Illegal Drugs, New Laws, and Justice: An Examination of Five Recently Enacted Minnesota Statutes

Philip Leavenworth
NOTE

ILLEGAL DRUGS, NEW LAWS, AND JUSTICE: AN EXAMINATION OF FIVE RECENTLY ENACTED MINNESOTA STATUTES

INTRODUCTION

This Note is about illegal drugs, new laws, and justice. A useful starting point is the restatement of a simple truth: state government, in the exercise of its inherent police power, may enact rules and laws for the purpose of governing certain types of individual conduct. Such laws are especially legitimate when they are intended to curb behavior that poses a serious threat to the health and welfare of society. Throughout the nation, recent increases in the sale and use of illegal drugs are perceived by many citizens to be one such threat to the welfare of American society. In Minnesota, part of the governmental response to this threat has been the passage of new civil and criminal laws.

These laws are generally designed to accomplish two things. First, the new laws often increase existing penalties, or impose altogether new penalties, for certain types of drug-related behavior. Second, these laws reduce the amount of proof the police require in order to justify an arrest, and correspondingly reduce—and in one case, eliminate—the prosecutor’s burden of proof in court. As a consequence, suspected drug offenders now face a dramatically increased risk of arrest and punishment.

There may be problems with this state of affairs. One problem may lie in the true scope of the drug problem. In recent years, the national and local media have unleashed a barrage of coverage on the drug problem, with particular focus on the effects of cocaine and "crack" cocaine. As of late, the question has begun to emerge as to whether this coverage has been responsible for making the drug problem appear larger than it really is.1 One need not diminish the

1. See, e.g., Nightline: "Pack Journalism": Horde Copy (ABC television broadcast, Sept. 27, 1989) (transcript on file at the William Mitchell Law Review Office). On this broadcast, news correspondent Jeff Greenfield questioned whether the media have accurately portrayed the true scope of the drug problem and the alleged rise in crime associated with drugs: "If drugs have triggered a sudden, huge surge in crime, why are national murder and robbery rates down in the last two years? Why were there fewer burglaries in New York and Los Angeles last year than there were back in 1980?" Id. at 3. Greenfield also noted that 163 drug-related stories were broadcast over a two week span on the three major network newscasts alone. Id.

See also Minnesotans’ Use of Drugs Below Average, St. Paul Pioneer Press Dispatch,
fact that there is a serious drug problem in order to hold out hope that important changes in the law will be based on the most solid and reliable information available, and that possible media exaggerations will not be unduly influential.

Another problem may lie in the potential of these new laws to bring about results that are unjust. This Note will examine the prospects for injustice that exist within two categories of new Minnesota drug laws. The first of these categories can be accurately labeled "inference-based" laws. Statutory inferences and presumptions permit the prosecutor to take one step back from the need to submit direct proof of a crime. Under these laws, the prosecutor may prove one fact which is then legislatively presumed or inferred to be proof of the existence of another fact. The presumed or inferred fact is in turn proof that a crime was committed. This Note will attempt to show how easily such presumptions may prove erroneous and, as a consequence, how easily innocent persons may be hurt.

The second category of new drug laws perhaps should not be called a category at all. The laws addressed here have little in common except for one principal feature: they may easily set forth punishments that are entirely out of proportion to the crime committed. As will be shown, one of the two new statutes discussed here potentially holds out the punishment of thirty years in prison for the mere speaking of certain words.

The five new Minnesota statutes discussed in this Note are: (A) Inference-Based Statutes: (1) Permissive Inference of Knowing Possession

Nov. 22, 1989, at 1, col. 1. Survey data provided by Minnesota Human Services Department indicates illegal drug use less widespread than in 1973 when last survey was taken. (State officials released preliminary data early because of the "great public concern" about drugs.)

Information mailed to this writer by the Minnesota Bureau of Criminal Apprehension shows the following number of narcotics (all types) arrests in Minnesota:

<table>
<thead>
<tr>
<th>Year</th>
<th>Sale</th>
<th>Possession</th>
</tr>
</thead>
<tbody>
<tr>
<td>1984</td>
<td>1,217</td>
<td>4,312</td>
</tr>
<tr>
<td>1985</td>
<td>1,373</td>
<td>3,999</td>
</tr>
<tr>
<td>1986</td>
<td>1,339</td>
<td>3,584</td>
</tr>
<tr>
<td>1987</td>
<td>1,542</td>
<td>4,405</td>
</tr>
<tr>
<td>1988</td>
<td>1,866</td>
<td>4,814</td>
</tr>
</tbody>
</table>

Office Memorandum from Kathy Frawley, Minnesota Bureau of Criminal Apprehension, to Phil Leavenworth (Sept. 15, 1989). While there has been an upward trend in arrests, it does not appear to be the type of trend that would be proper to describe as "dramatic" or "skyrocketing." Also, if the Human Services Department's data is correct, drug use is down, possibly meaning that increases in arrests are not related to increased demand for illegal drugs.

2. For a good general discussion of presumptions and inferences, see Soules, Presumptions in Criminal Cases, 20 BAYLOR L. REV. 277 (1968).
sion, Minnesota Statutes section 152.028; (2) Forfeiture of Property Associated with Controlled Substances, Minnesota Statutes section 609.5314, subdivision 1; (3) Possession of Controlled Substances, Minnesota Statutes sections 152.021–.025; (B) Punishment-Issue Statutes: (4) the definition of “sell” in Minnesota Statutes section 152.01, subdivision 15a; (5) Murder in the Third Degree, Minnesota Statutes section 609.195, subdivision b.

I. INference-Based Statutes

A. Minnesota Statutes Section 152.028 and Permissive Inference of Knowing Possession

When a person is arrested and the police find an illegal drug in that person's pocket or purse, the police and prosecutor have a relatively easy burden with respect to proving that the person possessed the drug. The illegal drug is first presented in court as evidence along with the test results to show that it is in fact an illegal drug. The arresting officer then takes the witness stand, describes the arrest, and testifies as to where the drugs were found. Typically, the officer's testimony is accepted by the jury as true and, absent some credible and exonerating explanation by the defendant, the defendant will likely be convicted for the crime of possession. The situation can be much different, however, when a search warrant is executed, drugs are found on a table in plain view, and six or seven people are in the room. Who possessed the drugs, all of the persons present? Prior to August 1, 1989, arrests and prosecutions under these circumstances proceeded under a "constructive possession" doctrine.3

In State v. Florine,4 the Minnesota Supreme Court explained that in order to prove constructive possession [of an illegal drug not found on the defendant's person] the state should have to show (a) that the police found the substance in a place under defendant's exclusive control to which other people did not normally have access, or (b) that, if police found it in a place to which others had access, there is a strong probability (inferable from other evidence) that defendant was at the time consciously exercising dominion and control over it.5

Police and prosecutors proceeding under this doctrine faced the possibility of a substantial and cumbersome task of evidence gathering.

3. This doctrine permits convictions where the state cannot prove actual or physical possession at the time of arrest but where the inference is strong that the defendant at one time physically possessed the substance and did not abandon his possessory interest in the substance but rather continued to exercise dominion and control over it up to the time of arrest.

State v. Florine, 303 Minn. 103, 104–05, 226 N.W.2d 609, 610 (1975).

4. 303 Minn. 103, 226 N.W.2d 609 (1975).

5. Id. at 105, 226 N.W.2d at 611.
Consider, for instance, a hypothetical police raid where nine people are found inside a room with illegal drugs in view. All nine will almost certainly deny possessing the drugs. In order to establish which of the people should be charged with the crime of possession, the police might consider: whether any of the persons present is the owner or lessee of the premises; whether any of the persons possessed drug paraphernalia or equipment known to be related to drug activity (e.g., glass tubes, radio controlled telephone pagers); whether any of the persons appeared to be under the influence of drugs; and the explanation of each person for being on the premises. Certainly, there could be other evidence indicating who possessed the drugs.

On August 1, 1989, a new law designed to ease the police and prosecutor's burden of proof in the constructive possession situation became effective. The new law creates a permissive inference of knowing possession of illegal drugs. Minnesota Statutes section 152.028, subdivision 1, states:

The presence of a controlled substance in open view in a room, other than a public place, under circumstances evincing an intent by one or more of the persons present to unlawfully... prepare for sale the controlled substance permits the factfinder to infer knowing possession of the controlled substance by each person in close proximity to the controlled substance when the controlled substance was found.6

What advantage have police and prosecutors gained with the passage of this law? One way of answering this question is to look at some of the testimony heard by Minnesota legislators when passage of the new law was under consideration. One witness in favor of the new law testified before a House committee as follows:

Witness: When [the police] go in and they execute a search warrant and they find drugs in plain view in a room, under circumstances showing that those drugs were packaged or those drugs were otherwise being prepared for sale, it makes sense that all the people sitting around the table were involved in that packaging, in that distribution in some way.7

Sometime later, this dialogue took place between the chair of the committee and the same witness:

Chairwoman: But if I were visiting someone and didn't know they were or were not a drug user and sat down at their table, the drugs were nearest me. And, you know, I'm the innocent friend of their mother's, you know, I go in and visit my friend's son, daughter be-

6. MINN. STAT. § 152.028, subd. 1 (Supp. 1989).
7. Statements of Jim Kamin, Assistant Hennepin County Attorney, before the Criminal Justice Division of the Minnesota House Judiciary Committee, Feb. 24, 1989 (tape on file at the Legislative Reference Library).
cause of the old family ties, I could be then implicated because I was close to the drugs?

Unknown voice: Book 'em, Danno.

All: Laughter.

Witness: Madam Chair, the answer is yes, the answer is yes. And the reason for that, and the reason that law enforcement I think would say this makes sense, is because the situation that you've described, although in this setting perhaps makes sense, in reality does not occur very often.8

Several interesting points can be drawn from these remarks. First, there is a strong indication from this kind of talk that the legislators and sponsors of the new law believed the police would gain new arrest powers from it. Presumably, the police were to be relieved of the need to conduct a burdensome inquiry to determine which persons in a room exercised dominion and control over the illegal drugs in plain view. The new law is directed at persons found in "close proximity" to illegally possessed drugs—and "close proximity" would be the new criteria for arrest.9 If the drugs are visible in a room, and there are people in the room, then, "Book 'em Danno."

But do the police really have new authority to arrest with the passage of this law? Under both the state and federal constitutions, police may make arrests only when there is probable cause to believe a crime has been committed and that the person to be arrested committed it.10 The assessment of probable cause is a judgment-based

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8. Statements of Representative Kathleen Vellenga, Chair of the Criminal Justice Division, and Jim Kamin, Assistant Hennepin County Attorney, before the Criminal Justice Division of the Minnesota House Judiciary Committee, Feb. 24, 1989 (tape on file at the Legislative Reference Library).

9. The new inference also refers to circumstances where the controlled substance is being prepared for sale. In many cases, this is unlikely to be a meaningful guide for determining when the statute will apply. The fact that a controlled substance is packaged in a certain way is often used by law enforcement personnel to infer preparation for sale. See, e.g., supra note 7 and accompanying text (House witness reference to packaging). The problem here is that drugs which are sold in packages must necessarily be purchased in packages. When a person who has purchased (and not prepared) drugs in packages places the packages on a table, and the police then encounter that person and his unwitting friends during a search of the room, the police are likely to believe the "preparation for sale" portion of the statute has been satisfied, simply because of the packaging.

10. Both the fourth amendment to the United States Constitution and article I, section 10, of the Minnesota Constitution, state:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend IV; MINN. CONST. art. I, § 10.

