)(b)2.
[32] See Wis. Stat. sec. 973.09(2)(a).
[33] This recommendation is consistent with current law which provides that the maximum original term of probation shall be for not more than the maximum period of imprisonment for the crime of conviction or three years, whichever is greater. See Wis. Stat. sec. 973.09(2)(b)1.
[34] Probation is not an available disposition for Class A felony offenses. See Wis. Stat. sec. 973.09(1)(c).

Having considered the recommended assignment of felonies in the new A-I felony classification system, the Committee believes that the dual objectives of probation (rehabilitation of the offender and protection of the state and community interest)[35] can be achieved within the time periods described above.

4. Method of Converting Crimes to the New A-I Classification System and Factors Influencing the Classification of Crimes

Crimes were initially placed in the new A-I classification system by determining the mandatory release (M.R.) date under current law when a court imposes the maximum sentence. As a general rule M.R. is fixed by statute at two-thirds of the sentence actually imposed.[36] For the offender who receives the maximum sentence, M.R. is two-thirds of that maximum. Service of the sentence to M.R. reflects the longest period the defendant can be held in prison before being mandatorily paroled.[37] That parole is subject to revocation and the defendant may be returned to prison if conditions of parole are violated.

The Committee concluded that the maximum sentence of incarceration for each crime in the new Truth-in-Sentencing system ought to roughly parallel the maximum the person could serve in prison under the current indeterminate sentencing law before reaching M.R. To allow for the worst case scenario of a prisoner who under current law is held to M.R., the Committee applied the M.R. converter to the maximum possible sentence under current law before classifying each crime in the new A-I classification system. Once this initial calculation using M.R. was accomplished, the Committee then applied the criteria described below to determine whether any class adjustments were necessary.

The Committee believes that use of the M.R. converter to locate crimes in the new A-I classification system in no way conflicts with its understanding of the legislative intent underlying the movement to Truth-in-Sentencing. The clear message of Act 283 is that the legislature wants "absolute truth" in the sentencing process such that everyone (judges, prosecutors, defense attorneys, defendants, victims, witnesses, corrections officials and the public) knows that the offender will serve the entirety of the prison sentence and subsequent period of extended supervision as ordered by the court at sentencing. Act 283 does not require the imposition of longer prison sentences nor does it suggest that offenders should be held in confinement for periods of time longer than under current law. What it requires is "truth" in the meaning of sentences and the Committee believes its method for classifying crimes is fully compatible with that requirement. In its view use of present law mandatory release to classify crimes in the new A-I classification system maintains consistency in the maximum time an inmate can

[35] See State v. Miller, 175 Wis. 2d 204,499 N. W.2d 215 (Ct. App. 1993).

[36] Wis. Stat. sec. 302.1 1(1). -There is no mandatory release for persons sentenced to life imprisonment. See Wis. Stat. sec. 302.1 l(lm).

[37] For certain serious felonies mandatory release upon service of 2/3rds of the sentence is presumptive but may be denied by the parole commission. See Wis. Stat. sec. 302.1 1(1g).

serve in prison prior to first release as Wisconsin moves from an indeterminate sentencing system to a Truth-in-Sentencing system.

Example: Under current law the offense of burglary is classified as a Class C felony for which the maximum possible sentence of incarceration is 10 years. If the judge sentences the defendant to the full lo-year term and he or she is held in custody until M.R., release to parole will occur after 6 2/3rds years. Using 6 2/3rds as the "M.R. converter," the closest felony class in the new A-I system is Class F, for which the maximum period of incarceration is 7.5 years. Thus, as an initial matter, burglary would be categorized in Class F and the defendant sentenced to the maximum could actually serve slightly more time in prison than a burglar sentenced to the maximum under current law who serves to M.R. Following release from the institution, the defendant will be subject to extended supervision for up to 5 years for this Class F offense. Under the old law, parole supervision was a maximum of 3 1/3 years, but ES supervision maximum of 5 years under the new law. Thus, under this proposal, the maximum possible period of time of imprisonment for burglary has been increased.

Felony Class Adjustments. After application of the M.R. converter to initially place a crime in one of the new A-I classes, the Committee then considered whether an adjustment up or down was necessary so that crimes of similar severity are classified together.[38] This was done in response to a specific charge from the legislature.[39] In making its final determination about the classification of offenses, the Committee also endeavored to:

- Allow enough incarceration exposure for the "worst case-worst offender" scenario in the single count context.[40] In making this assessment the Committee recognizes that the vast majority of crimes are less serious than the "worst case" and are committed by someone other than the "worst offender." For these situations the appropriate disposition within the statutory maximum for the crime of conviction is left to judicial discretion (as assisted by sentencing guidelines to the extent guidelines are available). However, the Committee also recommends preservation of the habitual criminality statute[41] and certain penalty enhancers to allow for those cases where the maximum penalty for the underlying crime is insufficient.

---

[38] The Committee utilized numerous tables to depict the flow of crimes through the proposed A-I classification system. Some of these are included in this report. The tables allowed the Committee to verify that related crimes are properly positioned in the classification system according to severity and to fulfill its charge to classify crimes of like severity in the same felony class.

[39] See 1997 Wis. Act 283 sec. 454(1)(e)2.

[40] The Committee recognizes that in many cases the defendant faces sentencing on multiple counts. However, in the process of classifying offenses, it had to determine the appropriate maximum sentence for each felony and Class A misdemeanor in the context of the defendant who faces sentencing on a single count. As a practical matter, there was no other way to approach the classification task.

[41] Wis. Stat. sec. 939.62.

- Show proper deference to judgments already made by the legislature about the relative severity of offenses.

- Classify crimes that involve death or serious injury (or the potential for such harm) in higher categories than those involving offenses against property or other non-violent behavior.

- Classify crimes involving similar harms according to the state of mind of the actor at the time of the criminal act.

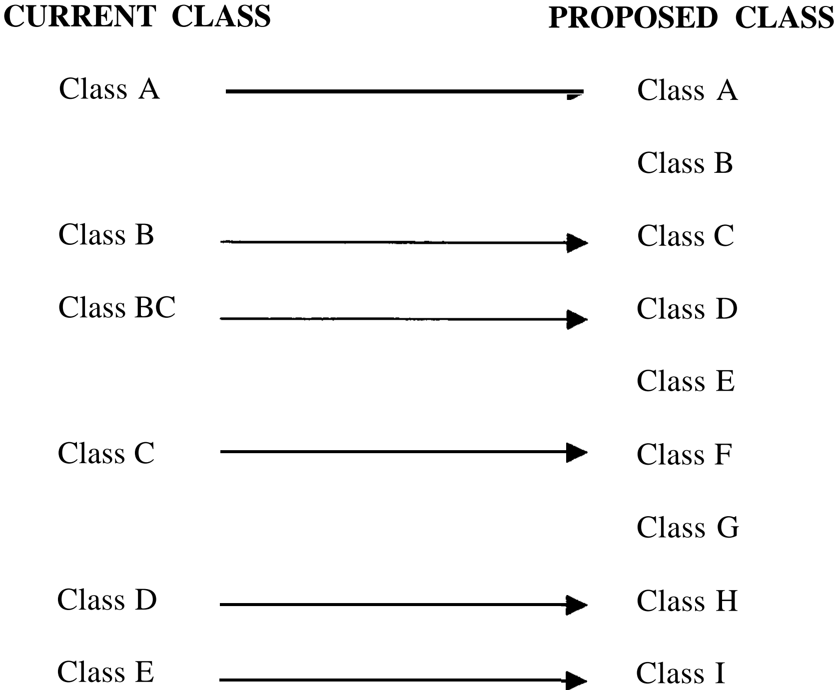
- Consider data about sentencing patterns and time actually served for offenses under current law when such data was available and when the Committee had some measure of confidence in its reliability.

- Account for the political reality that its recommendations must ultimately survive the scrutiny of both the legislature and the governor in order to become law.

D. Classification of Criminal Code Felonies

1. Introduction

When the mandatory release (M.R.) converter is applied to move crimes from the six felony classes under current law to the proposed nine-class system, the natural flow of crimes may be depicted as follows:



Application of the M.R. converter thus means that current Class A felonies flow naturally to proposed Class A, current Class B felonies flow naturally to proposed Class C, current Class BC felonies flow naturally to proposed Class D, current Class C felonies flow naturally to proposed class F, current Class E felonies flow naturally to proposed Class H, and current Class E felonies flow naturally to proposed Class I. Although a crime in the new system may have a class designation different from present law, the impact of the natural flow depicted above is that the maximum time of confinement in prison until first release is roughly the same.

As a result of applying the M.R. converter, no existing Criminal Code crimes have a natural placement in proposed Class B, E or G. These "empty" categories were thus available to the Committee when application of its classification criteria suggested that a crime needed an upward or downward adjustment from wherever the M.R. converter naturally placed it. These "empty" categories were also very useful when the Committee undertook the task of classifying drug crimes and other felonies that are presently unclassified.

Before presenting its proposal for the classification of Criminal Code felonies (and all other felonies for that matter), the Committee makes one further introductory observation. The classification of a felony offense establishes the maximum incarceration, maximum fine, and maximum period of extended supervision when the court sentences a defendant on a **single count.** If a criminal episode involves the commission of several crimes, the defendant will upon conviction face multiple sentences which may either be concurrent with or consecutive to one another.

2. Proposed Classification of Criminal Code Felonies

COLOR CODES

ENTRIES IN GREEN REFLECT UPWARD CLASS ADJUSTMENT AFTER APPLICATION OF M.R. CONVERTER.

ENTRIES IN BLUE REFLECT NEW CRIMES RECOMMENDED FOR ENACTMENT BY THE LEGISLATURE OR EXISTING CRIMES FOR WHICH SIGNIFICANT AMENDMENTS ARE PROPOSED.

ENTRIES IN RED REFLECT DOWNWARD CLASS ADJUSTMENT AFTER APPLICATION OF M.R. CONVERTER.

ENTRIES IN BLACK REFLECT THE NATURAL PLACEMENT OF CRIMES IN A-I SYSTEM AFTER APPLICATION OF THE M.R. CONVERTER.

NOTE: Each entry in green and red is accompanied by a parenthetical which indicates "from Red." and green entries mean that an adjustment has been made either upward (green) or downward (red) from the felony class where a crime would naturally be placed by application of the M.R. converter. The "from" indicates where natural placement would be.

CLASS A FELONIES (LIFE)

1 st Degree Intentional Homicide	940.0 1 (l)(a) & (b)
Partial-Birth Abortion	940.16(2)
Absconding after being adjudicated delinquent for a Class A felony[42]	946.50(1)
Treason	946.01(1)

[42] This crime appears in each of the felony classes. It addresses the problem of the juvenile who has been adjudicated delinquent but then absconds before his/her dispositional hearing. See discussion of juvenile absconding at p. _______

CLASS B (40 MAX PRISON; 20 E.S.)

Absconding after being adjudicated delinquent for a Class B felony [43]	946.50(2)
Conspiracy to commit a crime for which the penalty is life imprisonment (from C)	939.3 1
Attempt to commit a crime for which the penalty is life imprisonment (from C)	939.32(l)(a)
1st Degree Reckless Homicide (from C)	940.02(1) and (lm)
2nd Deg. Intentional Homicide (from C)	940.05(1) & (2g)
1st Degree Sexual Assault (from C)	940.225(1)
1st Deg. Sex Assault of a Child (from C) [44]	948.02(1)
Repeated Sexual Assault of Same Child (from C) [45]	948.025
Kidnapping (Aggravated) (from A)	940.3 1(2)(a)
Hostage Taking (Aggravated) (from A)	940.305(1)

CLASS C (25 MAX PRISON; 15 E.S.)

1st Deg. Reckless Homicide ("Len Bias" Law)	940.02(2)
Mayhem	940.2 1
Abuse of Vulnerable Adult (intentional or reckless maltreatment resulting in death)	940.285(2)(b)1g
Abuse & Neglect of Patients & Residents (intentional or reckless abuse or neglect resulting in death of "vulnerable" person)	940.295(3)(b) 1 g
Hostage Taking (Unaggravated)	940.305(2)
Kidnapping (Unaggravated)	940.3 1(1) & (2)(b)
Arson of buildings	943.02
Carjacking	943.23(1g) and (lm)
Armed Robbery	943.32(2)
Absconding after being adjudicated delinquent for a Class C felony [46]	946.50(3)

[43] This crime appears in each of the felony classes. It addresses the problem of the juvenile who has been adjudicated delinquent but then absconds before his/her dispositional hearing. See discussion ofjuvenile absconding at p. ._______

[44] This crime has a 5-year enhancer if the defendant is a person responsible for the welfare of the child. The Committee recommends that this enhancer be recast as a statutory sentencing aggravator. The underlying offense is classified as a B felony and 40 years' exposure is sufficient to deal with circumstances where the aggravator is present.

[45] This crime should be a Class B felony only if the proof demonstrates that the repeated assaults all constituted violations of the First Degree Sexual Assault of a Child statute.

This crime has a 5-year enhancer if defendant is a person responsible for the welfare of the child. The Committee recommends that the enhancer be recast as a statutory sentencing aggravator. The underlying offense is classified as a B felony and 40 years' exposure is sufficient to deal with circumstances where the aggravator is present.

CLASS C (25 MAX PRISON; 15 E.S.) (continued)

Repeated Sexual Assault of Same Child [47]	948.025
Abduction of Another's Child by Force or Threat of Force	948.30(2)
2nd Degree Sexual Assault (from D)	940.225(2)
2nd Deg. Sex Assault of Child (from D)[48]	948.02(2)
Incest (from D)	948.06
Tampering with Household Products (causing death) (from A)	941.327(2)(b)4
Homicide by Intoxicated Use of Vehicle (Repeater with 1 or more Prior OWI-type convictions) - NEW CRIME[49]	940.09

CLASS D (15 MAX PRISON; 10 E.S.)

Absconding after being adjudicated delinquent for a Class D felony"	946.50(4)
Continuing Criminal Enterprise	946.85(1)
Child Enticement	948.07
Soliciting a Child for Prostitution	948.08
2nd Degree Reckless Homicide (from F)	940.06
Homicide by Intoxicated Use of Firearm (from H)	940.09(1g)
1st Degree Reckless Injury (from F)	940.23(1)(a) & (b)
Child Neglect Resulting in Death (from F)	948.21(1)

---

[46] This crime appears in each of the felony classes. It addresses the problem of the juvenile who has been adjudicated delinquent but then absconds before his/her dispositional hearing. See discussion of juvenile absconding at p. ._______

[47] This crime should be a Class C felony if the evidence shows three or more violations of the Sexual Assault of a Child statute committed against the same victim within a specified period of time but fails to demonstrate that at least three of the repeated assaults all constituted violations of the First Degree Sexual Assault of a Child statute.

This statute has a 5-year enhancer if the defendant is a person responsible for the welfare of the child. The Committee recommends that this enhancer be recast as a statutory sentencing aggravator. The underlying offense is classified as a B felony under and 40 years' exposure is sufficient to deal with circumstances where the aggravator is present.

[48] This statute has a 5-year enhancer if the defendant is a person responsible for the welfare of the child. The Committee recommends that this enhancer be recast as a statutory sentencing aggravator. The underlying offense is classified as a C felony and 25 years' exposure is sufficient to deal with circumstances where the aggravator is present.

[49] See discussion of homicide crimes at p. ______ for a description of this offense.

This statute has a penalty doubler if there was a minor passenger in vehicle at the time of the offense. The Committee recommends that this penalty doubler be recast as a statutory sentencing aggravator. The underlying offense is classified as a C felony and 25 years' exposure is sufficient to deal with circumstances where the aggravator is present.

[50] This crime appears in each of the felony classes. It addresses the problem of the juvenile who has been adjudicated delinquent but then absconds before his/her dispositional hearing. See discussion of juvenile absconding at p. ._______

CLASS D (15 MAX PRISON; 10 E.S.) (continued)

Contributing to Delinquency of a Child (if death is a consequence (from F)	948.40(4)(a)
Homicide by Intoxicated Use of Vehicle (No Prior OWI-Type Record) (from C)[51]	940.09(1)
Abuse of Vulnerable Adult (negligent maltreatment resulting in death)	940.285(2)(b)1g[52]
Abuse & Neglect of Patients & Residents (negligent abuse or neglect resulting in death of "vulnerable" person)	940.295(3)(b)1g[53]

CLASS E (10 MAX PRISON; 5 E.S.)

Absconding after being adjudicated delinquent for a Class E felony[54]	946.50(5)
Abortion	940.04(2)[55]
Fleeing an Officer Causing Death (from H)	346.04(3) & 346.1 7(3)(d)[56]
Abuse & Neglect of Patients & Residents (intentional, reckless or negligent abuse or neglect causing great bodily harm to a vulnerable person) (from F)	940.295(3)(b)1m
Robbery (Unarmed) (from F)	943.32(1)
Contributing to Death: Obstructing Emergency or Rescue Personnel (from F)	941.37(4)
Engaging in Racketeering Activity (from F)	946.84(1)
Physical Abuse of a Child (intentionally causing great bodily harm) (from F)	948.03(2)(a)
Abduction of Another's Child (from F)	948.30(1)

---

[51] See discussion of homicide crimes at p. ______ for a description of this offense.
This statute has a penalty doubler if there was a minor passenger in vehicle at the time of the offense. The Committee recommends that this penalty doubler be recast as a statutory sentencing aggravator. The underlying offense is classified as a D felony and 15 years' exposure is sufficient to deal with circumstances where the aggravator is present.

[52] This crime is listed as "new" because it breaks out negligent maltreatment resulting in death and classifies it at a lower level than intentional or reckless maltreatment resulting in death.

[53] This crime is listed as "new" because it breaks out negligent abuse or neglect resulting in death and classifies it at a lower level than intentional or reckless abuse or neglect resulting in death.

[54] This crime appears in each of the felony classes. It addresses the problem of the juvenile who has been adjudicated delinquent but then absconds before his/her dispositional hearing. See discussion of juvenile absconding at p. ______

[55] Sec. 940.04(2) is part of the pre-Roe v. Wade statute. The form of the crimes codified in sec. 940.04 date back to the 1956 revision of the Criminal Code. When the legislature instituted a classification system for Criminal Code felonies and misdemeanors in 1977, it did not classify the crimes in sec. 940.04. 1997 Wisconsin Act 283 charges the Criminal Penalties Study Committee with classifying all felonies. Thus these crimes are now recommended for classification. However, the Committee recommends that the legislature independently study whether sec. 940.04 should be repealed given the fact that post-Roe v. Wade abortion statutes now exist at secs. 940.13 and 940.15.

[56] See discussion of Fleeing an Officer at p. ______.

CLASS E (10 MAX PRISON; 5 E.S.) (continued)

Aggravated Burglary (from C)	943.10(2)
Aggravated Battery	NEW[57]
Aggravated Battery to Unborn Chiid	NEW[58]

CLASS F (7.5 MAX PRISON; 5 E.S.)

Solicitation: Crime for which Penalty is Life Imprisonment	939.30(2)
Mutilating a Corpse	940.1 l(1)
Endangering Safety: Discharge Firearm from Vehicle	941.20(3)(a)
Sexual Exploitation by Therapist	940.22(2)
Abuse of Vulnerable Adults (intentional, reckless or negligent maltreatment causing great bodily harm)	940.285(2)(b)1m
Abuse & Neglect of Patients & Residents (intentional abuse or neglect causing great bodily harm)	940.295(3)(b)1r
Modifying Firearm to Make It a Machine Gun	941.26(1m) & (2)(b)
Possession of Explosives	941.31(1)
Administering Dangerous/Stupefying Drug to Facilitate Crime	941.32
Tampering with Household Products (causing great bodily harm)	941.327(2)(b)3
Burglary (Unaggravated)	943.10(1)
Loan Sharking	943.28
Unlawful Receipt of Payments to Obtain Loan for Another (<$2500)	943.62(4)(c)
Computer Crimes (risk of death or great bodily harm to another)	943.70(2)(b)4
Pandering (if compensated from earnings of prostitute)	944.33(2)
Sabotage	946.02(1)
Sedition	946.03(1)
Assaults by Prisoners	946.43
Public Officer or Employee Assisting or Permitting Escape	946.44(lg)
Bringing Firearm into Prison or Jail; Transferring Firearm to Prisoner	946.44(1m)
Failure to Prevent Sexual Assault of a Child	948.02(3)

[57] The proposed version of Aggravated Battery is similar to that codified in 940.19(5). The proposed statute would read as follows: "Whoever causes great bodily harm to another by an act done with intent to cause great bodily harm to that person or another is guilty of a Class E felony." See discussion of the general battery statutes at p. .______

[58] The proposed version of Aggravated Battery to Unborn Child is similar to that codified in 940.195(2). The proposed statute would read as follows: "Whoever causes great bodily harm to an unborn child by an act done with intent to cause great bodily harm to that unborn child, to the woman who is pregnant with that unborn child or another is guilty of a Class E felony." See discussion of the general battery statutes at p. ______.

CLASS F (7.5 MAX PRISON; 5 E.S.) (continued)

Physical Abuse of a Child (intentionally causing bodily by conduct which creates high probability of great bodily harm)	94803(2)(c)
Failure to Prevent Great Bodily Harm to a Child	94803(4)(a)
Causing Mental Harm to a Child	948.04
Sexual Exploitation of a Child	948.05(1), (lm) & (2)[59]
Causing a Child under 13 to View or Listen to Sexual Activity	948055(2)(a)
Child Sex Offender Working with Children	948.13(2)
Interference with Custody of Child with Intent to Deprive Custody Rights; Concealing Child	94831(1)(b) & (3)
Fleeing an Officer Causing Great Bodily Harm (from I)	346.04(3) & 346.17(3)(c)[60]
2nd Degree Reckless Injury (from H)	940.23(2)(a) & (b)
Injury by Intoxicated Use of Vehicle (from H)[61]	940.25
1st Deg. Reck. Endang. Safety (from H)	941.30(1)
Absconding after being adjudicated delinquent for a Class F felony	NEW[62]

CLASS G (5 MAX PFUSON; 5 E.S.)

Homicide:Neg. Use of Weapon (from H)	940.08(1) & (2)
Homicide:Neg. Use of Vehicle (from I)	940.10(1) & (2)
Hiding a Corpse (from H)	940.1 l(2)
3rd Degree Sexual Assault (from H)	940.225(3)
Abuse of Vulnerable Adult (intentional maltreatment under circumstances likely to cause great bodily harm) (from H)	940.285(2)(b) 1 r
Abuse & Neglect of Patients & Residents (intentional abuse under circumstances that are likely to cause great bodily harm) (from H)	940.295(3)(b)1r
Stalking (aggravated)[63] (from H)	940.32(2m) & (3m)
Felony Intimidation of a Witness (from H)	940.43

[59] The classification of the crimes codified in sec. 948.05 includes amendments to that statute enacted in 1999 Wisconsin Act 3.

[60] See discussion of Fleeing an Officer at p _____.

[61] This statute has a penalty doubler if there was a minor passenger in vehicle at the time of the offense. The Committee recommends that this penalty doubler be recast as a statutory sentencing aggravator. The underlying offense is classified as a F felony and 7.5 years' exposure is sufficient to deal with circumstances where the aggravator is present.

[62] This crime appears in each of the felony classes. It addresses the problem of the juvenile who has been adjudicated delinquent but then absconds before his/her dispositional hearing. See discussion of juvenile absconding at p. _______

[63] The crime of stalking is aggravated if the defendant intentionally gains access to certain records in order to facilitate the violation or if defendant has a prior stalking or harassment conviction.

CLASS G (5 MAX PRISON; 5 E.S.) (continued)

Felony Intimidation of a Victim (from H)	940.45
Possession of Firearm by Felon (from I)	941.29
2nd Deg. Reck. Endang. Safety (from I)	941.30(2)
Endangering Safety: Firing into Vehicle or Bldg. (from I)	941.20(2)
Theft from Person (from H)[64]	943.20(3)(d)2
Physical Abuse of Child (recklessly causing great bodily harm) (from H)	948.03(3)(a)
Child abandonment (from H)	948.20
Discharge of Firearm in a School Zone (from A misd.)	948.605(3)(a)
Homicide: Neg.Control of Vicious Animal (from F)	940.07
Theft (> $10,000)	NEW[65]
Receiving Stolen Property (> $10,000)	NEW[66]
Fraudulent Use of Financial Transaction Card (> $10,000)	NEW[67]
Retail Theft (> $10,000)	NEW[68]
Receiving Stolen Property from a Child (> $5000)	NEW[69]
Hazing Resulting in Death	NEW[70]
Absconding after being adjudicated delinquent for a Class G felony	NEW”

[64] Extracted from Wis. Stat. sec. 943.20(3)(d) but remove value requirement.

[65] The ordinary crime of Theft (sec. 943.20) is classified in Felony Classes G, H and I and in Misdemeanor Class A according to the value of the property stolen. The crimes are designated as “new” in the sense that the values used to differentiate the penalties are different than those used in present law.

[66] The crime of Receiving Stolen Property (sec. 943.34) is classified in Felony Classes G, H and I and in Misdemeanor Class A according to the value of the property involved. The crimes are designated as “new” in the sense that the values used to differentiate the penalties are different than those used in present law.

[67] The crime of Fraudulent Use of a Financial Transaction Card (penalty sec. 943.4 1 (S)(c)) is classified in Felony Classes G, H and I and in Misdemeanor Class A according to the value of the money, goods, services or property illegally obtained. The crimes are designated as “new” in the sense that the values used to differentiate the penalties are different than those used in present law.

[68] The crime of Retail Theft (sec. 943.50) is classified in Felony Classes G, H and I and in Misdemeanor Class A according to the value of the property involved. The crimes are designated as “new” in the sense that the values used to differentiate the penalties are different than those used in present law.

[69] The crime of Receiving Stolen Property from a Child (sec. 948.62) is classified in Felony Classes G, H and I and in Misdemeanor Class A according to the value of the property involved. The crimes are designated as “new” in the sense that the values used to differentiate the penalties are different than those used in present law. The value cutoffs are lower than those used in the Receiving Stolen Property statute (sec. 943.34) and other companion statutes like theft and retail theft to take into account the fact that the stolen property is received from a child.

The Committee recommends retaining the $500 value codified in sec. 948.62(2)(a). It constitutes part of the prima facie proof that the property received from a child was stolen and that the person receiving the property knew it was stolen

[70] The Committee recommends classifying hazing resulting in death at the G felony level, thus providing for a greater penalty when death results and a lesser penalty (H felony) when great bodily harm results. See Wis. Stat. sec. 948.5 1(3)(b).

[71] This crime appears in each of the felony classes. It addresses the problem of the juvenile who has been adjudicated delinquent but then absconds before his/her dispositional hearing. See discussion of juvenile absconding at p. ._______

CLASS H (3 MAX PRISON; 3 E.S.)