Although "probable cause" in the amendments modifies the issuance of warrants, the requirements and protections of probable cause have been extended to
assessment, taking into account all circumstances and facts known to
the officer on the scene.\textsuperscript{11} A person's presence in a room with drugs
in view is but a part of the constellation of facts that may exist to
establish probable cause to believe a person committed the crime of
illegal possession of a controlled substance. An arrest pursuant only
to the statutorily designated facts may be constitutionally invalid if
the exercise of totality of the circumstances judgment would not
have established probable cause.\textsuperscript{12}

Of even greater concern than the potentially unclear standards for
arrests is the prospect that innocent persons might be convicted
under the new inference. As the committee dialogue above indi-
cates, the legislators did not have difficulty imagining situations
where a person might be on the scene of illegal drug activity and yet
not be involved in that activity. Recall that the witness' answer to
this problem was that such situations "in reality do[ ] not occur very
often." Whether future "reality" bears that statement out or not, it
is clear that the prospect of arresting and charging innocent persons
too often can make a law unconstitutional.

In \textit{State v. Mercherson},\textsuperscript{13} the Minnesota Court of Appeals had before
it a Minneapolis city ordinance which declared, in part, that:

\begin{quote}
"[n]o person shall . . . visit . . . any building or place with knowl-
edge that . . . the unlawful use, sale or keeping for sale of any [ille-
gal] drug . . . occurs therein. Evidence of the general reputation of
such a building or place as one where any of the foregoing occurs
\end{quote}

warrantless searches and seizures as well. \textit{See}, \textit{e.g.}, Henry v. United States, 361 U.S.
98, 102 (1959) ("if an arrest without a warrant is to support an incidental search, it
must be made with probable cause"); Chambers v. Maroney, 399 U.S. 42, 51 (1970)
(in exigent circumstances, judgment of the police as to probable cause serves as suf-
cient authorization for a search).

The Minnesota Supreme Court has stated that the probable cause necessary to
arrest is "'a reasonable ground of suspicion supported by circumstances sufficiently
strong in themselves to warrant a cautious man in believing the accused to be
(1965) (quoting Garske v. United States, 1 F.2d 620, 623 (8th Cir. 1924)).

11. The Minnesota Supreme Court, in the context of determining the presence
or absence of probable cause, has noted that:

[each case, however, must be decided on its own facts and circumstances
and is not subject to some set formula as a guide by which to judge the
reasonableness of the arrest in issue. The question to be answered is
whether an officer in the particular circumstances, conditioned by his obser-
vations and information, and guided by the whole of his police experience,
reasonably could have believed that a crime had been committed by the per-
son to be arrested. \textit{Sorenson}, 270 Minn. at 196, 134 N.W.2d at 123 (citations omitted).

12. It is highly doubtful the Minnesota appellate courts will ever hold that realiza-
tion of the statutorily designated circumstances is alone sufficient to establish prob-
able cause. Such a holding would apparently conflict with the \textit{Sorenson} court's
objection to a "set formula." \textit{See supra} note 11.

shall be prima facie evidence of such knowledge.\textsuperscript{14}

The court of appeals ruled that this ordinance "infringes on a substantial amount of constitutionally protected activity" and was therefore so overbroad as to deny due process of law to those arrested under it.\textsuperscript{15} The court's decision is consistent with other case law holdings that declare a statute is overbroad when legal, constitutionally protected activities are criminalized as well as illegal, unprotected activities;\textsuperscript{16} or, when the legislature sets a web large enough to catch all possible offenders and leaves it to the courts to determine who is being lawfully detained and who should be set free.\textsuperscript{17}

The new inference of knowing drug possession bears some resemblance to the ordinance found unconstitutional in Merckerson. Each sets forth some specific feature of geography (with the new inference it is a room, in the ordinance it was a building or "place") and links the specified location together with presumably provable illegal drug activity. Persons then found present within the location may be inferred (or there is a prima facie conclusion) to have some culpable purpose or knowledge.

Defense lawyers may soon accuse the new inference of essentially being the old ordinance in sheep's clothing. A likely central issue in such a challenge will be whether the new inference, like the ordinance, infringes on too much constitutionally protected activity and therefore is overbroad. Such a challenge might again bring into question the kinds of activities and associations protected by the constitution.

As the chair of the legislative committee illustrated in her example, innocent persons who have not possessed drugs can be expected to enter dwellings where illegal drug activity is taking place. They may be unwitting family visitors or they may enter the dwelling on business, as for instance where a postal employee or plumber enters the home. If the visitor's timing is wrong and a raid is conducted while the visitor is present, then the statute technically permits the inference that the visitor possessed drugs, providing there are drugs in open view.

Consider a more difficult example. A mother knows that her son is involved in illegal activity and she knows that

\textsuperscript{14} Id. at 708 (quoting Minneapolis Code of Ordinances § 385.170 (1976)).
\textsuperscript{15} Id. at 709.
\textsuperscript{16} See, e.g., Houston v. Hill, 482 U.S. 451, 459 (1987) ("those [statutes] that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate applications").
\textsuperscript{17} See United States v. Reese, 92 U.S. 214, 221 (1875) ("It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.").
she will place herself in proximity to illicit drugs. Nevertheless, she is compelled by her love for her son to make the visit. When the police raid the home, she is aware that cocaine is resting on a table in the room in which she is seated. Is her circumstance the type of innocent association worthy of constitutional protection? Like a postal employee or plumber, she has never possessed a controlled substance and yet the terms of the new inference appear to authorize government action against her.

In opposition to the "too wide a net" challenge that defense lawyers may make, police and prosecutors may defend the new law on several grounds. First, they may emphasize the fact that the inference focuses on the activity taking place within a single room. Thus the operation of the inference is narrowly confined, unlike the Mercherson ordinance which placed an entire building within its scope. Second, they would note that the inference is by its very title permissive. There is no intention that it be brought to bear on the innocent visitor. The permissive nature of the new law, together with the prudent exercise of police and prosecutorial discretion, can be relied on to prevent unjust arrests and prosecutions. Taken together, these assertions may persuade an appellate court that the new inference is not as overbroad as the Mercherson ordinance and should therefore pass constitutional muster.

It is appropriate at this point to examine a final important aspect of the new inference—the effect of the inference at trial in a court of law. At trial, the new inference of knowing possession is intended to show up in the form of a jury instruction. Prior to jury deliberations, the prosecutor may request that an instruction be given that tracks the example presented by the House committee witness:

Witness: And, so what this presumption says, or this inference is, it says to a jury, when we get to that point, "ladies and gentlemen of the jury, you may infer that, if you find that the drugs were in [proximity to the defendants, you may] infer that [each person] knew something about those drugs and had some sort of interest in those drugs, and you may, you're not required, but you may convict them of possession of those drugs."  

18. It is true that the new inference is ostensibly concerned with what occurs within a single room. However, the law goes on to say that persons found in "close proximity" to the drugs are the persons who may be inferred to have possessed the drugs. "Close proximity" simply means "closely near." Proximity is defined as "next or very near," WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1828 (1971), which is to say, it means whatever anyone wants it to mean. This potent ambiguity could conceivably be exploited by an officer who wished to arrest someone who was, say, a block away from the drugs. The block-long distance would be "closely near" enough for that officer.

19. Statements of Jim Kamin, Assistant Hennepin County Attorney, before the Criminal Justice Division of the Minnesota House Judiciary Committee, Feb. 24,
The drafters of the new inference were wisely aware that inferences or presumptions which direct or require the jury to make certain findings or conclusions are seldom constitutional.20 If an instruction along the lines suggested by the witness is given, and the permissive nature of the inference is thereby made clear to the jury, then the drafters may have successfully avoided one due process problem.

However, the new inference as jury instruction is vulnerable to another due process challenge. Besides the fact that inferences must be permissive, they must also be consistent with the criminal reasonable doubt standard. In Barnes v. United States,21 the United States Supreme Court stated that "if a statutory inference submitted to the jury as sufficient to support conviction satisfies the reasonable doubt standard (that is, the evidence necessary to invoke the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt)... then it clearly accords with due process."22

This reasonable doubt issue can best be understood by considering two laws, one real and the other fictional. The first law, the real one, prohibits a person from possessing heroin that the person knows has been imported into the country. The law contains a permissive inference which allows a jury to infer (from the proved fact of possession) the fact that the person knew the heroin was imported. The second law, fictional, declares that drunk driving is a crime. The law contains a permissive inference which allows a jury to infer that a person who is stopped by police, and who exhibits slurred speech, is drunk.

The issue should now be clear. Since the beyond a reasonable

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20. For a discussion of the constitutionality of mandatory inferences, see State v. Kelly, 218 Minn. 247, 264, 15 N.W.2d 554, 563 (1944) (mandatory inference of criminal intent to sell alcohol upon proof of possession of alcohol held unconstitutional). See also State v. Edwards, 269 Minn. 343, 349-50, 130 N.W.2d 623, 626-27 (1964) (mandatory inference of intent to use burglar tools upon proof of possession of those tools held unconstitutional). Cf. State v. LaForge, 347 N.W.2d 247, 252-56 (Minn. 1984) (because trial court's wording of jury instruction may have impermissibly shifted burden of proof to defendant, reversible error was found). The main concern about mandatory presumptions and inferences is that traditional principles such as the prosecutor's burden of proof and the defendant's presumption of innocence are jeopardized. See Edwards at 348, 130 N.W.2d at 626.


22. Id. at 843.
doubt standard is of constitutional dimension, a statutory inference should not be able to suggest to a jury that it may convict a defendant upon proof of the statutorily designated facts if those facts are insufficient for a rational jury to also find the defendant guilty beyond a reasonable doubt.

In *Turner v. United States*, the United States Supreme Court considered the heroin law described above. Knowledge of the importation of the drug was an essential element of the crime. The Supreme Court held that the permissive inference in that case did not offend the reasonable doubt standard. Opium poppy is not indigenous to the United States so the inference may be made that any persons who possess heroin know that the heroin was imported.

The permissive inference in the fictional law is obviously out of synch with the reasonable doubt standard. A person with slurred speech might simply have a speech impediment. The proved fact of slurred speech leaves a substantial doubt whether the person was drunk, hence the denial of due process if such an inference is read to the jury in the form of an instruction.

How might Minnesota’s new inference of knowing drug possession fare under a challenge on this issue? Prosecutors defending the inference will gain strong support from the Court of Appeals for the Second Circuit decision in *Lopez v. Curry*. In *Lopez*, the court of appeals had before it a New York law similar to Minnesota’s new law.

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23. See *In re Winship*, 397 U.S. 358, 364 (1970) ("Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged").


25. Id. at 405.

26. Id. at 416.

27. Or, as the Court stated, "To possess heroin is to possess imported heroin." Id.

28. The Minnesota Supreme Court has dealt with the inference/reasonable-doubt issue on at least one occasion. In *State v. Dille*, 258 N.W.2d 565 (Minn. 1977), the court had before it a challenge to the accuracy of a blood-testing kit which was furnished and administered by state agencies to test blood alcohol levels in motorists. The court declared that state involvement in furnishing the kit created a presumption that the contents of the kit were not contaminated. The court stated, "Since state provision of the blood-testing kit would be sufficient for a rational juror to find the presumed inference beyond a reasonable doubt, the requirements of due process have been satisfied." Id. at 568–69 n.2 (citing *Barnes v. United States*, 412 U.S. 837 (1973)).

29. *Lopez v. Curry*, 583 F.2d 1188 (2d Cir. 1978). Of the major cases dealing with inferences, *Lopez* is particularly relevant to the subject of this Note because the case involved a statutory inference of drug possession. Supporters of Minnesota’s new inference will also gain support from *Ulster County Court v. Allen*, 442 U.S. 140 (1979). *Ulster* dealt with a statutory inference of firearms possession. The permissive nature of the inference in that case was heavily emphasized by the Court as justifica-
The New York statute declared that the presence of illegal drugs in an automobile "is presumptive evidence of knowing possession thereof by each and every person in the automobile at the time such controlled substance was found." At trial, this presumption materialized in the form of a jury instruction. The prosecutor and trial judge made it clear to the jury that the prosecutor's burden of proof under the presumption amounted to just this—the prosecutor need only prove beyond a reasonable doubt that there was (1) a car, (2) people in it, and (3) drugs in the car. On this much, the jury could (and did) convict.