Solicitation to Commit a Felony (other than A or I)	939.30(1)
Abortion	940.04(1)[72]
Assisting Suicide	940.12
Battery (causing great bodily harm by an act done with intent to cause bodily harm)	940.19(4)[73]
Battery (intentionally causing bodily harm to another by conduct that creates substantial risk of great bodily harm)	940.19(6)[74]
Battery to Unborn Child (causing great bodily harm by an done with intent to cause bodily harm)	940.195(4)[75]
Battery by Prisoners	940.20(1)
Battery to Law Enforcement Officers & Firefighters	940.20(2)
Battery to Probation and Parole Agents and Aftercare Agents	940.20(2m)(b)
Battery to Jurors	940.20(3)
Battery or Threat to Witnesses	940.201
Battery to Emergency Department Workers, EMT's, etc.	940.20(7)(b)
Battery or Threat to Judge	940.203(2)
Battery or Threat to Dep't of Revenue Employe	940.205(2)
Battery or Threat to Dep't of Commerce & Workforce Dev.	940.207(2)
Unsafe Burning of Buildings	941.11
Using Tear Gas Device: Bodily Harm to Peace Officer	94 1.26(2)(f)
Using Pepper Spray Device: Bodily Harm to Peace Officer	941.26(4)(d)
Tampering with Household Products (if act creates a high probability of great bodily harm to another)	941.327(2)(b)2
Arson with Intent to Defraud	943.04
Theft (agg. circumstances[76])	943.20(3)(d)

[72] Sec. 940.04(1) is part of the pre-Roe v. Wade statute. The form of the crimes codified in sec. 940.04 date back to the 1956 revision of the Criminal Code. When the legislature instituted a classification system for Criminal Code felonies and misdemeanors in 1977, it did not classify the crimes in sec. 940.04. 1997 Wisconsin Act 283 charges the Criminal Penalties Study Committee with classifying all felonies. Thus these crimes are now recommended for classification. However, the Committee recommends that the legislature independently study whether sec. 940.04 should be repealed given the fact that post-Roe v. Wade abortion statutes now exist at secs. 940.13 and 940.15.

[73] See discussion of the general battery statutes at p. ______.

[74] See discussion of the general battery statutes at p. ______.

[75] See discussion of the general battery statutes at p. ______.

[76] See Wis. Stat. sec. 943.20(3)(d) but remove requirement that the value of the property stolen does not exceed $2,500. The Committee recommends that when a theft is committed under aggravated circumstances (property taken is a domestic animal; property is taken from a building which has been destroyed or left unoccupied because of physical disaster, riot, bombing or the proximity of battle; property is taken after physical disaster, riot, bombing or the proximity of battle has necessitated its removal from a building; property taken is a firearm; or property is taken from a patient or resident of a facility or program under Wis. Stat. sec. 940.295(2) or from a vulnerable adult), the offense should be classified as a Class H felony. Normally this will be an upward adjustment of the what would otherwise be a lower level crime because the value of the property involved would put it in the Class I felony or Class A misdemeanor range. However, if the value of the property would put the theft in the Class H range (more than $5,000

CLASS H (3 MAX PRISON; 3 E.S.) (continued)

Misappropriation of Personal Identifying Information or Personal Identification Documents	943.201
Operating Vehicle Without Owner's Consent ("take & drive")	943.23(2)
Threats to Injure or Accuse of a Crime	943.30
Fraudulent Writings	943.39
Fraudulent Destruction of Certain Writings	943.40
Criminal Slander of Title	943.60(1)
Crime against Computers[77] (amend amt to > 5000)	943.70(2)(b)3 or (3)(b)3
Obscenity (if 2 or more prior obscenity violations or if crime involves wholesale transfer or distribution of obscene material)	944.21(5)(c) & (e)
Soliciting Prostitutes	944.32
Keeping Place of Prostitution	944.34
Bribery of Participant in a Contest	945.08(1)
Bribery of Public Officers and Employees	946.10
Perjury	946.3 1
False Swearing	946.32(1)
Felony Escape	946.32(3)
Obstructing Officer (by providing information or or evidence that results in conviction of innocent person)	946.41(2m)
Felony Failure to Report to Jail	946.425(1), (lm)(b) & (lr)(b)
Assisting or Permitting Escape	946.44(1)
False Information re: Kidnapped or Missing Persons	946.48(1)
Bail Jumping	946.49(l)(b)
Bribery of a Witness	946.61(1)
Simulating Legal Process (if the act is meant to induce payment of claim or simulates criminal process)	946.68(lr)(b) & (c)
Impersonating a Peace Officer (with intent to commit a Crime or aid & abet commission of a crime)	946.70(2)
Tampering with Public Records	946.72(1)
Aiding Escape from Mental Institution (with intent to commit crime against sexual morality with or upon the inmate of the institution)	946.74(2)

---

but not exceeding $10,000), the prosecutor could pursue either an aggravated theft charge under Wis. Stat. sec. 943.20(3)(d) or an ordinary Class H theft charge under proposed sec. 943.20(3)(bm) (no proof of aggravated circumstances required). And, of course, if the value of the property exceeds $10,000, the prosecutor may proceed with a Class G felony under proposed sec. 943.20(3)(c) (no proof of aggravated circumstances required).

[77] This felony is committed if the damage is greater than $2500 or if it causes an interruption or impairment of governmental operations or public communication, of transportation or of a supply of water, gas or other public service. The Committee recommends elevating the damage cutoff referred to in the preceding sentence to $5000 in order to maintain consistency with other Class H felonies having a value level.

CLASS H (3 MAX PRISON; 3 E.S.) (continued)

Offense	Statute
Harassment (if defendant has prior conviction or intentionally gains access to certain records in order to facilitate the violation)	947.013(1v) & (lx)
Physical Abuse of a Child (intentionally causing bodily harm)	948.03(2)(b)
Physical Abuse of a Child (recklessly causing bodily harm by conduct creating a high probability of great bodily harm)	948.03(3)(c)
Failing to Act to Prevent Bodily Harm to a Child	948.03(4)(b)
Causing Child between 13 and 17 to View or Listen to Sexual Activity	948.055(2)(b)
Sexual Assault of Student by a School Instructional Staff Person	948.095(2)
Unauthorized Placement for Adoption	948.24(1)
Contributing to Delinquency of a Child (if child's act which is encouraged or contributed to is a violation of criminal law punishable as a felony)	948.40(4)(b)
Selling or Giving Dangerous Weapon to Person under 18 (if the person under 18 discharges the firearm and the discharge causes the death of any person)	948.60(2)(c)
Instigating Fights between Animals (2nd or subsequent violation)	951.18(2)
Harassment of Police or Fire Department Animals (causing death to the animal)	951.18(2)(m)
Fleeing an Officer Causing Bodily Harm (from I)	346.04(3) & 346.17(3)(b)[78]
Abuse of Vulnerable Adult (intentional maltreatment causing bodily harm) (from I)	940.285(2)(b)2
Abuse & Neglect of Patients & Residents (intentional abuse or neglect causing bodily harm) (from I)	940.295(3)(b)2
Abuse & Neglect of Patients & Residents (reckless or negligent abuse or neglect causing great bodily harm) (from I)	940.295(3)(b)3
False Imprisonment (from I)	940.30
Stalking (if victim suffers bodily harm or defendant has prior conviction against same victim)	940.32(3)
Disarming a Peace Officer	941.21
Selling, Possessing, Using or Transporting Machine Gun (from I)	941.26(2)(a)
Sale or Commercial Transportation of Tear Gas Device (from I)	941.26(2)(e)

[78] See discussion of Fleeing an Officer at p. ______.

CLASS H (3 MAX PRISON; 3 E.S.) (continued)

Using or Threatening to Use a Tear Gas or Pepper Spray Device during Commission of a Crime to Cause Bodily Harm or Bodily Discomfort to Another (from I)	941.26(2)(g) & (4)(e)
Selling, Transporting or Possessing a Short-Barreled Shotgun or Rifle (from I)	941.28(3)
Selling, Manufacturing or Possessing an Electric Weapon (fi-om I)	941.295(1)
Using or Possessing a Handgun with Armor Piercing Bullets during Commission of Certain Crimes (from I)	941.296(2)
Selling, Delivering or Possessing a Firearm Silencer (from I)	941.298(2)
Making, Transferring, Possessing or Using an Improvised Explosive Device or Possessing Materials or Components with Intent to Assemble an Improvised Explosive Device (from I)	941.3 1(2)(b)
Possession, Manufacture or Transfer of a Fire Bomb (fi-om I)	943.06(2)
Hazing Resulting in Great Bodily Harm (from I)[79]	948.5 1(3)(b)
Forgery and Forgery-Uttering (from F)	943.38(1) & (2)
Theft of Library Material (> $2500) (from F)	943.61(5)(c)
Theft (> $5000 but < $10,000)	NEW[80]
Receiving Stolen Property (> $5000 but < $10,000)	NEW[81]
Fraudulent Use of Financial Transaction Card (> $5000 but < $10,000)	NEW[82]
Retail Theft (> $5000 but < $10,000)	NEW[83]
Receiving Stolen Property from a Child (> $2000 but < $5000)	NEW[84]
Absconding after being adjudicated delinquent for a Class G felony	NEW[85]

[79] If death results from the hazing, the Committee recommends that the offense be classified as a G felony. This will necessitate amending the statute to provide penalties when a death is involved.
[80] See footnote to crime of Theft (943.20) in Class G list.
[81] See footnote to crime of Receiving Stolen Property (943.34) in Class G list.
[82] See footnote to crime of Fraudulent Use of Financial Transaction Card (943.41) in Class G list.
[83] See footnote to crime of Retail Theft (943.50) in Class G list.
[84] See footnote to crime of Receiving Stolen Property from a Child (948.62) in Class G list.
[85] This crime appears in each of the felony classes. It addresses the problem of the juvenile who has been adjudicated delinquent but then absconds before his/her dispositional hearing. See discussion of juvenile absconding at p. ._______

CLASS I (18 mo. MAX PRISON; 2 yrs. E.S.)

Offense	Statute
Violation of a Condition of Lifetime Supervision of Serious Sex Offenders	939.615(7)(b)2[86]
Abortion	940.04(4)[87]
Abortion (various provisions)	940.15(2), (5) & (6)[88]
Battery (causing substantial bodily harm by an act done with intent to cause bodily harm)	940.19(2)[89]
Battery to Unborn Child (causing substantial bodily harm by an act done with intent to cause bodily harm)	940.195(2)[90]
Injury by Negligent Handling of Dangerous Weapon, Explosives or Fire	940.24
Abuse of Vulnerable Adult (reckless or negligent maltreatment under circumstances likely to cause great bodily harm)	940.285(2)(b)3
Abuse of Residents of Penal Facilities	940.29
Interfering with Fire Fighting	941.12(1)
Placing Foreign Objects in Edibles	94 1.325
Tampering with Household Products	941.327(2)(b)1
False Information Concerning Act that Constitutes Tampering with Household Products	941.327(3)
Obstructing Emergency or Medical Personnel with Reasonable Grounds to Believe the Interference May Endanger Another's Safety	941.37(3)
Soliciting a Child to Participate in Criminal Gang Activity	941.38(2)
Criminal Damage to or Graffiti on Religious and Other Property	943.012
Arson of Property other than Building	943.03
Possession of Burglarious Tools	943.12
Theft of Trade Secrets	943.205(3)

[86] Under circumstances specified in this statute, the sentenced imposed for a violation thereof must be consecutive to the sentence for whatever crime constitutes a violation of lifetime supervision of serious sex offenders. The Committee recommends repeal of this mandatory consecutive sentencing provision just as it has recommended repeal of other mandatory consecutive sentencing provisions. While a consecutive sentence may be desirable in any given case, that decision should be left to the sound discretion of the judge.

[87] Sec. 940.04(4) is part of the pre-Roe v. Wade statute. The form of the crimes codified in sec. 940.04 date back to the 1956 revision of the Criminal Code. When the legislature instituted a classification system for Criminal Code felonies and misdemeanors in 1977, it did not classify the crimes in sec. 940.04. 1997 Wisconsin Act 283 charges the Criminal Penalties Study Committee with classifying all felonies. Thus these crimes are now recommended for classification. However, the Committee recommends that the legislature independently study whether sec. 940.04 should be repealed given the fact that post-Roe v. Wade abortion statutes now exist at secs. 940.13 and 940.15.

8'. 940.15 is the post-Roe v. Wade abortion statute.

[89] See discussion of the general battery statutes at p. ______.

[90] See discussion of the general battery statutes at p. ______.

CLASS I (18 mo. MAX PRISON; 2 yrs. E.S.)

Operating Vehicle Without Owner's Consent ("drive or operate")	943.23(3)
Removing Major Part of a Vehicle without Consent	943.23(5)
Transfer of Encumbered Property	943.25(1) and (2)
Possession of Records of Usurious Loans	943.27
Threats to Communicate Derogatory Information	943.31
Certain Financial Transaction Card Crimes	943.41(8)(b) and (c)
Theft of Library Material (> $1000 but < $2500)	943.61(5)(c)
Unlawful Receipt of Payments to Obtain Loan for Another (if value of payment exceeds $500 but does exceed $2500)	943.62(4)(b)
Computer Crime (committed to defraud or obtain property)	943.70(2)(b)2 and (3)(b)2
Unauthorized Release of Animals (3rd or subsequent violation)	943.75(2)
Bigamy	944.05(1)
Adultery	944.16
Unlawful Visual Representations of Nudity	944.205(2)
Commercial Gambling	945.03
Dealing in Gambling Devices	945.05(1)
Permitting Seditious Assembly	946.03(2)
Flag Desecration	946.05(1)
Special Privileges from Public Utilities	946.1 l(1)
Misconduct in Public Office	946.12
Private Interest in Public Contracts	946.13(1)
Purchasing Claims at Less than Full Value	946.14
Public Construction Contracts at Less than Full Value	946.15(1) & (3)
Failure to Comply with Officer's Attempt to Take Person	946.415(2)
Harboring or Aiding Felons	946.47(1)
Bail Jumping by a Witness	946.49(2)
Destruction of Documents Subject to Subpoena	946.60(1) & (2)
Communicating with Jurors	946.64
Obstructing Justice	946.65(1)
Simulating Legal Process	946.68(lr)(a)
Falsely Assuming to Act as a Public Officer or Employee	946.69(2)
Premature Disclosure of Search Warrant	946.76
Harassment (if person has prior conviction for harassing same victim within last 7 years)	947.013(1t)
Bomb Scares	947.015
Physical Abuse of a Child (recklessly causing bodily harm)	948.03(3)(b)
Exposing a Child to Harmful Material	948.11(2)(a) & (am)
Possession of Child Pornography	948.12
Failure to Support (for 120 or more consecutive days)	948.22(2)
Concealing Death of Child	948.23

CLASS I (18 mo. MAX PRISON; 2 yrs. E.S.)

Offense	Statute
Interference with Custody of a Child	948.31(2)
Giving Dangerous Weapon to Person under 18 Years	94860(2)(b)
Possession of a Dangerous Weapon on School Premises (2nd and subsequent convictions)	948.61(2)(b)
Mistreating an Animal (if mistreatment results in mutilation disfigurement or death of animal or if the animal is police or fire department animal and the animal is injured)	951.18(1)
Exposing a Domestic Animal to Poisonous or Controlled Substances (if animal is a police or fire department animal and the animal is injured)	951.18(1)
Instigating Fights Between Animals (1 st offense)	951.18(2)
Harassment of Police or Fire Department Animal and Causing Injury to the Animal	951.18(2)
Criminal Damage to Property (Aggravated) (from H) (Raise damage amount in (2)(d) from $1000 to $2000)	943.01(2)
Damage or Threat to Property of Witness (from H)	943.011
Criminal Damage; Threat; Property of Judge (from H)	943.013
Criminal Damage; Threat: Property of Dep't of Revenue Employee (from H)	943.015
Graffiti to Certain Property (from H) (Raise damage amount in (2)(d) from $1000 to $2000)	943.017(2)
Graffiti to Property of Witness (from H)	943.017(2m)
Theft of Telecommunications Service [91] (from H)	943.45(3)(d)
Theft of Cellular Telephone Service [92] (from H)	943.455(4)(d)
Theft of Cable Television Service [93] (from H)	943.46(4)(d)
Theft of Satellite Cable Programming [94] (from H)	943.47(3)(d)
Fleeing: Endangering (from H)	Traffic Code
Stalking (from A misdemeanor)	940.32(2)
Criminal Damage to Railroads (including shooting a firearm at a train) (from A misdemeanor)	943.07(1)& (2)
Possession of Firearm in School Zone (from A misd.)	948.605(2)(a)

[91] This offense involves theft of telecommunications service for direct or indirect commercial advantage or private financial gain as a 2nd or subsequent offense.
[92] This offense involves theft of cellular telephone service for direct or indirect commercial advantage or private financial gain as a 2nd or subsequent offense.
[93] This offense involves theft of cable television service for direct or indirect commercial advantage or private financial gain as a 2nd or subsequent offense.
[94] This offense involves theft of satellite cable programming for direct or indirect commercial advantage or private financial gain as a 2nd or subsequent offense.

CLASS I (18 mo. MAX PRISON; 2 yrs. E.S.)

Offense	Statute
Abuse of Vulnerable Adult (intentional maltreatment under circumstances likely to cause bodily harm)	940.285(2)(b)2[95]
Abuse & Neglect of Patients & Residents (intentional abuse or neglect under circumstances likely to cause bodily harm)	940.295(3)(b)2[96]
Abuse & Neglect of Patients & Residents (reckless or negligent abuse or neglect under circumstances likely to cause great bodily harm)	940.295(3)(b)3[97]
Theft (> $2000 but < $5000)	NEW[98]
Receiving Stolen Property (> $2000 but < $5000)	NEW[99]
Fraudulent Use of Financial Transaction Card (> $2000 but < $5000)	NEW[100]
Retail Theft (> $2000 but < $5000)	NEW”’
Receiving Stolen Property from a Child (> $500 but < $2000)	NEW[102]
Fraud on Hotel or Restaurant Keeper or Taxicab Operator (if value of service > $2000)	NEW[103]
Issuing Worthless Checks (> $2000)	NEW[104]
Removing or Damaging Encumbered Real Property (if security is impaired by > $2000)	NEW[105]
Fraudulent Insurance or Employee Benefit Claim (~$2000)	NEW[106]

---

[95] This offense is “new” in the sense that it breaks out intentional maltreatment under circumstances likely to cause bodily harm and classifies it lower than the same conduct that actually causes bodily harm.

[96] This offense is “new” in the sense that it breaks out intentional abuse or neglect under circumstances likely to cause bodily harm and classifies it lower than the same conduct that actually causes bodily harm.

[97] This offense is “new” in the sense that it breaks out reckless or negligent abuse or neglect under circumstances likely to cause great bodily harm and classifies it lower than the same conduct that actually causes great bodily harm.

[98] See footnote to crime of Theft (943.20) in Class G list.

[99] See footnote to crime of Receiving Stolen Property (943.34) in Class G list.

[100] See footnote to crime of Fraudulent Use of Financial Transaction Card (943.41) in Class G list.

[101] See footnote to crime of Retail Theft (943.50) in Class G list.

[102] See footnote to crime of Receiving Stolen Property from a Child (948.62) in Class G list.

[103] The crime of Fraud on Hotel or Restaurant Keeper or Taxicab Operator (943.2 1) is listed as “new” because the fraud level has been raised from $1000 to $2000 in order for the crime to be classified as a felony. This is consistent with other “value” changes that are recommended.

[104] The crime of Issue of Worthless Check (943.24) is listed as “new” because the value level has been raised from $1000 to $2000 in order for the crime to be classified as a felony. This is consistent with other “value” changes that are recommended.

[105] The crime of Removing or Damaging Encumbered Real Property (943.26) is listed as “new” because the value of the security impaired has been raised from $1000 to $2000. This is consistent with other “value” changes that are recommended.

[106] The crime of Fraudulent Insurance or Employee Benefit Claim (943.395) is listed as “new” because the fraud level has been raised from $1000 to $2000. This is consistent with other “value” changes that are recommended.

CLASS I (18 mo. MAX PRISON; 2 yrs. E.S.)

Absconding after being adjudicated delinquent for a Class I felony	NEW[107]
Solicitation to Commit a Class I Felony	939.30(2)(amendment)

[107] This crime appears in each of the felony classes. It addresses the problem of the juvenile who has been adjudicated delinquent but then absconds before his/her dispositional hearing. See discussion of juvenile absconding at p. _______

CLASS A MISDEMEANOR (9 MOS. MAX JAIL)

EXCEPT AS NOTED BELOW, ALL OFFENSES CURRENTLY CLASSIFIED AS CLASS A MISDEMEANORS REMAIN IN THAT CLASSIFICATION.

Offense	Statute
Theft of Telecommunications Service (from I felony)	943.45(3)(c)
Theft of Cellular Telephone Service (from I felony)	943.455(4)(c)
Theft of Cable Television Service (from I felony)	943.46(4)(c)
Theft of Satellite Cable Programming (from I felony)	943.47(3)(c)
Carrying Firearm in Public Building (from B misdemeanor)	941.235(1)
Theft (< $2000)	NEW[108]
Receiving Stolen Property (< $2000)	NEW[109]
Fraudulent Use of Financial Transaction Card (< $2000)	NEW”’
Retail Theft (< $2000)	NEW”’
Receiving Stolen Property from a Child (< $500)	NEW[112]
Fraud on Hotel or Restaurant Keeper or Taxicab Operator (< $2000)	NEW[113]
Issuing Worthless Checks (< $2000)	NEW[114]
Removing or Damaging Encumbered Real Property (if security is impaired by < $2000)	NEW[115]
Fraudulent Insurance or Employee Benefit Claim (< $2000)	NEW[116]
Demolition of Historic Building without Authorization	NEW”’
Operating Vehicle Without Owner's Consent (new misdemeanor version)	NEW[118]
Fleeing an Officer (new misdemeanor version)	NEW[119]

---

[108] See footnote to crime of Theft (943.20) in the Class G list.
[109] See footnote to crime of Receiving Stolen Property (943.34) in the Class G list.
[110] See footnote to crime of Fraudulent Use of Financial Transaction Card (943.41) in the Class G list.
[111] See footnote to crime of Retail Theft (943.50) in Class G list.
[112] See footnote to crime of Receiving Stolen Property from a Child (948.62) in the Class G list.
[113] See footnote to crime of Fraud on Hotel or Restaurant Keeper or Taxicab Operator (943.21) in the Class I list.
[114] See footnote to crime of Issue of Worthless Checks (943.24) in the Class I list.
[115] See footnote to crime of Removing or Damaging Encumbered Real Property (943.26) in the Class I list.
[116] See footnote to crime of Fraudulent Insurance or Employee Benefit Claim in the Class I list.
[117] This crime is presently codified at sec. 943.014 but is not classified. Its penalty is currently imprisonment for not more than 9 months. The committee recommends classifying this offense as a Class A misdemeanor.
[118] The Committee recommends the creation of a misdemeanor version of the operating vehicle without owner's consent offense to supplement the felonies that exist under current law. A discussion of the proposal is included in the text of this report.
[119] The Committee recommends the creation of a misdemeanor version of the fleeing an officer offense to supplement the fleeing felonies that exist under current law. A discussion of the proposal is included in the text of this report at p. ______.

3. Attributes of the New Felony Classes

When the crimes which have been assigned to the nine new felony classes are examined, several observations may be made about the kinds of crimes in each class and the way in which offenses cascade through the classes on the basis of severity.

Felony Class A is reserved for the most serious crimes against life and the state. Class B is restricted to the gravest of violent offenses against the person (other than those in Class A). In Class C most of the crimes involve violence against the person or the potential for grave harm to persons (for example, armed robbery, carjacking and arson of buildings); this class is also utilized for the most serious of drug offenses (which are classified later in this report). Classes D, E and F contain primarily offenses against the person that involve either lesser harms (or lesser potential for harm) or less culpable mental states than the felonies in the higher classes. Class G is somewhat transitional in that it contains numerous offenses against persons and their safety but also picks up some serious property offenses. Classes H and I are utilized for less serious offenses against the person and for the great majority of property crimes and crimes against government and its administration (most of which are already classified among the less serious felonies).

4. Recommendations Regarding New Statutes, Amendments to Existing Statutes, and the Repeal of Certain Statutes

Homicide. The Committee carefully scrutinized Wisconsin's homicide statutes to determine their proper placement in the new A-I felony classification system. Because the result is the same in each of these crimes, the legislature has generally classified them according to mental state. The Committee has maintained this approach in making its classification recommendations.

Of course first-degree intentional homicide [120] is retained as a Class A felony for which the penalty is life imprisonment.

First-degree reckless homicide[121] and second-degree intentional homicide[122] are both recommended for classification as B felonies. Under present law these offenses are both punishable by up to 40 years in prison and thus would naturally convert to Class C felonies when the mandatory release converter is applied to transfer them to the new A-I

[120] Wis. Stat. sec. 940.01(1).

[121] Wis. Stat. sec. 940.02(1) (recklessly causing the death of another human being under circumstances that show utter disregard for human life and 940.02(lm) (recklessly causing the death of an unborn child under circumstances that show utter disregard for the life of that unborn child). The recommendation discussed in the text accompanying this note does not deal with the form of first-degree reckless homicide which involves the death of someone following the delivery of a controlled substance (the so-called "Len Bias" law). See Wis. Stat. sec. 940.02(2).

[122] Wis. Stat. sec. 940.05. Second-degree intentional homicide is first-degree intentional homicide mitigated by imperfect self-defense, adequate provocation, coercion, necessity, and unreasonable prevention of a felony. See Wis. Stat. sec. 940.01(2).

classification system. The Code Reclassification Subcommittee and the Criminal Penalties Study Committee as a whole both debated[123] whether these two homicides should be placed in the same class[124] and whether that class should be Class B or Class C. The Committee ultimately concluded that placement in the same class should be maintained because that placement was the result of intricate revisions of the law of homicide as a whole that took place over a decade ago and because splitting these offenses into separate classes would undesirably upset the balance that was struck at that time. Further, after considering the seriousness of these offenses, the factual contexts in which they arise, and the kinds of other offenses that have been placed in the B and C classes, the Committee concluded that first-degree reckless homicide and second-degree reckless homicide should be classified as B felonies.

The Committee recommends that the crime of homicide by intoxicated use of a vehicle be split into two felony classes depending upon the offender's record of impaired driving offenses. Under current law this crime is punishable by up to 40 years in prison[125] and would thus naturally convert to a Class C felony in the new A-I classification system. But when compared with other homicides, placement in Class C appears to be one class too high. The offense has no mental state element and it is thus difficult to place in the cascade of other homicide offenses which have a mental state element. However, the Committee concluded that homicide by the intoxicated use of a vehicle is most closely akin to second-degree reckless homicide. In its view driving in a state of impairment is the rough equivalent of the conscious risk taking associated with the crime of reckless homicide. The latter is recommended for placement in Class D and thus the Committee recommends that homicide by intoxicated use of a vehicle be placed in that classification as well. For both the maximum term of confinement for one count[126] would thus be 15 years (which in the world of Truth-in-Sentencing means 15 years of real time not subject to parole or other forms of early release) followed by a maximum period of extended supervision in the amount of 10 years. However, if the defendant has a prior conviction for an impaired driving offense,[127] then the offense is

[123] Valuable assistance in this debate was provided by appellate lawyers from both the Wisconsin Department of Justice and the Wisconsin State Public Defender's Office.

[124] Until the Wisconsin homicide laws were revised in 1989 (see 1987 Wis. Act 399), second-degree murder (the equivalent of what is now first-degree reckless homicide) was punished more severely than manslaughter (the rough equivalent of what is now second-degree intentional homicide). See Wis. Stat. secs. 940.02 and 940.05 (1985-86).