The Second Circuit, on writ of habeas corpus, concluded that the proved facts of a car, people, and drugs satisfied the reasonable doubt standard, thus permitting New York juries to convict defendants for possession of illegal drugs on those facts alone.

The good news for defense lawyers is that Lopez, besides being only persuasive in Minnesota, is not a well reasoned case. The Lopez court indirectly acknowledged that it "can and does in fact occasionally happen" that innocent persons will be found in cars with drugs. This sounds very much like the acknowledgement of the witness before the Minnesota House committee that innocent persons will be found in rooms with drugs in open view (although not "very often"). In spite of the implicit admission that innocent persons may be snared by the New York inference, the Second Circuit in

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30. Lopez, 583 F.2d at 1189 (quoting N.Y. PENAL LAW § 220.25(1)).
31. Lopez, 583 F.2d at 1190.
32. Id.
33. Id. at 1192.
34. Id. at 1191 (quoting report of Temporary State Commission to Evaluate the Drug Laws, a New York commission). The New York commission, in its report, rejected the possibility

"that persons transporting dealership quantities of contraband are likely to go driving around with innocent friends or that they are likely to pick up strangers. We do not doubt that this can and does in fact occasionally happen, but because we find it more reasonable to believe that the bare presence in the vehicle is culpable, we think it reasonable to presume culpability in the direction which the proven facts already point."

Id. at 1191–92 (quoting report of Temporary State Commission to Evaluate the Drug Laws, a New York commission).
Lopez declared, with little analysis, that the inference accorded with the reasonable doubt standard. Where the freedom of innocent persons may be at stake, blank declarations are particularly unsatisfactory. Minnesota courts should give this important issue the greater attention it deserves.

It is appropriate to close this examination of Minnesota's new inference with an observation from the Washington Supreme Court. In City of Seattle v. Ross, the Washington court had before it an ordinance which contained an irrebuttable presumption that a person found in proximity to a place where narcotics were located was guilty of narcotics trafficking. While there are apparent differences between the Seattle ordinance and the Minnesota inference, the words of the court with respect to the potential for injustice are on point. The court stated:

If every person found in comparative proximity to illegally kept narcotics . . . were arrested, fined and imprisoned, no doubt the municipal authorities could feel assured that a considerable number of persons engaged in the traffic of narcotics would meet their just punishment. By the same token, if every child in a city beset with a problem of juvenile delinquency were confined in an institution, that problem would be eliminated. The Chinese, we are told, for a long time held the firm conviction that the only way to roast a pig was to put it in the family home and burn it. Both they and we, it is hoped, have long since learned that, with industry and the exercise of the imagination and reason, the prize can be had without the sacrifice.

Police and prosecutors face a real and difficult evidence problem in the constructive possession situation. Where the police find a group of persons wandering around a room with drugs in view, it is hard to sort out those who may be innocent from those who may be guilty. But this is not a good reason to rely on a law that may cast its net over everybody, leaving the innocent to fend for themselves in a time consuming, expensive, and confusing criminal justice system. Minnesota's old doctrine of dominion and control at least had the virtue of requiring that convictions be based on all the cold, hard facts the authorities could assemble. There can be no better protection for the innocent.

The new inference should be either repealed by the legislature or declared unconstitutional. Short of this, the following measures should be taken:

1. Law enforcement authorities in the field should be reminded

35. See Lopez, 583 F.2d at 1191 n.7.
36. 54 Wash. 2d 655, 344 P.2d 216 (1959).
37. Id. at 661, 344 P.2d at 220.
often that probable cause, and not the statutorily designated facts, is the standard for arrest.

2. Defense lawyers should seek to have any jury instruction modified along the lines of the instruction that appears in the Minnesota case of *State v. Ferraro.*\(^{38}\) That instruction read:

Possession of property recently stolen, if not satisfactorily explained [or if falsely explained], is ordinarily a circumstance from which the jury may reasonably draw the inference and find, in the light of surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen.\(^{39}\)

Such an instruction tempers the impact of the inference, reminding the jury that it should consider the defendant's explanation, if one is given, and that it should rely on the statutory inference only when the surrounding facts are also consistent with guilt.

3. The defense lawyer might also consider requesting an instruction along these lines:

Although the State is entitled to the benefit of a permissive inference in this case, remember that a verdict of guilty may only be returned upon your finding that the defendant was guilty beyond a reasonable doubt.

In accord with *City of Seattle v. Ross,* the family home may well be afire in Minnesota, the decision having been made to roast the pig. Defense lawyers must be alert to the issues and rescue the innocent.

B. *Minnesota Statutes Section 609.5314, Subdivision 1, and Forfeiture of Property Associated with Controlled Substances*

Recall from the previous section that the question was raised whether the new statutory inference of knowing possession introduced some confusion into proper arrest standards. The issue was whether the arrest standards suggested by the statutory inference were consistent with the totality of circumstances basis of probable cause. This is also an issue with respect to the constitutionality of another Minnesota statute.

Minnesota Statutes section 609.5314, subdivision 1, declares that "all money, precious metals, and precious stones found in proximity to . . . controlled substances" are "presumed to be subject to administrative forfeiture."\(^{40}\) There is a presumption, in this case rebuttable,\(^{41}\) that valuable property found in proximity to illegal drugs is

\(^{38}\) 290 N.W.2d 177 (Minn. 1980).

\(^{39}\) Id. at 179.

\(^{40}\) MINN. STAT. § 609.5314, subd. 1(a) (Supp. 1989).

\(^{41}\) Id. at § 609.5314, subd. 1(b) (claimant of the property bears the burden to rebut presumption).
criminally associated with those drugs, as profits or otherwise.42

As will be shown, the fourth amendment has been held to apply to all forfeiture actions, whether civil or criminal. This being the case, the question again arises as to whether the authority given police and prosecutors upon the realization of limited circumstances described by statute (i.e., seizure and forfeitures of valuables upon finding the valuables in proximity to controlled substances) is consistent with the totality of circumstances basis of probable cause.

To understand how Minnesota's forfeiture statute operates, consider the hypothetical case of John and Susan. John and Susan met a few weeks ago and John mentioned to Susan that if she ever wanted to buy some cocaine she should talk to him. Two weeks later, Susan and John meet at the parking lot of a local supermarket and Susan brings fifty dollars with her to make the buy. Unfortunately for both of them, the police have received a tip that the sale is taking place, and undercover police officers arrest John and Susan. John is charged with selling a controlled substance and Susan is charged with possession.

When John is arrested, the police seize, pursuant to Minnesota Statutes section 609.5314, subdivision 1, several items of jewelry on his person, a coffee can full of jewelry in his automobile, and $1700 cash. The police also seize a few items of jewelry that Susan was wearing and, in addition to the fifty dollars she used to purchase the drugs, $150 that Susan set aside for her rent.

When John and Susan are released on bail, each is given a receipt for the property that has been taken.43 The receipt states that the property is subject to forfeiture and if an action for return is not commenced within sixty days, they will lose all right to the prop-

42. Minnesota Statutes section 609.5314, subdivision 1(a), refers only to a presumption of forfeitability; the presumed association with controlled substances is not explicitly stated. MINN. STAT. § 609.5314, subd. 1(a) (Supp. 1989). To see the association, two other provisions must be consulted. Minnesota Statutes section 609.531, subdivision 6a, declares that the agency handling the forfeiture bears the burden of proving the act that gave rise to the forfeiture. MINN. STAT. § 609.531, subd. 6a (Supp. 1989). One of the acts the agency must prove is described in Minnesota Statutes section 609.5311, subdivision 2, where authority for the forfeiture of property associated with controlled substances is set forth. MINN. STAT. § 609.5311, subd. 2 (Supp. 1989). Returning now to Minnesota Statutes section 609.531, subdivision 6a, an exception to the agency's burden of proof is provided by awarding the agency the presumption of forfeitability set forth in Minnesota Statutes section 609.5314, the statute with which this Note is concerned. MINN. STAT. § 609.5314, subd. 1(a) (Supp. 1989). Thus, the presumption of forfeitability is a presumption that property nearby controlled substances is associated with those substances.

43. A person whose property is subjected to forfeiture does indeed receive a receipt; they are handed out in order to comply with notice requirements set forth in Minnesota Statutes section 609.5314, subdivision 2.
John hires a lawyer who promptly commences an action for return of the property. Susan does not understand the law as well and after sixty days has done nothing to get her property back.

The seizure and forfeiture of Susan's jewelry, property that had no connection to criminal activity, is unjust. John, on the other hand, seems to have received his just desserts: he is a drug dealer and his dealings have been profitable.

Pursuant to Minnesota Statutes section 609.5314, seizures similar to those described in the example may be taking place in Minnesota. The reasoning behind these seizures can be expressed in this way: We do not permit captured bank robbers to retain possession of stolen cash, so why permit the local drug dealer to retain the profits from his or her criminal activity? And are not valuable items found near illegal drugs likely to represent those profits? Also, why not attack the spread of drugs from the economic, as well as the criminal, end? After word of enough seizures and forfeitures gets around, the

44. See Minn. Stat. § 609.5314, subd. 3(a) (Supp. 1989).

45. John can obviously afford the filing fee for a civil action. The civil filing fee in Hennepin County, Minnesota is presently $88. An indigent claimant may proceed in forma pauperis; however, it is not known how many persons simply abandon their claims because they are unaware that they may proceed for free.

46. If Susan immigrated to the United States, her inability to understand the law as explained on the receipt could stem from a limited ability with the English language. There is adequate space on the forfeiture receipt to include short advice-of-rights paragraphs in several of the minority languages spoken in Minnesota. This simple step, however, has not been taken.

47. Even if Susan had commenced an action a day or two after the seizure of her property, it would have been some time before she could receive her property. The commencement of an action only entitles the claimant to an assignment on the court docket. The assigned date may be months away. The property is retained by the state during this time.

48. See, e.g., Attorneys Say Property Seizure Law in Drug Cases Violates Civil Liberties, St. Paul Pioneer Press Dispatch, Dec. 26, 1989, at 1A, col. 1 [hereinafter Property Seizure]. This article discusses allegations that innocent property is being seized pursuant to the forfeiture presumption and specifically details (1) an allegation that a woman's mortgage money was seized, leading to foreclosure of her real property and (2) an allegation that the seizure of a welder's paycheck reduced the welder to living in the streets and in shelters. There is acknowledgement in the article, by both prosecutors and defense attorneys, that actual profits from illegal drug activity are also being successfully seized under the new law.

49. The author of the forfeiture law, James Appleby, an Assistant Hennepin County Attorney, states that the presumption is needed because, during police raids, occupants of "crack" houses deny that drugs and drug equipment are theirs. Property Seizure, supra note 48, at 6A, col. 1. By denying that the drugs are theirs, the occupants apparently attempt to disassociate their cash and valuables from connection with the surrounding drug activity. The presumption of association is therefore needed to overcome those denials.
economic incentive to enter the drug trade may be reduced.\footnote{50}{See Minn. Stat. § 609.531, subd. 1a(3) (Supp. 1989) (forfeiture laws to be construed to promote purpose of reducing economic incentive to engage in criminal enterprise); Minn. Stat. § 609.531, subd. 1a(4) (Supp. 1989) (forfeiture laws to be construed to promote purpose of increasing pecuniary loss resulting from detection of criminal activity).}

In the case of criminals such as John, this reasoning has achieved the right result. The presumption that property found near drugs represents profits or is otherwise associated with those drugs has matched reality in his case. Also, from this experience John and other dealers who know about John's case may now have second thoughts about the easy life of a drug dealer.

In the case of persons such as Susan, this reasoning has just as plainly achieved the wrong result. The presumption that property found near drugs will represent profits has not matched reality. With respect to stopping the spread in the use of drugs, Susan, to be sure, is going to think twice about buying drugs in the future. However, this effect probably was accomplished by her arrest and charge of possession. The loss of her jewelry and rent money has probably only inspired in her a hatred for the legal system.

It would seem that the central question in all of this would reduce to: How can the right result be preserved and the wrong one be avoided when section 609.5314, subdivision 1, is applied to a given case? As will be shown, the answer ought to lie in the fourth amendment requirement of probable cause.

Both the state and federal constitutions prohibit the government from conducting unreasonable searches and seizures.\footnote{51}{See supra note 10. For convenience, this Note will now refer only to the federal constitutional provisions that apply.} When property is taken pursuant to a forfeiture statute, it would seem that a "seizure" within the meaning of the fourth amendment has taken place and that probable cause and the test of reasonableness should therefore apply.

The Supreme Court's holding in \textit{Boyd v. United States}\footnote{52}{Boyd v. United States, 116 U.S. 616 (1886).} reinforces this conclusion. In \textit{Boyd}, the Court had before it a civil forfeiture action which the government had commenced against an importer of plate glass.\footnote{53}{See id. at 617-18.} The allegation was that the property was forfeitable
because the importer had illegally avoided paying import duties.\textsuperscript{54} The Court examined the character of the forfeiture action and stated, "We are . . . of the opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offense committed by him, though they may be civil in form, are in their nature criminal."\textsuperscript{55} The Court went on to state the law: "As, therefore, suits for penalties and forfeitures incurred by the commission of offenses against the law, are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all purposes of the Fourth Amendment of the Constitution . . . ."\textsuperscript{56}

At this point, it should be noted that Minnesota's forfeiture scheme is also civil in form.\textsuperscript{57} The actions are in rem actions against the property,\textsuperscript{58} the fiction being that the property itself has committed an offense against the state.\textsuperscript{59} Since the state enjoys the presumption that the property is forfeitable, the owner has the initial burden of rebutting the presumption by producing evidence in court showing the property had innocent origins and is therefore legal to possess.\textsuperscript{60} If the owner successfully rebuts the presumption the state may still attempt to prove an association between the property and crime by clear and convincing evidence.\textsuperscript{61}

Whatever a state's procedural structure for forfeitures may be, the \textit{Boyd} Court made it plain that civil versus criminal distinctions are irrelevant where the fourth amendment is concerned.\textsuperscript{62} Although there has clearly been a retreat from \textit{Boyd}'s "quasi-criminal" characterization of forfeiture actions, and although there has been a corresponding reluctance to expand the full run of criminal constitutional rights to those actions,\textsuperscript{63} the United States Supreme Court has never

\begin{itemize}
\item \textsuperscript{54} Id.
\item \textsuperscript{55} Id. at 633–34.
\item \textsuperscript{56} Id. at 634.
\item \textsuperscript{57} See MINN. STAT. § 609.531, subd. 6a (Supp. 1989) (legislative declaration of civil form).
\item \textsuperscript{58} See id.
\item \textsuperscript{59} See Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680–88 (1974) (discussing historical development of fiction that property, in forfeiture proceedings, may be conceived of as having committed an offense against the state).
\item \textsuperscript{60} See MINN. STAT. § 609.5314, subd. 1(b) (Supp. 1989) (claimant bears burden to rebut the presumption); MINN. STAT. § 609.5314, subd. 3(b) (Supp. 1989) (claimant as plaintiff must specify grounds on which plaintiff alleges property was improperly seized). The author has personally observed that many claimants attempt to produce receipts or pay stubs as evidence the property is not associated with illegal drugs. The author has also observed that claimants often do not keep the necessary documentation.
\item \textsuperscript{61} See MINN. STAT. § 609.531, subd. 6a (Supp. 1989) (state's burden of proof is set at clear and convincing standard).
\item \textsuperscript{62} See Boyd v. United States, 116 U.S. 616, 634 (1886).
\item \textsuperscript{63} See generally State v. Spooner, 520 So. 2d 336, 356–59 (La. 1988) (Cole, J., concurring). Justice Cole's thorough review of constitutional considerations in for-
retreated from Boyd's treatment of the fourth amendment. In fact, the Court in a later case reaffirmed the applicability of the fourth amendment to civil forfeiture actions.\textsuperscript{64} In short, the fourth amendment application to forfeiture actions is the current the law.

The Boyd case, however, did not deal with the specific issue of probable cause in the context of forfeiture.\textsuperscript{65} Thus, the Supreme Court did not (and apparently never has) explicitly stated that for property to seized and subject to forfeiture there must be probable cause to believe the property is associated with criminal activity. Many federal\textsuperscript{66} and state\textsuperscript{67} court decisions, however, have since acknowledged that law enforcement authorities must establish a probable cause "nexus" between the property and crime before seizures and forfeiture may commence. Also, unlike Minnesota's enactment,

feiture actions is unique and highly recommended reading. Justice Cole's main theme is that the United States Supreme Court has examined civil forfeiture proceedings to see whether a feature of the process has become sufficiently criminal in nature to warrant the extension of a criminal constitutional protection. Depending on the nature of the procedural feature in question, the Court has extended some protections but not others.

\textsuperscript{64} See One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965). In Plymouth, the Court had before it an automobile seizure and forfeiture case where the application of the exclusionary rule was in question. The Court noted that "[t]here is nothing even remotely criminal in possessing an automobile. It is only the alleged use to which this particular automobile was put that subjects [the claimant] to its possible loss." \textit{Id.} at 699. Certainly, a parallel observation could be made as to the possession of precious stones, precious metals and money. The Plymouth Court also reviewed the Boyd decision and made note of the "authoritative statement and the holding by the Court in Boyd that the Government could not seize evidence in violation of the Fourth Amendment for use in a forfeiture proceeding . . . ." \textit{Id.} at 698.

\textsuperscript{65} The fourth amendment issue in Boyd had to do with compelling a person to produce papers which would then be introduced as evidence against that person in a forfeiture action. In addition to being a violation of the fifth amendment right against self-incrimination, the process of compulsion was held to be an unreasonable seizure under the fourth amendment. \textit{See Boyd, 116 U.S. at 617-35.}


Congress included an explicit probable cause requirement when it passed the forfeiture provisions of the Comprehensive Drug Abuse Prevention and Control Act.\(^{68}\) Many state forfeiture provisions are modeled on the federal act and likewise contain a probable cause requirement.\(^{69}\)

Consider the following discussions of the relationship between probable cause and forfeiture. In *United States v. \$22,287.00*,\(^{70}\) the Eleventh Circuit Court of Appeals explained: "The probable cause that the government must show is: 'a reasonable ground for belief of guilt, supported by less than prima facia proof but [requiring] more than mere suspicion. In making its probable cause showing, however, the government must also establish a nexus between the property to be forfeited and the criminal activity defined by statute.' "\(^{71}\)

The Texas Supreme Court, in much the same vein, stated:

> In forfeiture proceedings, the burden is on the state to show probable cause for seizing a person's property. Probable cause in the context of forfeiture statutes is a reasonable belief that a "substantial connection exists between the property to be forfeited and the criminal activity defined by statute." It is that link, or nexus, between the property to be forfeited and the statutorily defined criminal activity that establishes probable cause, without which the State

\(^{68}\) The Act is codified at 21 U.S.C. §§ 801–904 (1988). The forfeiture/probable cause requirements appear in 21 U.S.C. § 881 (b)(3–4). The author has been unable to uncover any legislative history that directly explains Congress' decision to include the requirement of probable cause. When the Act was passed, however, Congress was aware of the Boyd Court’s application of the fourth amendment to forfeiture actions. \textit{See H.R. Rep. No. 91-1444, 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. & Admin. News 4566, 4655} (discussing Boyd, fourth amendment, and exclusionary rule).

\(^{69}\) In 1978, Congress amended the Act to expand upon the types of drug-associated property which can be seized and forfeited. In its Joint Explanatory Statement of Titles II and III, \textit{reprinted in 1978 U.S. Code Cong. & Admin. News 9518, 9522}, legislators made the following comment: "Due to the penal nature of forfeiture statutes, it is the intent of these provisions that property would be forfeited only if there is a substantial connection between the property and the underlying criminal activity which the statute seeks to prevent."

From these materials, it would not be unreasonable to conclude that Congress inserted the probable cause requirement in order to comply with the fourth amendment and because Congress believed it was proper and fair to condition seizures and forfeitures on a finding of probable cause.

\(^{70}\) 709 F.2d 442 (1983) (currency was seized in plaintiff's house and on his person after a narcotics sale by the plaintiff to undercover police officer).

\(^{71}\) \textit{Id.} at 446–47 (citations omitted).
lacks authority to seize a person's property.\textsuperscript{72}

These pronouncements hopefully have clarified the role of probable cause in the forfeiture context. Due to the Boyd Court's firm and enduring application of the fourth amendment to forfeiture actions (for all purposes), and the subsequent applications of probable cause by the courts, Congress, and state legislatures, the probable cause requirement would seem to be unassailably in place as the law with respect to forfeitures.

In view with what has just been said, it may be surprising to learn that at least one Minnesota district court judge has observed that "the laws relating to forfeiture as set forth in Minn. Stat. 609.531 and 609.5314 do not require a showing of probable cause."\textsuperscript{73} It is also surprising to learn that the Minnesota Court of Appeals has expressed some uncertainty as to whether probable cause is a requirement in state forfeiture proceedings.\textsuperscript{74}

The probable cause/forfeiture issue remains to be decided in Minnesota. At this point, it is appropriate to examine how probable cause ought to operate when law enforcement authorities seize property and subject it to forfeiture. Recall what has been stated else-

\textsuperscript{72} Fifty-Six Thousand Seven Hundred Dollars in United States Currency v. State, 730 S.W.2d 659, 661 (Tex. 1987) (citations omitted).

\textsuperscript{73} Order and Memorandum of Judge Steven Z. Lange at 6, Walker v. $737.00 in United States Currency, No. 89-00772 (Dist. Ct. Hennepin County, Minn. Aug. 9, 1989). The order denied plaintiff's motion to have Minnesota Statutes section 609.5314, subdivision 1, ruled unconstitutional as violating the fourth amendment requirement of probable cause. \textit{Id.} at 2.

\textsuperscript{74} See State v. Valento, 405 N.W.2d 914 (Minn. Ct. App. 1987). The forfeiture issue before the court was a procedural issue under the old pre-August 1988 laws. The court held that the trial court's order of forfeiture must be reversed because the forfeiture was accomplished in contravention of the laws as they were then written. In the course of that reversal, the court added the following interesting dicta: "Moreover, at least under the federal forfeiture statute, 19 U.S.C. \textsection 1615, the burden of proof is on the government to show probable cause for the institution of a forfeiture suit. Here there has been no showing whatsoever that the $892 found on Valento was received from sales of narcotics." \textit{Id.} at 921 (citations omitted).

From this much, it appears the probable cause issue was not briefed for the court, hence the words "at least," words which seem to indicate some uncertainty as to whether Minnesota's forfeiture laws also require a showing of probable cause. It is encouraging, however, to note that the court found it appropriate to apply probable cause analysis to the forfeiture case before it.

It should also be noted that the Michigan Court of Appeals has squarely ruled that Michigan's presumption statute, similar to Minnesota's, does not require a showing of probable cause. \textit{See} People v. United States Currency $4,082, 404 N.W.2d 634, 636 (Mich. Ct. App. 1986). This decision was based on a reading of the applicable statutes and two state cases where the issues were off point. There is no fourth amendment analysis (the entire probable cause issue is dealt with in two paragraphs) and the court is oblivious to \textit{Boyd}. In the opinion of the author, the decision in the case was wrong.

http://open.mitchellhamline.edu/wmlr/vol16/iss2/5
where about the nature of probable cause.\textsuperscript{75} Probable cause is a judgment-based assessment, taking into account the totality of the circumstances.\textsuperscript{76} How might the forfeiture presumption in section 609.5314 conflict with the probable cause requirement? Returning to the example of John and Susan and their arrest in the parking lot, assume the police did not exercise any probable cause judgment when they seized property. All they knew or cared about was the statute authorizing the seizure of valuables found in proximity to controlled substances, the very situation they had encountered. What probable cause assessment could they have made?