[125] The history of punishing homicide by the intoxicated use of a vehicle in Wisconsin reveals a consistent pattern of escalating the severity of this offense. When this state first undertook the process of crime classification in 1978, the offense was punished as a Class D felony for which the maximum imprisonment was five years. See Wis. Stat. sec. 940.09 (1977). Since then its classification has been upgraded several times to the point where it is now classified as a Class B felony for which the maximum imprisonment is 40 years. This is doubtless the result of the great tragedy which accompanies the commission of this crime and the high visibility with which violations are publicly reported.

[126] The Wisconsin Supreme Court has concluded that a separate count of homicide by intoxicated use of a vehicle may be prosecuted for each death caused by the defendant's act of driving in an impaired state. See State v. Rabe, 96 Wis. 2d 48,291 N.W.2d 809 (1980).

[127] Prior convictions are determined by application of the "counting statute" codified at Wis. Stat. sec. 343.307(2).

graded as a Class C felony for which the maximum term of confinement is 25 years followed by a maximum period of extended supervision in the amount of 15 years. [128] The Committee believes that these classifications meet the legislative charge to classify crimes of like severity in the same class while at the same time providing sufficient real-time punishment for those who drive while impaired and take human life in the process of doing so.

The remaining homicides and other serious injury offenses are classified according to harm and mental state. They are depicted on the chart which follows. Only Classes A through G are used in the chart because homicides and other serious injury offenses are all classified at the G level or above. Commentary following the chart explains how harm and mental state compare for some of the more commonly prosecuted homicides and serious injury offenses.

[128] It is the intent of the Committee that in prosecutions for the Class C felony version of homicide by intoxicated use of a vehicle, the existence of the prior impaired driving offense be an element of the crime.

DEPICTION OF HOMICIDES & SERIOUS INJURY FELONIES

GBH = GREAT BODILY HARM ***LGBH = LIKELIHOOD*** *OF GREAT BODILY HARM*

A	B	C	D	E	F	G
1st Degree Intentional Homicide						
Partial-Birth Abortion	1 st Degree Reckless Homicide					
	2"" Degree Intentional Homicide	Len Bias Homicide (Drugs)				
	Attempted 1 st Deg. Int. Homicide		2nd Degree Reckless Homicide			
		Int/Reck Abuse of Vul. Adult: Death	1 st Degree Reckless Injury			
		Int/Reck Abuse of Patients/Res: Death	Neg. Abuse of Vul. Adult: Death		2nd Degree Reckless Injury	
			Neg. Abuse of Patients/ Res: Death		1" Degree Reck.Endan. Safety	
		Tamper w/ Household Prod: Death	Child Neglect: Death		Abuse of Vul. Adult: GBH	2nd Degree Reck.Endan. Safety
	1st Degree Sexual Assault	OWI Homicide Repeater[129]		Abuse of Patients/Res: GBH[130]	Abuse of Patients/Res: GBH	Int.Abuse of Vul.Adult: LGBH
	1st Degree Sex Assault of a Child	Mayhem	OWI Homicide[131]		Tamper w/ Household Prod: GBH	Int.Abuse of Patients/Res: LGBH
		2nd Degree Sexual Assault	Homicide: Intox. Use Of Firearm	Aggravated Battery (int. cause GBH)		Hazing: Death
		2nd Degree Sex Assault of a Child		Child Abuse (int. causing GBH)		Homicide: Neg Use of Weapon
				Fleeing: Death	Injury by OWI	Homicide: Neg. Use of Vehicle
			3rd Degree Sex Assault	Obstruct Rescue Pers: Death	Fleeing: Causing GBH	Homicide: Neg. Control of Animal

[129] OWI Repeater = 1 or more prior impaired driving convictions as counted under Wis. Stat. sec. 343.307(2).
[130] Victim must be a "vulnerable adult."
[131] OWI Homicide with no impaired driving convictions as determined by application of Wis. Stat. sec. 343.307(2).

DEPICTION OF HOMICIDES AND SERIOUS INJURY FELONIES (continued)

CHARACTERISTICS OF EACH FELONY CLASS

CLASS	CRIME	RESULT	MENS REA
A	1st Degree Int. Homicide	Death	Intent
A	Partial-Birth Abortion	Death	Intent
B	1st Degree Reckless Homicide	Death	Aggravated Recklessness
C	2nd Degree Int. Homicide	Death	Mitigated Intent
C	OWI Homicide - Repeater	Death	Akin to Reckless[132]
D	Child Neglect: Death	Death	Intent: Contr. To Neglect of Child Strict Liab: Death
D	2nd Degree Reckless Homicide	Death	Recklessness
D	OWI Homicide	Death	Akin to Reckless[133]
D	1st Degree Reckless Injury	Great Bodily Harm	Aggravated Recklessness[134]
E	Aggravated Battery	Great Bodily Harm	Intent
F	2nd Degree Reckless Injury	Great Bodily Harm	Recklessness
F	Injury by OWI	Great Bodily Harm	Akin to Reckless[135]
F	1st Degree Reck. Endan. Safety	Endanger Safety	Aggravated Recklessness
G	2nd Degree Reck. Endan. Safety	Endanger Safety	Recklessness
G	Homicide: Neg. Use of Weapon	Death	Crim. Negligence
G	Homicide: Neg. Use of Veh.	Death	Crim. Negligence

[132] OWI Homicide - Repeater is graded at the C level because defendant has prior impaired driving conviction as determined by application of Wis. Stat. sec.343.307(2).

[133] Though the OWI homicide statute contains no mens rea, the committee concluded that driving a vehicle while under the influence of intoxicants (and/or other specified substances) represents the rough equivalent of the conscious risk taking associated with the crime of reckless homicide.

[134] Aggravated recklessness involves taking a conscious risk of causing death or great bodily harm. Thus 1" degree reckless injury is graded higher than aggravated battery which involves the same harm but involves a mental purpose to cause great bodily harm - not death.

[135] Though the OWI injury statute contains no mens rea, the committee concluded that driving a vehicle while under the influence of intoxicants (and/or other specified substances) represents the rough equivalent of the conscious risk taking associated with the crime of 2nd degree reckless injury.

Battery. The Wisconsin general battery statute is codified at Wis. Stat. sec. 940.19. A companion statute protecting the unborn from similar harms is codified in sec. 940.195. Beyond these general battery statutes, the Criminal Code contains a whole host of special circumstance batteries, offering protection to various groups by way of the greater penalties that attend these offenses. The list is long and includes such groups as law enforcement officers, firefighters, judges, witnesses, jurors, public officers, employees and visitors to prisons, employees of technical colleges and school districts, public transit drivers and passengers, employees of the Department of Revenue, employees of the Department of Workforce Development, etc. In some instances the protections of the special circumstance batteries are also extended to family members.

Proposed Revision of General Battery Statutes

When the State of Wisconsin last undertook a comprehensive revision of its criminal laws in the 1950's, the legislature addressed the crime of battery with two simple and straightforward statutes. The misdemeanor version of the crime prohibited the "caus[ing of] of bodily harm to another by an act done with intent to cause bodily harm to that person or another."[136] The felony version, known as "aggravated battery," prohibited "intentionally caus[ing] great bodily harm to another."[137]

Since 1955 the legislature has made numerous additions to the general battery statute, creating several intermediate levels of the offense by mixing and matching harms and mental states. The result is a relatively confusing set of crimes about which the Committee heard several complaints from both within and without. At present the statute reads as follows:

> (1) Whoever causes bodily harm to another by an act done with intent to cause bodily harm to that person or another without the consent of the person so harmed is guilty of a Class A misdemeanor.
>
> (2) Whoever causes substantial bodily harm to another by an act done with intent to cause bodily harm to that person or another is guilty of a Class E felony.
>
> (3) Whoever causes substantial bodily harm to another by an act done with intent to cause substantial bodily harm to that person or another is guilty of a Class D felony.
>
> (4) Whoever causes great bodily harm to another by an act done with intent to cause bodily harm to that person or another is guilty of a Class D felony.

[136] Wis. Stat. sec. 940.20 (1955).
[137] Wis. Stat. sec. 940.22 (1955). The 1955 aggravated battery statute was augmented by the mayhem statute which remains a part of the Criminal Code to this day. See Wis. Stat. sec. 940.21.

> (5) Whoever causes great bodily harm to another by an act done with intent to cause either substantial bodily harm or great bodily harm to that person or another is guilty of a Class C felony.
>
> (6) Whoever intentionally causes bodily harm to another by conduct that creates a substantial risk of great bodily harm is guilty of a Class D felony. A rebuttable presumption of conduct creating a substantial risk of great bodily harm arises:
>
> (a) If the person harmed is 62 years of age or older; or
>
> (b) If the person harmed has a physical disability, whether congenital or acquired by accident, injury or disease, that is discernible by an ordinary person viewing the physically disabled person, or that is actually known by the actor.

After careful review of the statute, the Committee proposes a revision which is designed to return simplicity and straightforwardness to the law of battery and which the Committee believes addresses the several concerns expressed about it. Preserved are traditional forms of misdemeanor battery (causing bodily harm with intent to cause bodily harm) and felony aggravated battery (causing great bodily harm with intent to cause great bodily harm). Also maintained are intermediate offenses of causing great bodily harm[138] or substantial bodily harm[139] by an act done with intent to cause bodily harm. Finally, the special provisions protecting those 62 years of age or older and those with a physical disability are preserved without change.

The proposed statute reads as follows:

> 940.19 **Battery.** (1) Whoever causes great bodily harm to another by an act done with intent to cause great bodily harm to that person or another is guilty of a Class E felony.[140]
>
> (2) Whoever causes great bodily harm to another by an act done with intent to cause bodily harm to that person or another is guilty of a Class H felony. [141]

[138] Wis. Stat. sec. 939.22(14) defines "great bodily harm" as "bodily injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss of impairment of the function of any bodily member or organ or other serious bodily injury."
[139] Wis. Stat. sec. 939.22(38) defines "substantial bodily harm" as "bodily injury that causes a laceration that requires stitches; any fracture of a bone; a bum; a temporary loss of consciousness, sight or hearing; a concussion; or a loss or fracture of a tooth."
[140] Subsection 1 is derived from sec. 940.19 (5) (traditional aggravated battery) but limits this offense to the situation where the actor causes great bodily harm and intends this level of harm.

(3) Whoever causes substantial bodily harm to another by an act done with intent to cause bodily harm to that person or another is guilty of a Class I felony.[142]

(4) Whoever causes bodily harm to another by an act done with intent to cause bodily harm to that person or another without the consent of the person so harmed is guilty of a Class A misdemeanor.[143]

(5) Whoever intentionally causes bodily harm to another by conduct that creates a substantial risk of great bodily harm is guilty of a Class H felony. A rebuttable presumption of conduct creating a substantial risk of great bodily harm arises:

(a) If the person harmed is 62 years of age or older; or

(b) If the person harmed has a physical disability, whether congenital or acquired by accident, injury or disease, that is discernible by an ordinary person viewing the physically disabled person, or that is actually known by the actor.[144]

Using mental state and harm actually caused, the following chart depicts the relationship of the four principal offenses as they appear in subsections 1 through 4 of the proposed statute:

OFFENSE CLASS	INTENT	HARM CAUSED
Class E felony	Intent to Cause Great Bodily Harm	Great Bodily Harm
Class H felony	Intent to Cause Bodily Harm	Great Bodily Harm
Class I felony	Intent to Cause Bodily Harm	Substantial Bodily Harm
Class A misdemeanor	Intent to Cause Bodily Harm	Bodily Harm

[141] Subsection 2 is the current sec. 940.19 (4).
[142] Subsection 3 is the current sec. 940.19 (2).
[143] Subsection 4 is the current 940.19(1) (traditional misdemeanor battery).
[144] Subsection 5 preserves Wis. Stat. sec. 940.19(6) without change.

An understandable complaint about current law is that it is difficult to craft jury instructions when the court determines that the jury should be given the option of finding the defendant guilty of a lesser included battery offense.[145] The proposed four-tiered structure of crimes should simplify this part of the trial considerably. Examples:

- If the defendant is charged with the E felony but there is some dispute in the evidence as to whether the actor harbored the intent to cause great bodily harm but no dispute that great bodily harm was inflicted, the H felony (subsection 2) should be given to the jury as an option.

- If the defendant is charged with the E felony but there is some dispute in the evidence as to whether great bodily harm was inflicted but no dispute that the actor harbored the intent, the jury should be given the option of finding the defendant guilty of an attempt to commit the E felony.

- If the defendant is charged with the E felony but there is some dispute both as to whether the actor harbored the intent to cause great bodily harm and whether great bodily harm was inflicted, the jury should be given the option of finding the defendant guilty of either the I felony or the A misdemeanor (according to the evidence re: harm inflicted).

- If the defendant is charged with the H felony (subsection 2) but there is some dispute as to whether great bodily harm was inflicted, the jury should be given the option of finding the defendant guilty of either the I felony or the A misdemeanor (according to the evidence re: harm inflicted).

- If the defendant is charged with the I felony but there is some dispute as to whether substantial bodily harm was inflicted, the jury should be given the option of the finding the defendant guilty of the A misdemeanor.

The Committee believes that the range of variations involving harms and mental states that may realistically occur are comprehensively addressed by the proposed statute. It also notes that there are several other statutes which address related behavior, including the following:

---

[145] Wis. Stat. sec. 939.66 provides that an included crime may be any of the following: "(2) A crime which is a less serious or equally serious type of battery than the one charged." The statute presents the anomaly of one crime being "included" within another when they have the same penalty.

First-degree Reckless Injury - Wis. Stat. sec. 940.23(1)
Second-degree Reckless Injury - Wis. Stat. sec. 940.23(2)
First-degree Recklessly Endangering Safety - Wis. Stat. sec. 941.30(1)
Second-degree Recklessly Endangering Safety - Wis. Stat. sec. 940.30(2)
Mayhem - Wis. Stat. sec. 940.21

A recent addition to the compendium of battery laws is the statute entitled **Battery to an Unborn Child; Substantial Battery to an Unborn Child; Aggravated Battery to an Unborn Child.**[146] This statute is codified at Wis. Stat. sec. 940.195 and currently provides as follows:

> (1) Whoever causes bodily harm to an unborn child by an act done with intent to cause bodily harm to that unborn child, to the woman who is pregnant with that unborn child or another is guilty of a Class A misdemeanor.
>
> (2) Whoever causes substantial bodily harm to an unborn child by an act done with intent to cause bodily harm to that unborn child, to the woman who is pregnant with that unborn child or another is guilty of a Class E felony.
>
> (3) Whoever causes substantial bodily harm to an unborn child by an act done with intent to cause substantial bodily harm to that unborn child, to the woman who is pregnant with that unborn child or another is guilty of a Class D felony.
>
> (4) Whoever causes great bodily harm to an unborn child by an act done with intent to cause bodily harm to that unborn child, to the woman who is pregnant with that unborn child or another is guilty of a Class D felony.
>
> (5) Whoever causes great bodily harm to an unborn child by an act done with intent to cause either substantial bodily harm or great bodily harm to that unborn child, to the woman who is pregnant with that unborn child or another is guilty of a Class C felony.
>
> (6) Whoever intentionally causes bodily harm to an unborn child by conduct that creates a substantial risk of great bodily harm is guilty of a Class D felony.

---

[146] This statute was created by 1997 Wis. Act 295.

The Committee has reviewed this statute as well and recommends that it be repealed and recreated to read as follows:

> **940.195 Battery to an Unborn Child.** (1) Whoever causes great bodily harm to an unborn child by an act done with intent to cause great bodily harm to that unborn child, to the woman who is pregnant with that unborn child or another is guilty of a Class E felony.
>
> (2) Whoever causes great bodily harm to an unborn child by an act done with intent to cause bodily harm to that unborn child, to the woman who is pregnant with that unborn child or another is guilty of a Class H felony.
>
> (3) Whoever causes substantial bodily harm to an unborn child by an act done with intent to cause bodily harm to that unborn child, to the woman who is pregnant with that unborn child or another is guilty of a Class I felony.
>
> (4) Whoever causes bodily harm to an unborn child by an act done with intent to cause bodily harm to that unborn child, to the woman who is pregnant with that unborn child or another is guilty of a Class A misdemeanor.

The provisions of proposed sec. 940.195 track the first four subsections of proposed sec. 940.19. The same commentary to sec. 940.19 would be applicable here as well.

Abuse of Vulnerable Adults, Abuse and Neglect of Patients and Residents, Physical Abuse of a Child, Neglecting a Child, Causing Mental Harm to a Child, Tampering with Household Products, etc. The Wisconsin Statutes contain numerous offenses in the categories of crime listed in the title to this section. In many of these categories there are several offenses which mix and match harm, potential for harm, and culpability or mental state. The Committee attempted to bring some uniformity to the treatment of these offenses and recommends the classification system depicted on the chart which follows. Its rationale for the classifications suggested and for proposed changes to the statutes is discussed in the footnotes which accompany the chart.

DEPICTION OF MISCELLANEOUS INJURY OFFENSES IN THE A-I SYSTEM

AVA = ABUSE OF VULNERABLE ADULTS (940.285)
APF = ABUSE OF RESIDENTS OF PENAL FACILITIES (940.29)
APR = ABUSE AND NEGLECT OF PATIENTS AND RESIDENTS (940.295)
THP = TAMPERING WITH HOUSEHOLD PRODUCTS (941.327)
PAC = PHYSICAL ABUSE OF A CHILD (948.03)[147]
MHC = CAUSING MENTAL HARM TO A CHILD (948.04)
CN = NEGLECTING A CHILD (948.2 1)

MENS REA ("MR"): I = Intentionally R = Recklessly N = Negligently

HARMS ("H") GBH = Great Bodily Harm BH = Bodily Harm
LGBH = Likely to Cause GBH LBH = Likely to Cause BH
HPGBH = High Probability of Great Bodily Harm SBH = Substantial Bodily Harm

A	B	C	D	E	F	G	H	I
		AVA MR:I R H: Death	AVA MR: N H: Death		AVA MR:I R N H: GBH	AVA MR: I H: LGBH	AVA MR: I H: BH[148]	AVA MR: I H: LBH
								AVA MR:RN H: LGBH
								APF
		APR MR:I R H: Death[149]	APR MR: N H: Death[150]	APR MR:I R N H: GBH[151]	APR MR: I H:GBH[152]	APR MR: I H: LGBH	APR MR: I H: BH[153]	APR MR: I H: LBH
							APR MR: RN H: GBH[154]	APR MR: RN H: LGBH
		THP H: Death			THP H: GBH		THP HPGBH	THP General

[147] See also Wis. Stat. sec. 948.03(4) re: Failing to Act to Prevent Bodily Harm.
[148] This proposal calls for classifying what is currently sec. 940.285(2)(b)2 as an H felony when bodily harm is actually caused and as an I felony when there is only a likelihood of bodily harm. Under present law these two offenses are both classified as an E felony.
[149] Victim must be a "vulnerable person."
[150] Victim must be a "vulnerable person."
[151] Victim must be a "vulnerable person." This is the justification for classifying this offense at the E level.
[152] This proposal calls for classifying what is currently sec. 940.295(3)(b)1r as a F felony when great bodily harm is actually caused and as an I felony when there is only a likelihood of great bodily harm. Under present law these two offenses are both classified as a D felony.
[153] This proposal calls for classifying what is currently sec. 940.295(3)(b)2 as an H felony when bodily harm is actually caused and as an I felony when there is only a likelihood of bodily harm. Under present law these two offenses are both classified as an E felony.
[154] This proposal calls for classifying what is currently sec. 940.295(3)(b)3 as an H felony when great bodily harm is actually caused and as an I felony when there is only a likelihood of great bodily harm. Under present law these two offenses are both classified as an E felony.

A	B	C	D	E	F	G	H	I
				PAC MR: I H: GBH			PAC MR: I H: BH	PAC MR: R H: BH
					PAC MR: I [155] H: BH [156]	PAC MR: R[157] H: GBH		
							PAC MR: R H: BH [158]	
					MHC			
			CN H: Death					
				Agg. Battery [159] MR: I: GBH H: GBH			Int. Battery[160] MR: I: BH H: GBH	Int. Battery[161] MR: I: BH H: SBH

[155] The intent here must be to cause bodily harm.
[156] The conduct here must be such as to create a high probability of great bodily harm.
[157] The recklessness element of this offense involves creating a situation of unreasonable risk of harm to and demonstrates a conscious disregard for the safety of the child. It is less serious than the ordinary definition of recklessness found in sec. 939.24 which involves consciously creating an unreasonable and substantial risk of death or great bodily harm to another. Thus the offense to which this footnote is attached is graded less seriously than 2nd degree reckless injury (940.23(2)).
[158] The conduct here must be such as to create a high probability of great bodily harm.
[159] <u>See</u> proposed amendment to general battery statute at p. ._______
[160] <u>See</u> proposed amendment to general battery statute at p. ._______
[161] <u>See</u> proposed amendment to general battery statute at p. ._______

Fleeing an Officer. Under present law fleeing an officer[162] is a felony offense. It is codified in the Motor Vehicle Code and has a graduated penalty structure as follows:[163]

HARM	IMPRISONMENT	FINE
No Bodily Harm; No Property Damage	2 years	$ 10,000
Bodily Harm or Damage to Property of Another	2 years	$1000 - $10,000
Great Bodily Harm	2 years	$1100 - $10,000
Death	5 vears	$1100 - $10.000

The Committee notes several problems with this structure of penalties. First, the maximum term of imprisonment is the same (2 years) regardless of whether the harm caused by the act of fleeing is no bodily harm, bodily harm or great bodily harm. The term of imprisonment increases only if death is caused. Further, the only distinction between the penalty for an act of eluding that causes bodily harm and one that causes great bodily harm is a $ 100 difference in the minimum fine.

The Committee recommends that the penalty structure for fleeing be revamped such that the terms of maximum possible imprisonment are graduated according to the level of harm caused by the actor. This would bring fleeing into line with a number of other crimes whose penalties are likewise staggered according to harm.

[162] Wis. Stat. sec. 346.04(3).
[163] The penalties depicted in the chart accompanying this note are those established by the legislature prior to 1997 Wis. Act 283. See Wis. Stat. sec. 346.17(3)(a)-(d).

Using the A-I felony classification system the Committee recommends the following classifications for fleeing offenses:

HARM	FELONY CLASS	MAXIMUM TERM OF INCARCERATION	MAXIMUM TERM OF EXTENDED SUPERVISION	MAXIMUM FINE
No Bodily Harm; No Property Damage	I	18 months	2 years	$ 10,000
Bodily Harm or Damage to Property of Another	H	3 years	3 years	$ 10,000
Great Bodily Harm to Another	F	7.5 years	5 years	$25,000
Death Of Another	E	10 years	5 years	$50,000

The Committee further recommends that a **misdemeanor** fleeing offense be restored to Wisconsin law. Until 1994 an act of fleeing that did not result in injury or property damage was a misdemeanor offense.[164] In that year the misdemeanor was elevated to a 2-year felony.[165] Doubtless this occurred because some fleeing episodes, though not resulting in injury or property damage, nonetheless pose great threats to the safety of officers and others and thus deserve felony treatment.

However, the Committee learned that the total absence of a misdemeanor fleeing offense has caused an undesirable gap in the motor vehicle laws. Some episodes are short, don't involve high speed, don't seriously compromise public safety, etc. Some prosecutors are hesitant to pursue these cases as felonies and look for ways to resolve them other than at the felony level, sometimes resorting to non-traffic offenses like resisting an officer. Some judges, too, have expressed dissatisfaction with adjudication at the felony level when the actor's conduct, though technically in violation of the statute, is relatively minor in nature.

The Committee believes that a misdemeanor fleeing offense should be incorporated into the fleeing statute for use in those cases when the defendant's behavior is appropriately addressed with a conviction other than at the felony level. The

[164] Wis. Stat. secs. 346.04(3) and 346.17(3)(a) (1991-92).
[165] See 1993 Wis. Act 189.

Committee further believes that the misdemeanor should be part of the motor vehicle laws so that a conviction is properly entered upon the actor's driving record and can appropriately affect the actor's driving privilege. The latter does not occur if a minor offense is pleaded out to a non-traffic offense like resisting an officer.

The Committee searched for the most desirable way of describing the misdemeanor offense. It recommends the following:

> **No operator of a vehicle, after having received a visual or audible signal from a traffic officer, or marked police vehicle, shall intentionally resist the officer by failing to stop his or her vehicle as promptly as safety reasonably permits.**

As proposed, the misdemeanor would not be a lesser included offense of the felony because it has elements in addition to the elements of the felony, i.e., a mental state of "intentionally" and an actus reus element of "resists." Neither of these is an element of felony fleeing.

A provision should be crafted that indicates that one cannot be convicted of both the misdemeanor and the felony for the same act of fleeing. As a practical matter the Committee expects that the misdemeanor will probably be used most often - not as a charge to be tried - but as a way of resolving minor fleeing cases by way of a guilty plea. Nonetheless, in appropriate cases, the prosecutor may elect to proceed from the outset with the misdemeanor.

This offense should be punishable by fine or imprisonment or both. The Committee recommends penalties at the Class A misdemeanor level, which would involve a 9-month maximum term of imprisonment or a $10,000 fine, or both.

Habitual Criminality. The Committee recommends that the penalty section of the general repeater statute[166] (also known as habitual criminality) be amended to read as follows:

> 939.62 (1) If the actor is a repeater, as that term is defined in sub. (2), and the present conviction is for any crime for which imprisonment may be imposed (except for an escape under s. 946.42 or a failure to report under s. 946.425) the maximum term of imprisonment prescribed by law for that crime may be increased as follows:
>
> (a) A maximum term of one year or less may be increased to not more than 3 2 years.

[166] Wis. Stat. sec. 939.62(1).

(b) A maximum term of more than one year but not more than 10 years may be increased by not more than 2 years if the prior convictions were for misdemeanors and by not more than ~~6~~ 4 years if the prior conviction was for a felony.

(c) A maximum term of more than 10 years may be increased by not more than 2 years if the prior convictions were for misdemeanors and by not more than ~~10~~ 6 years if the prior conviction was for a felony.

The Committee arrived at these changes by applying the mandatory release converter (which it used to convert felonies from their existing felonies into the new A-I classification system) to arrive at the numbers recommended above. It does not recommend reducing the provisions for the 2-year increases specified in (b) and (c) which apply when the person is a habitual criminal because of prior misdemeanor convictions.