In John’s case, the officers could have noted that John was observed in the act of selling an illegal drug. From this the police could logically conclude that John is engaged in criminal enterprise for profit. Also, he was carrying an unusually high dollar amount of property, particularly the cash that might indicate recent involvement in other drug transactions. The coffee can full of jewelry is highly suspicious. The indication is that John is bartering drugs for non-cash valuables. Based on these facts, the police would certainly have been justified in finding a probable cause nexus between John’s property and criminal activity. The seizure pursuant only to the statute complies with the fourth amendment, but that compliance is fortuitous since the police did not apply a totality of the circumstances analysis.

In Susan’s case, the outcome is different. The police have observed her in the act of purchasing a small amount of cocaine. From this, there is not the least indication that she is anything more than a mere user of drugs. Also, the property on her person is utterly innocuous. Susan’s rather ordinary jewelry does not exhibit the appearance of being the prizes of crime. The rent money is a relatively modest amount, an amount not unlikely to be found on any person.

In Susan’s case, the probable cause nexus between the property and the crime is absent and yet, pursuant to section 609.5314, the property is seized. Without probable cause, the seizure of her property is constitutionally unreasonable. Hopefully, this example has illustrated how Minnesota’s forfeiture statute has the potential to steer police conduct in one direction (seizure and forfeiture, carte blanche) while the United States Constitution steers the police in an-

\textsuperscript{75} See supra notes 10–12 and accompanying text.

\textsuperscript{76} Id. For a review of case digests showing some of the factors—proximity of property to drugs, amount of money, witness statements, confessions, informants, etc.—which might figure in to a totality-of-circumstances assessment of probable cause in a forfeiture action, see Annotation, Forfeiture of Money to State or Local Authorities Based on Its Association With Or Proximity to Other Contraband, 38 A.L.R. 4th 496 (1985 & Supp. 1989).
other (seizure and forfeiture on the delimiting basis of probable cause).

The legislature should repeal the presumption in section 609.5314, subdivision 1, and replace it with general authority to seize and forfeit property where the responsible agency has probable cause to believe the property has a substantial connection with criminal activity. Such a grant of authority gives police and prosecutors all the power they need to seize the prizes of crime that are likely to be found in proximity to illegal drugs. The beneficial side-effect of such a grant is that the police will approach seizure situations with the responsibility to exercise mature and intelligent judgment, as opposed to the present practice of making seizure determinations on the basis of a mechanical statutory "broom." This is a result that accords not only with the Constitution, but also accords with our sense of right and fairness. If the legislature fails to act, the appellate courts of Minnesota should rule that Minnesota Statutes section 609.5314, subdivision 1, is unconstitutional as permitting violations of fourth amendment rights.

It is appropriate to conclude with a quote from the Eleventh Circuit Court of Appeals decision in United States v. $38,000.77 That court, in the course of dismissing a government forfeiture action, summed up the situation this way: "A forfeiture complaint must allege sufficient facts to provide a reasonable belief that the property is subject to forfeiture: in particular, that the government has probable cause to believe that a substantial connection exists between the property to be forfeited and the exchange of a controlled substance."78 The court then added:

[W]e are not unsympathetic to the government’s strong desire to eradicate drug trafficking: we recognize that illegal drugs pose a tremendous threat to the integrity of our system of government. We must not forget, however, that at the core of this system lies the Constitution with its guarantee of individuals’ rights. We cannot permit these rights to become fatalities of the government’s war on drugs.79

Whatever action is taken, the requirement of probable cause in forfeiture actions should be firmly recognized. By restoring probable cause to its proper role, we restore at least some minimal protection for innocent property, the loss of which can be devastating in ways we can only imagine. By restoring the probable cause requirement to its proper role, we ensure that a precious individual right will not become a fatality to the war on drugs in Minnesota.

77. 816 F.2d 1538 (11th Cir. 1987).
78. Id. at 1548.
79. Id. at 1548–49.
C. Possession of Controlled Substances in the First Through Fifth Degree—Minnesota Statutes Sections 152.021-.025

Prior to August 1, 1989, Minnesota's controlled substances laws focused on three types of criminal conduct: possession of illegal drugs; selling illegal drugs; and possession of illegal drugs with the intent to sell. The latter law might apply in a situation where weighing scales, drug manufacturing equipment, and large quantities of drugs were found at the scene of a drug raid, but no actual sale of drugs was observed by the police. Both the quantity of drugs and the other materials found at the scene indicate that the drugs were possessed for the purpose of distribution for profit, rather than for personal consumption. In this situation, prosecutors could not charge the offenders with the crime of sale; and the relatively moderate five-year penalty set forth in the possession law seemed inadequate.

The possession with intent to sell charge filled the gap, permitting prosecutors to charge these persons with a crime that set forth the same severe twenty-year penalty as the sale law. The jury was then confronted with two fact questions when a case came to trial: the fact of possession and the fact of intent to sell.

The passage of a new five-tiered statutory scheme by the Minnesota Legislature in 1989 radically changed the way these crimes are charged. Minnesota Statutes sections 152.021 through 152.025 now set forth five degrees of sale crimes and five degrees of possession crimes. The crime of possession with intent to sell has vanished, except in cases where small amounts of drugs are involved. The question this Note will attempt to answer is: What happened to the crime of possession with intent to sell?

At the outset, an examination of some of the basic operational fea-

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80. Minnesota Statutes section 152.09, prohibiting the manufacture, possession, and sale of certain drugs was repealed effective August 1, 1989. MINN. STAT. § 152.09, repealed by 1989 Minn. Laws ch. 290, art. 3, §§ 37, 38.

81. Minnesota Statutes section 152.15, subdivision 2, setting forth penalties of up to five years imprisonment for possession crimes was repealed effective August 1, 1989. MINN. STAT. § 152.15, subd. 2, repealed by 1989 Minn. Laws ch. 290, art. 3, §§ 37, 38.

82. Minnesota Statutes section 152.15, subdivision 1, setting forth penalties of up to 20 years imprisonment for first offense sale crimes and first offense intent to sell crimes, was repealed effective August 1, 1989. MINN. STAT. § 152.15, subd. 1, repealed by 1989 Minn. Laws ch. 290, art. 3, §§ 37, 38.

83. Note also that the crime of possession was a lesser included offense of possession with intent to sell. If the state proved possession, but failed to prove intent to sell, the defendant was still guilty of the less severe charge of possession.

84. See MINN. STAT. §§ 152.021, subd. 1; 152.022, subd. 1; 152.023, subd. 1; 152.024, subd. 1; 152.025, subd. 1 (Supp. 1989).

85. See MINN. STAT. §§ 152.021, subd. 2; 152.022, subd. 2; 152.023, subd. 2; 152.024, subd. 2; 152.025, subd. 2 (Supp. 1989).
tures of the new five-tiered possession scheme is helpful. The new laws create the crimes of possession in the first through the fifth degree. Beginning, at the low end, with the crime of fifth degree possession, the punishment authorized by each succeeding degree escalates in severity. The primary distinction between degrees is the amount of controlled substance that the person apprehended possessed.86

Examples of the “amount” distinction between each degree are shown in the following two charts.87 The first chart illustrates how the possession of “crack” cocaine is now treated at each degree.88 The second chart illustrates how the possession of powder cocaine is treated at each degree.89

<table>
<thead>
<tr>
<th>Crack Cocaine</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Degree of Offense</strong></td>
</tr>
<tr>
<td>---------------------</td>
</tr>
<tr>
<td>1st</td>
</tr>
<tr>
<td>2nd</td>
</tr>
<tr>
<td>3rd</td>
</tr>
<tr>
<td>4th</td>
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<tr>
<td></td>
</tr>
<tr>
<td>5th</td>
</tr>
</tbody>
</table>

86. See id.

87. The charts are the author’s simplifications of a rather wordy and complex statutory scheme. The author believes these charts accurately represent the treatments of the drugs described.

88. The word “crack” does not appear in any of the statutes. Although not defined by the statute, the words “cocaine base” include “crack.” See e.g., Minn. Stat. § 152.021, subd. 2(1) (Supp. 1989) (“cocaine base” is not defined). The words “cocaine base” were challenged for vagueness in State v. Moore, 431 N.W.2d 565 (Minn. Ct. App. 1988). In Moore, a defendant who was alleged to have possessed crack cocaine was charged under statutes making it a crime to possess “cocaine base” with intent to sell. The defendant challenged the constitutionality of the charge, arguing that the use of the words “cocaine base” rendered the applicable statute void for vagueness. In relevant part, the court held that the words “cocaine base” would normally be understood to “mean[ ] pure cocaine in its undiluted chemical form” (e.g., crack). Id. at 568-69.

89. The words “cocaine powder” do not appear in the statutes. Instead, the statutes refer to mixtures containing narcotic drugs. See e.g., Minn. Stat. § 152.021, subd. 2(2) (Supp. 1989). “Narcotic drug” is defined to include cocaine. See Minn. Stat. § 152.01, subd. 10(1) (1988) (narcotic drug includes extracts of coca leaves).

90. The phrase “less than” does not appear in the statutes. The reference in the two charts to less than three grams of crack and less than 10 grams of cocaine powder are rooted in a logical reading of the statutes. (See infra note 92 for an explanation of why coca derivatives crack and powder cocaine are treated differently). First, second, and third degrees are linked to specified weights of drugs, while fourth and fifth degrees are not. Fourth and fifth degrees, however, still punish possession of Schedule II drugs, and Schedule II includes any derivative of coca leaves. Minn.
ILLEGAL DRUGS AND NEW LAWS

POWDER COCAINE

<table>
<thead>
<tr>
<th>Degree of Offense</th>
<th>Amount Possessed</th>
<th>Penalty Authorized By Statute</th>
</tr>
</thead>
<tbody>
<tr>
<td>1st</td>
<td>500 grams</td>
<td>30 years</td>
</tr>
<tr>
<td>2nd</td>
<td>50 grams</td>
<td>25 years</td>
</tr>
<tr>
<td>3rd</td>
<td>10 grams</td>
<td>20 years</td>
</tr>
<tr>
<td>4th</td>
<td>less than 10 grams</td>
<td>15 years</td>
</tr>
<tr>
<td>5th</td>
<td>less than 10 grams (mere possession)</td>
<td>5 years</td>
</tr>
</tbody>
</table>

Why would the Minnesota Legislature enact a five level structure with punishments keyed to the amount of drug possessed? The answer is that police and prosecutors were frustrated with the burden of proving the intent element of the crime of possession with intent to sell and wanted to eliminate that burden. The new five-tiered structure provided the means to do this.

Under the new law, possessors of small amounts of drugs are presumed to be mere users. Traditionally charged with the less harsh crime of possession under the old law, they are now charged with the least harsh fifth degree level under the new law. Where other facts (scales, etc.) indicate that the possessor of a small amount of drugs intended to sell them, the two-element crime of possession with intent to sell remains an option in two of the lower degrees.


91. The different treatments of possession of crack and cocaine powder may appear confusing. Possession of 10 grams of powder is required to earn the possession charge of third degree, while possession of only three grams of crack earns the same charge. As each substance is a derivative of coca, one may wonder why they are treated differently.

92. See Minn. Stat. § 152.024, subd. 2(2) (Supp. 1989) (fourth degree violation for possessing Schedule I, II, or III substances with intent to sell); Minn. Stat. § 152.023, subd. 2(3) (Supp. 1989) (third degree violation for possessing a narcotic drug with intent to sell). These provisions are confusing and difficult to explain.