The Committee recommends no changes for the persistent repeater ("three strikes" and "two strikes") provisions of the habitual criminality statute.[167]

Penalty Enhancers. The last recodification of the Wisconsin Criminal Code occurred in the early 1950's.[168] At that time Chapter 939 had a habitual criminality provision but no other enhancers. Concealing identity during the commission of a crime was treated as a separate crime[169] and a few substantive crimes had aggravating circumstances built into them which elevated the severity of the offense.[170]

Since that time the enactment of penalty enhancers has become extremely popular with the Wisconsin legislature (and legislatures nationally). Today Chapter 939 by itself has at least 17 enhancer statutes and that number may reasonably be expected to rise. In addition to the Chapter 939 enhancers, numerous substantive crimes have enhancers and penalty doublers built into them. Further, the legislature has passed a significant number of special circumstances crimes which really amount to enhancers in the sense that they consist of ordinary crimes whose protections have been extended to special groups with concomitant increases in penalties.[171]

With the advent of truth in sentencing the Committee considered whether some penalty enhancers (but not all of them) might be incorporated into an omnibus statute identifying aggravating circumstances which the judge must consider at sentencing. An aggravating circumstance may drive the judge to impose a heavier sentence but it does not affect the maximum possible sentence. In making the recommendations which

---

[167] See Wis. Stat. sec. 939.62(2m).
[168] See 1955 Wis. Laws 696.
[169] See Wis. Stat. sec. 946.62 (1955).
[170] See, e.g, Criminal Damage to Property (Wis. Stat. sec. 943.01(2)(1955)) and Burglary (Wis. Stat. sec. 943.10(2)(1955)).
[171] The numerous special circumstances battery statutes codified in Wis. Stat. ch. 940 are perhaps the best examples of ordinary crimes whose protections have been extended to special groups.

follow for the recharacterization of certain enhancers as sentencing aggravators, the Committee determined that the amount of real incarceration time available to the judge in the proposed A-I classification system leaves enough room for appropriately dealing with the offender who has committed most "aggravated" forms of the underlying offense. It also considered the extent to which the enhancers are actually utilized, the real impact of enhancers on the maximum term of imprisonment, and the experience of other states which have embraced truth in sentencing and which have recast penalty enhancers as sentencing aggravators.

The Committee believes that if any enhancers are recharacterized as sentencing aggravators, a statute should be enacted that lists the aggravators and directs the judge to consider them when imposing a sentence. The statute should specify that aggravators are not elements of the crime.

The Committee recommends that the following penalty enhancers found in Chapter 939 be recast as sentencing aggravators and codified in an omnibus sentencing statute.

- The defendant committed the crime while his or her usual appearance was concealed, disguised or altered, with intent to make it less likely that he or she would be identified with the crime;[172]

- The defendant committed any felony while wearing a bulletproof garment;[173]

- The defendant committed a violation of secs. 940.19(2), (3), (4), (5) or (6), 940.225(1), (2) or (3), 940.23 or 943.32 against a person who at the time was 62 years of age or older;[174]

- The defendant committed the crime for the benefit of, at the direction of or in association with any criminal gang, with the specific intent to promote, further or assist in any criminal conduct by criminal gang members;[175]

- The defendant committed a violation of secs. 940.225(1) or (2), 948.02(1) or (2) 948.025 and at the time knew that he or she had syphilis, gonorrhea, hepatitis B, hepatitis C, chlamydia, or acquired immunodeficiency syndrome or has had a positive test for the presence of HIV, antigen or nonantigenic products of HIV or an antibody to HIV.[176]

---

[172] Currently codified at Wis. Stat. sec. 939.641.
[173] Currently codified at Wis. Stat. sec. 939.64.
[174] Currently codified at Wis. Stat. sec. 939.647.
[175] Currently codified at Wis. Stat. sec. 939.625.
[176] Currently codified at Wis. Stat. sec. 939.622.

- The defendant committed a crime using information that was disclosed to him or her under sec. 301 .46.[177] (sex offender registry)

- Terrorism[178]

The Committee recommends that the following statutes should be maintained as presently codified without change:

- Wis. Stat. sec. 939.63 Penalties; Use of a Dangerous Weapon
- Wis. Stat. sec. 939.632 Penalties; Violent Crime in a School Zone
- Wis. Stat. sec. 939.621 Increased Penalty for Certain Domestic Abuse Offenses

- Wis. Stat. sec. 939.645 "Hate Crimes"

The Committee further recommends that the following enhancers codified other than in Chapter 939 be recast as sentencing aggravators:

- The defendant committed a violation of secs. 948.02(1) or (2) against a child and at the time was a person responsible for the welfare of that child, as defined in sec. 948.01(3).[179]

- The defendant committed a violation of sec. 948.025 against a child and at the time was a person responsible for the welfare of that child, as defined in sec. 948.01(3).[180]

- The defendant committed a violation of sec. 940.09(1) or 940.25(1) and there was a minor passenger under 16 years of age in the motor vehicle at the time of the offense."'

- Various enhancers codified in Chapter 961 .[182]

Minimum Sentences and Mandatory Consecutive Sentences. The Committee makes a general recommendation that provisions in criminal statutes establishing minimum sentences (presumptive or otherwise) or mandatory consecutive sentences be repealed. This is consistent with the general approach to crime classification and penalty variations embraced by the legislature when it first undertook the process of crime

---

[177] Currently codified at Wis. Stat. sec. 939.646.
[178] Currently codified at Wis. Stat. sec. 939.648.
[179] Currently codified at Wis. Stat. sec. 948.02(3m).
[180] Currently codified at Wis. Stat. sec. 948.025(2m).
[181] Currently codified at Wis. Stat. sec. 940.09(1 b) and 940.25(1 b)
[182] Chapter 961 changes were recommended in a separate memorandum dealing with drug offenses.

classification more than twenty years ago. It allows the court maximum sentencing discretion to deal with the multitude of offenders who commit crimes and the multitude of ways in which they do so. Guided by sound judicial discretion and assisted by sentencing guidelines (when the crime of conviction is one for which a guideline has been established), the judge should have maximum flexibility to mete out the appropriate sentence in every case. As a practical matter the Committee notes that when the circumstances which underlie these statutes are present in a particular case, they are properly matters for the prosecutor to argue at sentencing and will inevitably influence the court in determining the sentence to be imposed.

The observations in the preceding paragraph are subject to a limited number of exceptions. There is no recommendation to change mandatory life imprisonment for Class A felonies, nor is there a recommendation to change the provisions of the persistent repeater ("three strikes" or "two strikes") statute which, if invoked, mandate life imprisonment. Finally, the Committee recommends maintaining the structure of minimum mandatory penalties for repeat OWI offenders. Those exceptions aside, the Committee recommends the repeal of the following Criminal Code statutes:

- Wis. Stat. sec. 939.615(7)(c) Violation of a Condition of Lifetime Supervision (consecutive sentence provision only)[183]
- Wis. Stat. sec. 939.623 Increased Penalty; Repeat Serious Sex Crimes[184]
- Wis. Stat. sec. 939.624 Increased Penalty; Repeat Serious Violent Crimes[185]

[183] Wis. Stat. sec. 939.615(7) establishes penalties for certain sex offenders who are placed on lifetime supervision and violate a condition of that supervision. Under present law this offense is punished either as a Class A misdemeanor or a Class E felony. However, if the person is convicted of violating this statute for the same conduct that resulted in the person being convicted of another crime, the sentence imposed for a violation of this statute must be consecutive to any sentence imposed for the other crime.

This is one of the very few situations where the law requires the court to impose a consecutive sentence. In virtually every other sentencing context, the law trusts the judge to appropriately decide whether a sentence should be concurrent with or consecutive to another sentence. There is no reason not to likewise trust the judge in the sec. 939.615(7) context.

[184] Wis. Stat. sec. 939.623 provides that if a person has one or more prior convictions for a serious sex crime (defined as first or second degree sexual assault), the court shall sentence the person to not less than 5 years imprisonment, but otherwise the penalties for the new crime apply, subject to any penalty enhancement. The court shall not place the person on probation.

This statute really isn't a penalty enhancer, though the title of the statute speaks of an "increased penalty." Rather, it establishes a minimum term of imprisonment. It is thus inconsistent with the general approach of the Committee to recommend that, except for life imprisonment felonies, minimum terms of imprisonment should be repealed. Further, as a practical matter, there is little likelihood that a person who qualifies as a serious sex offender and then commits another sexual assault would be placed on probation or receive a sentence of less than five years.

[185] Wis. Stat. sec. 939.624 provides that if a person has one or more prior convictions for a serious violent crime (defined as felony murder or second-degree intentional homicide) or a crime punishable by life imprisonment and subsequently commits felony murder or second-degree intentional homicide, the court

- Wis. Stat. sec. 939.63(2) Penalties; Use of Dangerous Weapon (minimum term only)[186]

- Wis. Stat. sec. 939.635 Penalties; Assault or Battery in Secured Juvenile Facilities or to Aftercare Agent[187]

- Wis. Stat. sec. 941.296(3) Use or Possession of a Handgun and An Armor-Piercing Bullet During Crime (consecutive sentence provision only)[188]

- Wis. Stat. sec. 946.42(4) Escape (consecutive sentence provision only)[189]

---

shall sentence the person to not less than 5 years in prison, but otherwise the penalties for new crime apply, subject to any applicable penalty enhancements. The court shall not place the defendant on probation.

Like sec. 939.623 discussed in the preceding footnote, this statute is not really a penalty enhancer either though the title of the statute speaks of an "increased penalty." If the very unusual circumstances described therein should occur, the court must sentence the person to a minimum prison term. For the very same reasons described in the preceding footnote, the Committee recommends repeal of this statute.

[186] Wis. Stat. sec. 939.63 is a penalty enhancer available when the defendant commits a crime while possessing, using or threatening to use a dangerous weapon. The Committee recommends that this enhancer be retained as an enhancer and further recommends that the amount of imprisonment by which the penalty for the underlying crime may be increased be retained without change. However, it recommends that sub.(2) of the statute, which establishes certain minimum terms of imprisonment when the underlying crime is a felony, be repealed. This is consistent with the Committee's general approach of removing presumptive minimum penalties from the criminal law in favor of maximizing judicial discretion in the imposition of sentences. Further, as a practical matter, present law allows the court to depart from this minimum or to place the person on probation if it places its reasons for doing so on the record.

[187] Though codified with the Chapter 939 penalty enhancers, this statute really amounts to a presumptive minimum sentencing statute. As indicated in the text, the Committee recommends repeal of all presumptive minimum sentencing provisions.

[188] Wis. Stat. sec. 941.296(3) provides that a court shall impose a sentence for this crime consecutive to any sentence previously imposed or that may be imposed for the crime that the person committed while using or possessing a handgun loaded with an armor-piercing bullet.

This offense is currently a Class E felony and would naturally convert to a Class I felony in the proposed A-I felony classification system. The Committee recommends that the offense be raised to a Class H felony. However, it recommends that the consecutive sentencing provision be repealed. This is one of the very few situations where the law requires the court to impose a consecutive sentence. In virtually every other sentencing context, the law trusts the judge to appropriately decide whether a sentence should be concurrent with or consecutive to another sentence. The same discretion should be afforded in the sec. 94 1.296 context.

[189] Wis. Stat. sec. 946.42(4) provides that a sentence for escape must be consecutive to any sentence previously imposed or which may be imposed for any crime or offense for which the person was in custody when he or she escaped.

The Committee recommends repeal of this mandatory consecutive sentence provision. This too is one of the very few situations where the law requires the court to impose a consecutive sentence. In virtually every other sentencing context, the law trusts the judge to appropriately decide whether a sentence should be concurrent with or consecutive to another sentence. The same discretion should be afforded here.

- Wis. Stat. sec. 946.425(2) Failure to Report to Jail (consecutive sentence provision only)[190]
- Wis. Stat. sec. 948.36 Use of a Child to Commit a Class A Felony"'
- Wis. Stat. sec. 948.605(4) Gun-Free School Zones (consecutive sentence provision)[192]

Felony Murder. The felony murder statute[193] should be amended to provide that the maximum penalty for the underlying offense may be increased by not more than 15 years. Under present law the increase is 20 years, but applying the mandatory release converter (2/3rds of the maximum possible imprisonment), which has been used to convert all felonies to the new A-I classification system, this number (20) should be reduced to 15.

Carjacking Resulting in Death. Carjacking resulting in death[194] is currently classified as a Class A felony. The Committee recommends treating this offense like armed robbery and including it within the catalogue of offenses that receive felony murder treatment under Wis. Stat. sec. 940.03. Armed robbery and carjacking are very similar to each other and, as proposed by the Committee, both would be classified as Class C felonies. If death results from either, the prosecutor should have the similar option of proceeding with a felony murder charge. Of course, if the factual circumstances of the case so warrant, the state may forego a felony murder charge in favor of a combination of other charges, like first-degree intentional homicide and carjacking (just as it often does when it charges first-degree intentional homicide along with armed robbery).

---

[190] Sentencing for failure to report to jail is treated much like sentencing for escape described in the preceding note. For the same reasons the Committee recommends repeal of that part of the statute mandating a consecutive sentence.

[191] In essence this statute adds 5 years to a life term if a person who has attained the age of 17 years advises, hires, counsels, procures, etc. a person 17 years of age or younger to commit a Class A felony and the latter is actually committed by the child. In the view of the Committee sec. 939.05(2)(c) makes the adult in these circumstances a party to the Class A felony and he or she would thus face life imprisonment. This is sufficient exposure and the S-year enhancer is unnecessary.

[192] The Gun-free School Zone statute provides that, if a term of imprisonment is imposed for a violation thereof, the court shall impose the sentence consecutive to any other sentence. The Committee recommends repeal of this mandatory provision. Imposing a sentence of incarceration for a violation of this statute is discretionary with the judge; no jail term is mandated. Further, the Committee believes the court should have the same discretion to impose a concurrent or consecutive sentence for a violation of this law that it has for virtually every other violation of the criminal law, including many more serious crimes.

[193] See Wis. Stat. sec. 940.03.

[194] Wis. Stat. sec. 943.23(Ir).

Possession of Firearm by Felon. The Committee recommends classifying the crime of possession of a firearm by a felon[195] as a Class G felony with a maximum term of confinement of five years followed by a maximum term of extended supervision of five years. Under present law a violation of this statute is punishable as a Class E felony for which the maximum term of imprisonment is two years. [196] If the actor is a repeat violator of this statute, the offense is punishable as a Class D felony for which the maximum term of imprisonment is currently set at five years. [197] The Committee recommends making all violations of the statute punishable by up to five years in prison. The severity of the offense and the potential for violence posed by those who are prohibited from possessing firearms prompted the proposed classification at the G level. The new five-year exposure is sufficient to deal even with repeat offenders and therefore the Committee recommends repeal of the repeater which is built into the current statute.