Powder cocaine and crack cocaine are each derivatives of coca. Derivatives of coca qualify as both a narcotic drug (Minn. Stat. § 152.01, subd. 10(1) (1988)) and as a Schedule II substance (Minn. Stat. § 152.02, subd. 3(1)(d) (1988)). Therefore, a person possessing two grams of powder cocaine under circumstances...
The story gets more interesting with the first, second, and third degrees of the crime. Possessors of “dealership” quantities of drugs are charged here. The reasoning behind the creation of these levels can be best understood by considering one witness’ testimony before a Minnesota House Committee:

Now, the proposed bill changes the crime [of possession] in one way which law enforcement and prosecutors, I think, will welcome heartily. It changes possessions of significant quantities by simply saying, “if you possess the specified weight, you have committed the crime.” It relieves a burden on law enforcement and prosecutors of showing that that possession was with the intent to sell.93

Later the same witness expanded on this statement:

As I described earlier, the possessions, all the possession crimes that are keyed to weights now [under the proposed bill] do not require law enforcement to prove, nor does it require the prosecutor to show beyond a reasonable doubt, that those quantities were possessed with the intent to sell. That would be an enormous benefit to law enforcement.94

The witness offered this illustration: “Presently, if you possess three grams of crack with the intent to sell, you face a zero to twenty year penalty. The proposed bill says if you possess three grams of crack period, you face a zero to twenty year penalty.”95

Finally, the witness offered this justification:

The rationale for that really is twofold. First, no one possesses three grams of crack without the intent to sell. Therefore, why require prosecutors and law enforcement to prove it? Second, even if there is the odd occasion when someone might conceivably possess that much crack, without the intent to sell, three grams of crack is an awful lot of havoc sitting there in someone’s pocket under any circumstances and ought to be punished appropriately.96
The legislature apparently accepted this reasoning because it subsequently enacted a version of the graduated scheme of possession statutes promoted by the witness. The net result is that Minnesota statutes no longer explicitly punish the independent crime of possession with intent to sell when certain levels of drugs are involved. For first, second, and third degrees, the prosecutor need only prove possession of the statutorily designated amount and the harsher penalty is automatically meted out. At these levels, intent to sell is assumed and is therefore omitted from the definition of the crime.

At least two lines of analysis are available to test the validity of the legislature’s action. The first of these has to do with the legislature’s inherent power to criminalize an act without reference to the actor’s intent to break the law. In *State v. Kremer*, the Minnesota Supreme Court stated that “[i]t has long been settled that the legislature may forbid the doing of an act and make its commission criminal without regard to the intention, knowledge or motive of the doer.” Thus, the legislature has the power to eliminate intent as an element of crimes such as statutory rape. With statutory rape, it is irrelevant that the actor did not intend to engage in sexual activity with an underage youth (i.e., mistake of age is no defense).

A problem arises, however, when this reasoning is applied to the new drug possession scheme. It is proper to view possession with intent to sell as a crime that contains two elements of intent. First, there is the initial intent to possess. A person may claim that he did

97. 262 Minn. 190, 114 N.W.2d 88 (1962).

98. *Id.* at 191, 114 N.W.2d at 89. In *Kremer*, the defendant ran a red light. At trial, the court accepted that the defendant ran the light because the brakes on his car were bad. This defense failed, however, because the traffic law in question made no reference to the violator’s intent or lack of intent to run the light. Thus, running the light for any reason was sufficient for conviction. On appeal, the Minnesota Supreme Court stated that while the legislature could disregard the violator’s intent to break the law, the violator must have intended the act which violated the law. Since the defendant had no intent to perform the act, the conviction was reversed. *Id.* at 192, 114 N.W.2d at 89-90.

In *Morissette v. United States*, 342 U.S. 246 (1952), the United States Supreme Court showed that there will be occasions when the legislature probably does not have power to disregard even the intent to break the law. In *Morissette*, the defendant picked up property that he thought was abandoned scrap metal. The metal turned out to be property of the government. The theft statute made no reference to intent so the defendant could not defend himself at trial. The Supreme Court declared that the defendant’s intent to break the law (he obviously intended to perform the act which amounted to a violation of law) was relevant under these circumstances and reversed the conviction. *Id.* at 276.

This discussion is given to acquaint the reader with the manner in which legislative power to disregard intent has traditionally been analyzed. As the text will demonstrate, these traditional analyses are not exactly on point with the unique issue of intent presented by the Minnesota Legislature’s new possession scheme.

not intend to break the law when the person possessed drugs, but the legislature may rightly prohibit possession without regard to that intent. The second element of intent—the intent to sell—operates as a differential between two penalties (unlike the role intent might play in a case of statutory rape). Absent this element of intent, the accused has only possessed drugs, and faces a lower penalty. If the intent to sell is present—proved or assumed—then the penalty is drastically elevated. Thus, intent itself is criminalized. The Kremer court did not have this kind of situation in mind when it acknowledged legislative power to disregard intent. Thus, the pronouncement in Kremer appears to be weak support for upholding legislative power to disregard intent when the affirmative presence of intent performs an elevating function with respect to punishment.

The second line of analysis has to do with the concept of irrebuttable presumption of fact. This analysis attributes to the legislature the following reasons for enacting the first, second, and third degrees in the scheme: “If you, the accused, possessed a dealership quantity of illegal drugs, i.e., a quantity so large that the possession of it is inconsistent with a typical drug user’s needs for personal use, then you must have intended to sell or distribute those drugs to others, and you shall be punished not only for your possession, but also for your presumed intent to sell.” Thus, once the fact of possession is proved, the fact of intent to sell is presumed for first, second, and third degree. It is irrebuttable because intent to sell is

100. There may be times, however, when the intent to do the act of possessing will be relevant. If X attends a party and leaves his coat in a closet and later Y mistakenly puts his drugs in the pocket of X’s coat, then X will not have intended the act of possession when he leaves the party with drugs in his pocket.

101. This attribution tracks one of the House witness’ two rationales for the new scheme, i.e., the rationale that no one will possess a certain amount of drug without the intent to sell it. See supra note 96 and accompanying text. Whether the witness’ second rationale, i.e., the “awful lot of havoc” in the pocket which deserves to be punished accordingly, is a defensible rationale is highly doubtful. By the witness’ own premise, “havoc” cannot refer to sale or distribution. Thus, the reference to “havoc” is probably a reference to the deleterious effect the drug will have on the user himself, or to some notion that the user is likely to become addicted from the high amount of drugs he possessed, and will therefore commit crimes to meet future drug needs.

With respect to deleterious effect, Minnesota does not punish those who have attempted suicide. Those who pose a danger only to themselves are in need of treatment, not severe criminal sanction. With respect to the notion of addiction and future crime, this justification for increased punishment is a justification based on likelihoods. While the phenomenon of addiction and associated crime is certainly familiar in society as a whole, the future behavior of an individual possessor of drugs is impossible to foresee.

102. The Minnesota Sentencing Guidelines Commission apparently would agree that these levels of possession contain a presumption of intent to sell. See St. Paul Pioneer Press Dispatch, Mar. 21, 1990, at 1B, col. 6 (in course of discussion on re-
not an element of the crime.103

Both the Minnesota Supreme Court104 and the United States Supreme Court105 have had much to say about irrebuttable pre-

lease of Commission's sentencing report and the effect of recent changes in law, newspaper notes “[l]egislators also eliminated the need to prove intent to sell the drug in many cases where a person possesses a large amount. Those with large amounts are presumed to be dealers”).

103. The concept of presumptions in graduated schemes of possession crimes was addressed by the Michigan Court of Appeals in People v. Campbell, 320 N.W.2d 381 (Mich. Ct. App. 1982). The defendant alleged the graduated possession law deprived him of due process of law by conclusively presuming he had an intent to sell the drugs he possessed. The court was uncomfortable with the concept, saying “This is not a case, then, where one offense with a lesser punishment is elevated to a different offense with a more severe punishment by operation of some legislative presumption.” But, just in case that operation was going on, the court analyzed the validity of the presumption in two separate paragraphs. See id. at 383–84. In the Minnesota scheme, the comments of the House witness should make it clear that the elevating function of presumption is indeed at work.

104. In State v. Kelly, 218 Minn. 247, 15 N.W.2d 554 (1944), the Minnesota Supreme Court stated, “Such statutes are of two general types: those creating conclusive presumptions of law or fact, and those creating rebuttable presumptions of fact or 'prima facia' proof. Those of the first type have met the almost uniform fate of being declared unconstitutional, as denying due process of law.” Id. at 250, 15 N.W.2d at 557.

In Juster Bros., Inc. v. Christgau, 214 Minn. 108, 7 N.W.2d 501 (1943), a statutory notice technicality prevented an employer from contesting unemployment compensation obligations found due when an employee separated from the employer’s company. The effect of the technicality was to create “a presumption and an estoppel against the employer.” Id. at 112, 7 N.W.2d at 504. The Minnesota Supreme Court declared that

[e]ven the legislature itself does not have the power to declare what shall be conclusive evidence contrary to the fact. “The legislature cannot in this manner provide for the arbitrary exercise of power, so as to deprive a person of his day in court to vindicate his rights. And the law which closes his mouth absolutely when he comes into court is the same, in effect, as the law which deprives him of his day in court.”

214 Minn. at 117–18, 7 N.W.2d at 507 (citations omitted).

A statutory conclusive presumption of fact has been upheld on at least one occasion. In State v. District Ct. of Hennepin County, 139 Minn. 409, 166 N.W. 772 (1918), a workman’s compensation law provided “that the surviving wife ‘shall be conclusively presumed to be wholly dependent’ ” on her deceased spouse. Id. at 411, 166 N.W. at 773. The Minnesota Supreme Court stated that “[t]he Legislature can make a presumption conclusive unless such presumption would cut off or impair some right given and protected by the Constitution.” Id. The court found there was no impairment of such a right in the case before it. Id.

105. In McFarland v. American Sugar Refining Co., 241 U.S. 78 (1916), the Court considered the effect of a presumption set forth in a Louisiana sugar refining statute. The statute, among other things, declared that a refinery kept idle for more than a year raised the presumption that the operating company was in violation of an antimonopoly law. Writing for the Court, Justice Oliver Wendell Holmes declared the statute to be unconstitutional and stated that “it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime.” Id. at 86.

In Manley v. Georgia, 279 U.S. 1 (1928), the Court considered a statute that
sumptions and they are clearly disfavored. Perhaps the case that best addresses this situation, however, is a case which was not directly concerned with the irrebuttable presumption concept at all. In the Minnesota case of *Meyer v. Berlandi*\(^{106}\), Justice William Mitchell considered a statute under which a material man could be imprisoned for owing debts because his failure to pay was conclusively presumed to be evidence of fraudulent intent. Justice Mitchell based his decision on the constitutional prohibition against imprisonment for debt\(^{107}\) but also indicated that there were other constitutional grounds upon which his decision could have been based\(^{108}\).

Under the statute in question, wrote Justice Mitchell, if the material man

> has received his pay from the owner of the property, and owes a debt due on a contract to one of his laborers... which he is unable to pay, he is guilty of obtaining money on false pretenses, and liable to imprisonment in the penitentiary. No matter how honestly he may have paid over the last dollar which he has received on his contract, yet if, through honest mistake, he took the job too cheap, or if by unforeseen accident it cost more than he anticipated, and for that reason he cannot pay all that he owes for labor or material, he is a felon. This is returning with a vengeance to the old barbarous fiction upon which imprisonment for debt was originally based, viz., that a man who owed a debt, and did not pay it, was a trespasser against the peace and dignity of the crown, and for this supposititious crime was liable to arrest and imprisonment. Such a statute cannot be sustained for a moment.\(^{109}\)

Here, then, the material man has committed an initial wrong: the failure to pay debts. Under what is in effect a statutory irrebuttable presumption, the defendant is presumed to have committed the second wrong of intentional fraud when he incurred the debt in the first place. Justice Mitchell aptly described the potential injustice and denial of due process inherent in such a statute—it punishes a supposititious crime, and not necessarily a crime that was committed. The new Minnesota possession statutes are likewise “supposititious” in that they presume the possessor of drugs intended to sell them,

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\(^{107}\) *Id.* at 441, 40 N.W. at 514.

\(^{108}\) *Id.* ("if not unconstitutional on other grounds, [the statute] is clearly repugnant to section 12, art. 1, of the constitution of the state, prohibiting imprisonment for debt").