Operating Vehicle without Owner's Consent. The operating vehicle without owner's consent (OAWOOC) statute prohibits taking and driving any vehicle without the consent of the owner (recommended for classification as a Class H felony).[198] It also prohibits driving or operating any vehicle without the consent of the owner (recommended for classification as a Class I felony).[199] There is no misdemeanor joyriding offense except for one dealing with passengers who know that the vehicle is being driven without the owners consent.[200]

The Committee recommends that a misdemeanor joyriding statute be restored to the OAWOOC law. It uses the term "restore" because such a statute used to be part of the OAWOOC law. In essence it provided that whoever violated the OAWOOC law (normally a felony) would be guilty of a Class A misdemeanor if he or she abandoned the vehicle without damage within 24 hours.[201] The misdemeanor portion of the statute was subsequently repealed.

The Committee recommends the restoration of a misdemeanor OAWOOC consent offense to read as follows:

> **It is an affirmative defense to a prosecution for a violation of sub. (2) or (3) [of Wis. Stat. sec. 943.23) if the defendant abandoned the vehicle without damage within 24 hours after the vehicle was originally taken from the owner. An affirmative defense under this subsection mitigates the offense to a Class A misdemeanor. A defendant who raises this affirmative defense has the burden of proving the defense by a preponderance of the evidence.**

[195] Wis. Stat. sec. 941.29.
[196] Wis. Stat. sec. 941.29(2).
[197] Wis. Stat. sec. 941.29(2m).
[198] Wis. Stat. sec. 943.23(2).
[199] Wis. Stat. sec. 943.23(3).
[200] Wis. Stat. sec. 943.23(4m).
[201] See Wis. Stat. sec. 943.23(2) (1977).

This statute provides an option for disposing of OAWOOC consent cases at the misdemeanor level when the deprivation is brief in duration and involves no property damage to the vehicle. The proposed statute resolves difficult proof issues that existed under the prior misdemeanor law by clearly articulating that abandonment without damage within 24 hours of the taking is an affirmative defense as to which the defendant bears the burden of proof by a preponderance of the evidence.

Juvenile Absconding Statutes. Under current law each felony class has a provision dealing with the very specialized situation of a juvenile who absconds after being adjudicated delinquent and then fails to return to court for a dispositional hearing before attaining the age of 17.[202] This offense is punishable as a felony at the same level as the offense of which the actor would have been guilty had his or her conduct been committed by an adult. For example, it is a Class B felony to abscond after having been adjudicated delinquent for committing an act that would be a Class B felony if committed by an adult.

The Committee debated the classification of this absconding provision at length. It recognizes the anomaly that the juvenile who appears as required for a dispositional hearing before turning 17 is subject to a juvenile disposition, but if the very same juvenile fails to appear before turning 17, he or she may be prosecuted under the absconding statute and in some cases face an adult sentence of much greater length. But the Committee also recognizes another anomaly in the law. If a juvenile absconds prior to adjudication and does not become adjudicated before turning 17, the prosecutor may waive him or her to adult court on the underlying charge,[203] whereas if the same juvenile is adjudicated prior to turning 17 but is returned to custody after turning 17, he or she cannot be waived on the underlying charge and, except for a few very serious felonies, would only to subject to a disposition lasting until his or her 18th birthday. The absconding statute attempts to deal with the latter situation.

Though there are to date very few cases in which this statute has been enforced, the Committee recommends retaining it and extending its application to all classes of felonies in the new A-I classification system. Though not totally satisfied with this result because of the first anomaly described above, it appreciates the need to fill the gap which exists because of the second. Perhaps a better solution would be to allow the adjudication of the juvenile who absconds after adjudication and is not returned to court before turning 17 to be vacated and to thereafter permit the filing of an adult charge on the underlying offense. However, making such a change would require amendments to the Juvenile Code which should not be pursued until those with greater expertise in juvenile law have a chance to consider the matter.

Solicitation of a Child to Commit a Felony. Wis. Stat. sec. 948.35 is an inchoate solicitation statute when the person solicited is a person 17 years of age or older. The Committee recommends the repeal of this statute. In its view of the penalties under

[202] Wis. Stat. sec. 946.50.
[203] See Wis. Stat. 938.18(2).

the general solicitation statute[204] are sufficient to address the dangers of inchoate solicitation. Whether the actor solicited a child to commit an offense is an aggravating circumstance to be considered by the court at sentencing.

[204] **See** Wis. **Stat. sec. 939.30.**

E. Proposed Classification of Criminal Code Class A Misdemeanors

Act 283 directs this Committee to study the penalties "for all felonies and Class A misdemeanors." It further provides that the committee shall classify "each felony and Class A misdemeanor in a manner that places crimes of similar severity into the same classification." There is no directive in Act 283 to classify misdemeanors that are presently unclassified.

The Committee has examined all crimes currently assigned status as Class A misdemeanors in the Criminal Code using the classification criteria described earlier in this report. Except as noted below, it has concluded that they are all properly classified as Class A misdemeanors and therefore ought to be retained in that classification.

The changes which the Committee recommends are as follows:

- Stalking[205] should be elevated to a Class I felony.
- Criminal Damage to Railroad Property[206] should be elevated to a Class I felony.
- The "value" level at which the following crimes listed are classified as Class A misdemeanors should be raised to a new ceiling of $2,000:

    1. Theft[207]
    2. Fraud on Hotel or Restaurant Keeper or Taxicab Operator[208]
    3. Issuance of Worthless Check[209]
    4. Removing or Damaging Encumbered Real Property[210]
    5. Receiving Stolen Property[211]
    6. Fraudulent Insurance and Employee Benefit Program Claims[212]

---

[205] Wis. Stat. sec. 940.32(2) (1997).
[206] Wis. Stat. sec. 943.07(1) & (2) (1997).
[207] Wis. Stat. sec. 943.20(3)(a) (1997).
[208] Wis. Stat. sec. 943.21(3)(a) (1997).
[209] Wis. Stat. sec. 943.24(1) (1997).
[210] Wis. Stat. sec. 943.26(1) (1997).
[211] Wis. Stat. sec. 943.34(l)(a) (1997).
[212] Wis. Stat. sec. 943.395(2)(a) (1997).

7. Financial Transaction Card Crimes[213]

8. Retail Theft[214]

- Possession of a Firearm in a School Zone[215] should be elevated to a Class I felony.

- Discharge of a Firearm in a School Zone[216] should be elevated to a Class G felony.

- Carrying Firearm in a Public Building[217] should be elevated from a Class B misdemeanor to a Class A misdemeanor.

- Fornication[218] should be renamed "Public Fornication" to more accurately depict the nature of the offense and should remain classified as a Class A misdemeanor.

- The crime of Criminal Damage to Certain Coin-Operated or Card-Operated Machines with Intent to Commit Theft[219] should be repealed. The harm covered by this statute is adequately addressed by several other crimes, including Damage to Property (943.01), Attempted Theft (943.20 and 939.32), and Entry Into Locked Coin Box (943.125).

[213] Wis. Stat. sec. 943.41(8)(c) (1997).
[214] Wis. Stat. sec. 943.50(4)(a) (1997).
[215] Wis. Stat. sec. 948.605 (2) (1997).
[216] Wis. Stat. sec. 948.605(3) (1997).
[217] Wis. Stat. sec. 941.235(1) (1997).
[218] Wis. Stat. sec. 944.15 (1997).
[219] Wis. Stat. sec. 943.01(2g).

F. Classification of Chapter 961 Drug Offenses

1. Introduction

Most of Wisconsin's drug offenses are codified in Chapter 961 of the Statutes. This chapter is not part of the Wisconsin Criminal Code,[220] though many of the Code's general provisions apply to drug prosecutions[221] and, unless there is a specific provision to the contrary, so do the provisions of the Wisconsin Code of Criminal Procedure.[222]

Chapter 961 is a relatively self-contained drug code for the state. Beyond the complex set of crimes codified therein, it has its own declaration of legislative intent, its own set of definitions, and its own system of sanctions. At present its felonies and misdemeanors are not classified in either the A-E felony classification system or the A-C misdemeanor classification system provided for in Wis. Stat. secs. 939.50 to 939.5 1.

The Committee used the same process for converting drug offenses to the new A-I classification system that it used for Criminal Code offenses as well as non-drug non-Criminal Code felonies.[223] The factors described earlier in this report which guided the classification of crimes in the new system were applied to drug offenses as well. However, with specific regard to drug crimes, the Committee also took into account the statement of legislative intent codified in Wis. Stat. sec. 961.001 as well as the interplay between the federal and state governments in the enforcement of overlapping drug laws.

2. Impact of Proposed Classification of Drug Offenses

Under current law drug offenses are not classified; each has a specific penalty articulated in Chapter 961. For drugs that are stratified by amounts delivered or possessed with the intent to deliver, different penalty systems are used. In some instances the maximum amount of imprisonment escalates with the amount of the drug. In others presumptive minimum penalties are used to distinguish among amounts. In yet others a combination of these approaches is used.

Bringing drugs within a uniform system for classifying crimes (a charge given to the Committee by the legislature) means that the penalty structure for these offenses will be expressed in terms of a maximum fine and a maximum term of imprisonment. Once a drug offense is placed in a given felony classification, the penalty range for that classification will apply.

---

[220] Chapters 939 to 95 1 comprise the Wisconsin Criminal Code. See Wis. Stat. sec. 939.01.

[221] Wis. Stat. sec. 939.20 provides: "Sections *939.22* to *939.25* [definitions of criminal intent, criminal recklessness, criminal negligence, and other miscellaneous words and phrases] apply only to crimes defined in chs. 939 to 95 1. Other sections in ch. 939 [the general provisions of Wisconsin's substantive criminal law] apply to crimes defined in other chapters of the statutes as well as to those defined in chs. 939 to 95 1."

[222] Wis. Stat. sec. 967.01 provides in pertinent part that "Chapters 967 to 979 [the Wisconsin Criminal Procedure Code] shall govern all criminal proceedings.. . .."

[223] See Part II.C.4., pp. _____---._____

There is at least a two-fold impact of such classification. First, for all felony classes into which drugs have been placed, there is no minimum term of imprisonment and no minimum fine (presumptive or mandatory). In appropriate cases the judge would have the discretion to place the offender on probation. The Committee agrees that this is a desirable outcome of classifying drug offenses. It believes that judges should have the same full range of penalties available to them when sentencing drug offenders as they have when sentencing persons convicted of such dangerous offenses as homicide (other than first-degree intentional homicide), armed robbery, sexual assault, or aggravated burglary. It also believes that the exercise of sound judicial discretion in sentencing drug offenders should not be restricted by minimum penalties when the legislature has not seen fit to so restrict discretion when sentencing offenders convicted of other serious felonies like those noted above.[224]

Another impact of classification is the reduction in maximum fines. Under current law fines top out at $100,000 for THC (marijuana), $500,000 for cocaine, $500,000 for LSD, $500,000 for methamphetamine, amphetamine, phencyclidine (PCP) and methcathinone, and $1,000,000 for heroin. These amounts double for repeat offenders. As a practical matter these enormous amounts are never imposed on state law offenders and, if the drug defendant has sizable assets linked to his or her illicit activities, the forfeiture laws will be used to seize them. The latter is most attractive to the authorities because it results in some or all of the forfeited assets being retained by law enforcement agencies for official use.[225] The Committee recommends that its proposed fine structure for other classified felonies be applied to drug felonies as well. The maximum fines in the uniform fine structure are more than sufficient to encompass the kinds of fines judges impose in state drug prosecutions today.

These changes are in no way intended to depreciate the seriousness of drug offenses or to minimize the impact drugs have had on modem society. Rather, they bring drugs into the kind of uniform classification system which the Committee believes was intended by the legislature when it commanded that "a uniform classification system for all felonies, including felonies outside of the criminal code"[226] be created.

---

[224] The Committee recognizes that some presumptive minimum penalties are used in the penalty enhancer statutes. It will be recommending that these be repealed as well for the same reasons as those articulated in the text accompanying this note.
[225] See Wis. Stat. sec. 96 1.55 et seq.
[226] See *1997* Wis. Act 283 sec. 454(l)(e)l.

3. Proposed Classification of Drug Offenses

COLOR CODES

ENTRIES IN GREEN REFLECT UPWARD CLASS ADJUSTMENT AFTER APPLICATION OF M.R. CONVERTER.

ENTRIES IN BLUE REFLECT NEW CRIMES RECOMMENDED FOR ENACTMENT BY THE LEGISLATURE OR EXISTING CRIMES FOR WHICH SIGNIFICANT AMENDMENTS ARE PROPOSED.

ENTRIES IN RED REFLECT DOWNWARD CLASS ADJUSTMENT AFTER APPLICATION OF M.R. CONVERTER.

ENTRIES IN BLACK REFLECT THE NATURAL PLACEMENT OF CRIMES IN A-I SYSTEM AFTER APPLICATION OF THE M.R. CONVERTER.

NOTE: Each entry in green and red is accompanied by a parenthetical which indicates "from Red."and green entries mean that an adjustment has been made either upward (green) or downward (red) from the felony class where a crime would naturally be placed by application of the M.R. converter. The "from" indicates where natural placement would be.

KEY TO ABBREVIATIONS

DELIVERY: Manufacture, distribution or delivery
COCAINE: Cocaine or cocaine base
METH: Phencyclidine, amphetamine, methamphetamine or methcathinone
LSD: lysergic acid diethylamide
PSILOCIN: psilocin or psilocybin
THC: tetrahydracannibonols (marijuana). **NOTE:** All weight values for THC should also be expressed in terms of the number of plants with the converter of 1 plant = 50 grams applied.