\(^{109}\) *Id.* (emphasis added).
although that may not have been the case.  

The best defense that can probably be made in favor of the new possession statutes is that at some point the presumption of intent to sell seems inescapably rational. One rather extreme example helps to illustrate this point. On September 30, 1989, law enforcement authorities in Los Angeles, California, seized twenty tons of cocaine stockpiled in a warehouse. One person on the scene estimated that there was enough illegal cocaine to occupy the space of two school buses. Could anyone doubt that the owners of these illegal drugs intended to sell them?

The problem, however, is that rationality is—or ought to be—a separate question. If the defendants in the California case are charged with possession with intent to sell, they will earn the smirks and skepticism of the jury if they claim that the drugs were intended for personal use or that, for some other reason, the drugs were not intended for sale. But the defendants would at least get the intent issue to the jury in the first place; and although the owner of twenty tons may have difficulty raising a credible claim of intentions of personal use, the possessor of three grams of crack may have a far more credible claim. When the government's own experts state that twenty-five million Americans have used cocaine and that millions more use it every month, it seems incredible to speak in terms of the "odd occasion" when someone will possess three or more grams of crack not for sale but for personal use. There will be a fair number of such occasions and these persons deserve to have a jury of their peers decide the intent to sell issue the same as juries decide all questions of fact in criminal trials.

110. Consider an example of where the Minnesota presumption has almost certainly gone wrong. In Turner v. United States, 396 U.S. 398 (1970), the United States Supreme Court had before it the case of a defendant accused of dealing in both heroin and cocaine. The defendant possessed 14 grams of cocaine when arrested. The Court expressed its opinion that "having a small quantity of a cocaine and sugar mixture [14 grams] is itself consistent with [the defendant's] possessing the cocaine not for sale but exclusively for his personal use." Id. at 423. Minnesota, by singling out possessors of 10 or more grams, has reached precisely the opposite conclusion.

Likewise, in State v. Collard, 414 N.W.2d 733 (Minn. Ct. App. 1987), a Duluth police officer at trial "conceded [that] a heavy user [of cocaine] could go through five grams in a week." Id. at 735. That officer probably would not be surprised to learn that a heavy user had stockpiled a two-week supply. Despite the concession of personal use, the presumption of intent to sell reaches this defendant too.


112. Id. at 1A, col. 3, 5A, col. 2.

The Minnesota Legislature should return the burden of proof to the prosecution in all cases of intent to sell. Short of this, the legislature should consider permitting the defendant to raise an affirmative defense. This would have the effect of allowing the defendant to rebut the presumption.\textsuperscript{114} Such a statutory defense might read: "In all cases wherein the defendant is charged with first, second or third degree possession, it shall be an affirmative defense, sufficient to reduce the charge to possession in the fifth degree, that the defendant illegally possessed a controlled substance but did not intend to sell or distribute it."

Such a statutory defense accomplishes several things. First, the prosecutor is still relieved of the burden of showing intent. Upon a showing that the defendant did in fact possess the amount of drugs in question, it becomes the burden of the defendant to convince the jury that his intentions were for personal use and that he had no intentions to distribute the drugs. If he is successful, he has only reduced his culpability, not eliminated it. He is still guilty of possession in the fifth degree, the "mere user" level of punishment. If he is unsuccessful, he has still had the opportunity to get the intent question to the jury, and cannot complain that he has not had his full day in court. In either event, the possibility of punishing a person who is innocent of intent to sell will have been largely avoided, a result which must work to the satisfaction of all.

If the legislature fails to act, the appellate courts of Minnesota should restore due process in the manner they deem appropriate.

\section*{II. Punishment-Issue Statutes}

\subsection*{D. Minnesota Statutes Section 152.01, Subdivision 15a, and the Definition of "Sell"}

Not surprisingly, it is against the law to sell illegal drugs in Minnesota. Prior to August 1, 1989, "sell" was not defined in Minnesota's controlled substance laws. Presumably, then, "sell" was used by the courts more or less in line with its commonly understood meaning. However, with the passage of Minnesota Statutes section 152.01, subdivision 15a,\textsuperscript{115} sell now means "to sell, give away, barter, deliver, exchange, distribute or dispose of to another; or to offer or agree to do the same; or to manufacture."\textsuperscript{116} The most interesting part of this new definition is the term "offer or agree." Under this

\begin{footnotesize}
\begin{itemize}
\item[114.] For a review of cases dealing with rebuttable presumptions of intent to sell, see Annotation, \textit{Validity and Construction of Statute Creating Presumption or Inference of Intent to Sell from Possession of Specified Quantity of Illegal Drugs}, 60 A.L.R. 3d 1128 (1974 & Supp. 1989).
\item[115.] \textsc{Minn. Stat.} § 152.01, subd. 15a (Supp. 1989).
\item[116.] \textit{Id.}
\end{itemize}
\end{footnotesize}
language, it would appear that drug sale convictions can now be based purely on announced intentions to obtain drugs for another.

In examining the validity of this provision, it is useful to begin with the universally recognized principle that a person cannot be punished solely for bad thoughts. As one writer observed long ago, "The thought of man shall not be tried, for the devil himself knoweth not the thought of man." But while the thoughts alone may not be punishable, the transformation of bad thoughts into words often is punishable. In Minnesota, for instance, some common examples can be found in the crimes of uttering terroristic threats or the crime of perjury. In each case, there is an immediate and identifiable harm caused by the spoken word alone.

More on point with the definition of sell, however, is the crime of soliciting prostitution. In Minnesota, prostitution is defined to mean "engaging or offering or agreeing to engage for hire in" sexual acts. The Minnesota Court of Appeals has stated that "the mere offer of sexual services is a crime." The court added that "the state need only prove that the prostitute 'intentionally agreed or offered to engage in sexual intercourse for hire.'"

Since both "sell" and "prostitution" are defined to include offers and agreements, the rationales for these crimes are probably similar. According to one treatise, "For the crime of solicitation to be completed, it is only necessary that the actor with intent that another person commit a crime, have enticed, advised, incited, ordered or otherwise encouraged that person to commit a crime." The recognizable harm from words of solicitation therefore stems from the fact that they induce or encourage another to commit a crime. With prostitution, it is the encouragement of another to engage in illegal sexual activity. With solicitation for a sale of drugs, it is the encouragement given to another to illegally possess a controlled substance. There would also seem to be a "nuisance" type of harm in both of these crimes, perhaps stemming from a view that bargaining over proposed illicit activity, often on a public street corner, somehow imposes the immorality of others on the public.

In any event, there is an obvious (and perhaps somewhat amusing) distinction that can be drawn between the two crimes. All persons of the human race, simply by virtue of gender, possess the immediate

117. Y.B. 7 Edw. IV, f.2 (Pasch. pl. 2) (quoted as an epigraph in J. Marshall, Intention—In Law and Society xi (1968)).
118. MINN. STAT. § 609.713 (1988).
119. MINN. STAT. § 609.48 (1988).
120. MINN. STAT. § 609.321, subd. 9 (1988).
122. See id. (citation omitted).
123. See 2 W. LaFave & A. Scott, Substantive Criminal Law § 6.1, at 3 (1986).
capacity to engage in prostitution. When the offer is made, there is little doubt that the offeror can make good on the offer. With the offer to sell drugs, however, the capacity to perform the crime is less obvious. Should this capacity distinction matter? As will be shown, it probably should to some extent.

Bearing in mind that under Minnesota’s definition of sell a person who agrees to sell and a person who actually hands over drugs in exchange for money have each committed a sale crime, it is important to examine how sale crimes are punished. On August 1, 1989, an entirely new drug-sale statutory scheme went into effect. There are now five degrees of sale crimes and the degrees are generally distinguished by the amount of the drug that was sold.124 “Crack” cocaine, for instance, is dealt with in the following manner:

<table>
<thead>
<tr>
<th>Degree</th>
<th>Amount Sold</th>
<th>Penalty by Statute in Years/Fines</th>
</tr>
</thead>
<tbody>
<tr>
<td>First</td>
<td>ten grams</td>
<td>30 / $1,000,000</td>
</tr>
<tr>
<td>Second</td>
<td>three grams</td>
<td>25 / $500,000</td>
</tr>
<tr>
<td></td>
<td>less than</td>
<td></td>
</tr>
<tr>
<td>Third</td>
<td>three grams</td>
<td>20 / $250,000</td>
</tr>
<tr>
<td></td>
<td>less than</td>
<td></td>
</tr>
<tr>
<td>Fourth</td>
<td>three grams</td>
<td>15 / $100,000</td>
</tr>
<tr>
<td>Fifth</td>
<td>N/A</td>
<td>N/A</td>
</tr>
</tbody>
</table>

Given this graduated structure of amounts and punishments, is it possible that persons could be charged according to the amount they agreed or offered to sell? There does not appear to be anything in this scheme to prevent such charges. It seems unlikely, however, that legislators ever intended that offers and agreements be treated in this fashion. There are too many common sense, as well as constitutional, objections.

For example, a serious entrapment issue is raised. Under this scheme, undercover police officers would have an apparent incentive to get a suspected trafficker to commit to selling large amounts of drugs so that the trafficker would face a harsher sentence when brought to trial. As with most entrapment scenarios, the bounds of acceptable police conduct and the true measure of a defendant’s

124. MINN. STAT. §§ 152.021, subd. 1; 152.022, subd. 1; 152.023, subd. 1; 152.024, subd. 1; 152.025, subd. 1 (Supp. 1989).

125. Like the possession charts discussed above, this chart is a simplification of a wordy and complicated statutory scheme. The author believes the chart accurately represents the treatment of sales of “crack” cocaine.

Prosecutions at the fifth degree are precluded because only marijuana and Schedule IV substances (coca derivatives are not included in Schedule IV) are addressed there. See MINN. STAT. § 152.025, subd. 1 (Supp. 1989) (fifth degree sale); MINN. STAT. § 152.02, subd. 5(a) (Supp. 1989) (Schedule IV).
culpability both come into serious question.126

Also, given that extremely long prison sentences are at stake, it would seem to be vitally important to know if the vendor actually can supply large amounts of drugs. The experienced police officer might agree that "street" behavior can be very braggadocio, and that the person who says, "Yeah, you know I'm the guy who can get you ten grams," may actually only be able to run and fetch a tiny fraction of that amount, or even nothing at all. Does it make sense to severely punish this person solely for his false and petty claim to possess significant criminal ability?

And the vendor who has committed to the sale of ten grams of crack—is he really more culpable than the person who has planned and taken substantial steps toward the commission of first degree murder? Under Minnesota law, a person guilty of attempted first degree murder may be sentenced to a maximum term of twenty years.127 The vendor, who may be merely bragging about his ability to supply ten grams of crack, faces thirty years imprisonment and his crime was to speak words.

Any number of constitutional challenges could be made here. To punish a person with a thirty year penalty on the basis of words spoken may constitute cruel and unusual punishment in violation of the eighth amendment.128 Due process, equal protection and fourth amendment probable cause challenges could be fashioned without too much difficulty. In short, it is doubtful that the State could constitutionally send anyone to prison for thirty years based on the level of culpability to be found in a mere offer.

The Minnesota Legislature should consider removing the words "offer and agrees" from the definition of "sell." Solicitation should not be keyed to the graduated structure of sale crimes. If an undercover officer really suspects that the person offering drugs for sale has the actual capacity to deliver the drugs, all the officer needs to do is wait until the drugs are delivered before making an arrest. At that point, the officer can charge the vendor with an actual sale.

126. See generally W. LaFave & J. Israel, Criminal Procedure §§ 5.1, 5.2, at 247–53 (1985). Entrapment may occur where law enforcement authorities have gone to improper lengths to encourage another to commit a crime, or where it is found to be unlikely that the crime would have been committed without that encouragement. Id.

127. See Minn. Stat. § 609.185 (1988) (imprisonment for life for first degree murder); Minn. Stat. § 609.17, subd. 4(1) (1988) (when conviction is for the attempt of a crime, and the underlying crime sets forth a penalty of life imprisonment, the penalty for the attempt is up to 20 years).

128. For a review of some cases dealing with length of sentence and cruel and unusual punishment, see Annotation, Length of Sentence as Violation of Constitutional Provisions Prohibiting Cruel and Unusual Punishment, 33 A.L.R. 5d 335 (1970).
In short, the vendor should be allowed to show, through his action or inaction, just how culpable he really is.

Solicitation could be made an independent crime in much the same manner as prostitution is now. One statute should contain both the behavior prohibited and the penalty to be imposed. Such a law would probably withstand constitutional challenge if the penalty is not unreasonable. In determining that penalty, the legislature should focus on the harms discussed above. Solicitations harm because they induce others to engage in crime and they may also cause a public nuisance. The penalty for solicitation should not address any other harm. If the vendor goes beyond soliciting to actual delivering, existing laws already address the greater harm that has come into play.

E. Minnesota Statutes Section 609.195, Subdivision b, and Third Degree Murder

On March 5, 1982, popular comedian and movie star John Belushi died from an overdose of cocaine and heroin. A woman named Cathy Smith admitted preparing and administering the fatal injection.\textsuperscript{129} If these events took place today in Minnesota, Ms. Smith could be charged with murder. Minnesota Statutes section 609.195, subdivision b,\textsuperscript{130} passed by the legislature in 1987, states: "Whoever, without intent to cause death, proximately causes the death of a human being by, directly or indirectly, unlawfully selling, giving away, bartering, delivering, exchanging, distributing, or administering a controlled substance . . . is guilty of murder in the third degree . . . ."\textsuperscript{131}

Before the passage of this statute, prosecutions for this type of crime were conducted under Minnesota’s felony murder statute, Minnesota Statutes section 609.19(2).\textsuperscript{132} Felony murder charges traditionally involve the situation where a person has caused the death of another while the person was in the course of committing some underlying felony offense.\textsuperscript{133} The Minnesota Supreme Court has noted that the purpose of the felony-murder rule is to "isolate for special treatment those felonies that involve some special danger to human life."\textsuperscript{134} The felony act of administering illegal drugs could therefore create liability for murder, notwithstanding the probability

\textsuperscript{130.} Minn. Stat. § 609.195, subd. b (Supp. 1989).
\textsuperscript{131.} Id.
\textsuperscript{132.} Minn. Stat. § 609.19, subd. 2 (1988).
\textsuperscript{133.} See generally W. LaFave & A. Scott, supra note 123, at § 7.5, at 206-11.
\textsuperscript{134.} In re Welfare of M.D.S., 345 N.W.2d 723, 729 (Minn. 1984) (citation omitted).
that the act was performed without intent to kill or malice. It is the indifference to the underlying "special danger" that matters.

In Minnesota, there have been at least two prosecutions under the felony murder rule involving drug overdose deaths. In State v. Forsman, a defendant who injected heroin into the body of a person who later died as a result of that injection was convicted of murder. The Minnesota Supreme Court affirmed the conviction, holding that it was the act of injection that brought the crime within the felony murder rule.

In State v. Aarsvold, the defendant sold cocaine to the decedent. It was unclear whether the defendant actually helped the decedent inject himself with the drug. The issue before the Minnesota Court of Appeals was whether the defendant, assuming he could prove he did not help with the injection, could still be liable for murder based on the act of selling cocaine to the decedent. In the opinion of the court, the deciding factors were the nature of cocaine and the legislature's intent. The court stated:

Because the sale of cocaine alone does not justify the assumption that the purchaser is incurring a substantial and unjustified risk of death, we hold that sale alone is not a proper felony upon which to predicate a charge of felony murder. To hold otherwise would give the felony-murder statute a broader scope that this court will impute in the absence of clear legislative intent to effectuate that meaning.

With Forsman and Aarsvold, the Minnesota appellate courts sustained the charge of murder where the defendant had actually participated in administering a drug, but did not sustain the charge where the defendant only sold the drug. The Minnesota Legislature wanted the charge of murder to apply in both circumstances. Minnesota Statutes section 609.195, subdivision b, was passed to accomplish this. According to one sponsor of the bill that led to the new law, "the purpose of the [proposed] statute is to extend [the charge of murder] to the sale of a controlled substance where the sale causes the death of a human being."

With the passage of Minnesota Statutes section 609.195, subdivision b, the legislature has probably succeeded in extending the charge of murder to the drug sale and overdose situation. Drug overdose murder is now treated under specially defined circum-

135. 260 N.W.2d 160 (Minn. 1977).
136. See id. at 163–65.
137. 376 N.W.2d 518 (Minn. Ct. App. 1985).
138. Id. at 522 (footnote omitted).
139. Remarks of Ray Schmitz, Olmstead County Attorney, during the House Crime and Family Law Division meeting, Mar. 30, 1987, on the hearings for H.F. 350, discussing a proposed extension of murder to drug sale crimes that result in death (tape on file at the Minnesota Legislative Reference Library).
stances apart from the felony murder rule. Thus, the Minnesota appellate courts will not have any legislative intent problems similar to those in *Aarsvold*.

One interesting question raised by the new law is why the words "proximately causes" were included in the statute. This is the only homicide statute that refers to proximate cause instead of just plain "cause." Perhaps legislators thought this language would further clarify their intention that sale crimes provide the basis for murder. Whatever the reason, the effect of the words "proximately causes" at trial should be no different than if the word "cause" alone had been used. To see why this is so, consider the fictional trial of Cathy Smith in Minnesota.140

Defense counsel at closing argument:

"Ladies and gentlemen of the jury, we freely admit that Cathy Smith gave John Belushi the drugs that killed him that night. We freely admit that Cathy Smith, a heroin addict and drug dealer, was no picture of virtue. But, you have also seen that she cared for John Belushi in some ways, expressed affection for him. The last thing she wanted that night was for John to die.141

"And ladies and gentlemen, who really killed John Belushi? We have shown that John Belushi was completely unable to ever turn down an opportunity to consume drugs. Six years before his death, one of his doctors wrote in Belushi's file:

- Smokes 3 packs a day
- Alcohol drinks socially
- Medications: Valium occasionally
- Marijuana 4 to 5 times a week
- Cocaine—snort daily, main habit
- Mescaline—regularly
- Acid—10 to 20 trips
- No heroin.
- Amphetamines—four kinds.
- Barbiturates (Quaalude habit).142

"We have shown you that by the time of his death, Mr. Belushi was in fact a heavy user of heroin.143 You also heard from the doctor who saw Belushi briefly in 1979 and was so struck by Belushi's drug habit that the doctor later told studio executives to "get as many

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140. This fictional portrayal draws upon facts presented in Bob Woodward's book *Wired*.
141. Defense counsel should be able to discuss the subject of intent before the jury even though intent is not an element of the crime. See *State v. Blank*, 352 N.W.2d 91 (Minn. Ct. App. 1984). The court held evidence of a victim's provocation in assault trial is admissible. Although provocation was not a defense to the charge, the court stated, "Lawsuits are not tried in a vacuum." *Id.*
143. See, e.g., *id.* at 415–76 (detailing Belushi's use of heroin).
movies out of him as possible, because he has only two to three years to live.”144

“Ladies and gentlemen, John Belushi got drugs from more people than we will ever know. It is as if Cathy Smith’s name was drawn from a hat. It just happened to be her who supplied the drugs that killed him. Does this sound like murder to you?”

Defense counsel’s theory of the case is that John Belushi “caused” his own death. If the charge had read “cause” instead of “proximate cause,” the jury might well have used a “but for” analysis in its deliberations. But for the acts of Cathy Smith, would John Belushi have died? If the jury accepts defense counsel’s argument that Belushi was destined to find a way to kill himself, then they may very well acquit Ms. Smith, or perhaps convict her of a lesser charge.

Does the jury consider the proximate causation issue any differently from a plain causation issue? If the current civil law treatment of proximate cause is referred to, the answer is probably no. In Minnesota civil cases, the word “proximate” becomes the word “direct” when an instruction is read to the jury.145 The jury may be told that direct cause is established when an act is shown to have been a “substantial factor” in bringing about the result giving rise to the charge.146 A jury might well believe, therefore, that given John Belushi’s self destructive behavior, the acts of Cathy Smith did not constitute a substantial factor in bringing about his death. Thus, in a case involving the death of a heavy drug abuser, the “proximately causes” language in Minnesota Statutes section 609.195, subdivision b, probably brings about no major change in the way a jury considers the issue of causation.

A final matter involving the drug overdose murder charge deserves brief consideration. The legislature has structured Minnesota Statutes section 609.195, subdivision b, so that lack of intent or lack of malice are irrelevant to the charge. If the proper case arises, defense counsel should argue that there must be a limit on the legislature’s power to make these factors irrelevant.

Consider the case of State v. Patrick.147 The Patrick defendant got drunk and went driving. Then, the

144. See id. at 5 (Report from Dr. Braun to Producer Robert Weiss).
145. See MINN. CIV. JURY INSTRUCTION GUIDES, CIVIL 3d JIG #140, at 113 (1986); see also Gardner v. Germain, 264 Minn. 61, 65–66, 117 N.W.2d 759, 762 (Minn. 1962) (“direct” is preferable to “proximate” because the latter word may confuse the jurors).
146. See MINN. CIV. JURY INSTRUCTION GUIDES, CIVIL 3d JIG #140, at 113 (1986); see also Flom v. Flom, 291 N.W.2d 914 (Minn. 1980) (use of “substantial factor” test).
woman and her two children. Appellant forced two pedestrians off a road, turned around, and chased them off the road a second time for fun traveling 60 miles per hour.

When the police began to pursue appellant, he decided to outrun them driving up to 80 miles per hour on residential streets. He ran a police roadblock at high speed, nearly striking a patrol car that had to move to avoid a collision. Appellant ran several stop signs and eventually struck a car, killing the driver.\textsuperscript{148}

The \textit{Patrick} defendant was convicted of third degree murder, the same level of murder that Cathy Smith would have been charged with under Minnesota Statutes section 609.195, subdivision b. Ms. Smith's level of culpability, however, does not begin to compare with that of the \textit{Patrick} defendant. The defendant in \textit{Patrick} could almost be certain that he was going to kill or injure someone. The person who occasionally sells or shares drugs is unlikely to ever be so certain, as the risk of death, while present, is much lower.

The point, then, is that intent, foreseeability, and malice ought to play a role in the way drug overdose murder convictions are obtained.\textsuperscript{149} Although the fatal drug overdose scenario may present facts which express the essence of pathetic human behavior, that may not be enough of a reason to ignore traditional measures of culpability, especially when the charge is murder. Defense lawyers should be prepared to make the appropriate challenges to the court.

\textbf{Conclusion}

On most any day, the heavy toll of illegal drug activity is made apparent in the morning newspaper. The drug-related murders, assaults, and burglaries are written about; there are stories about drug overdose deaths and infants experiencing the pangs of withdrawal from drug addiction—addiction caused by the mother's drug abuse. Given this reality, government would be irresponsible if it did not take action.

With respect to the quick enactment of drug laws, the main purpose of this Note has been to show that this well-intentioned remedy may itself cause unintended tragedies. The conviction of the innocent, the seizure of property from the innocent, the imposition of unduly harsh sentences—Minnesota's new drug laws may encourage all of these results.

Since "[t]he interest of the United States in a criminal prosecution 'is not that it shall win a case, but that justice shall be done,'"\textsuperscript{150} perhaps it is time to carefully examine Minnesota's new laws to be

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\textsuperscript{148} Id. at 427–28.
\textsuperscript{149} For a discussion on legislative power to disregard intent, see supra notes 80–114 and accompanying text.
\textsuperscript{150} Jencks v. United States, 353 U.S. 657, 668 (1957) (citation omitted).
\end{flushright}
certain that justice is being served. There is justice when the illegal drug dealer goes to prison. There is travesty when the innocent go there too. No law should give short shrift to the latter result, not even in the furtherance of a war on drugs.

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