NEW JERSEY CRIMINAL LAW

REVISION COMMISSION

Study Draft of A New PENAL code for New Jersey

Part I - General Provisions

October, 1969

New Jersey Criminal Law Revision Commission
Rutgers Law School
Newark, New Jersey 07102

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To the Commissioners:

The following is Part I of the Study Draft of a new Penal Code for New Jersey. It covers the "general part" of the substantive criminal law and is built upon Part I of the Model Penal Code. This portion of the draft will be taken up first in the Commission's discussions.

Part II of the Study Draft, which is now being prepared, will be entitled "Definition of Specific Offenses". It will be built upon Part II of the Model Penal Code, supplemented to include subjects not there covered and to recommend deletion of unnecessary existing statutory provisions.

Part III of the Study Draft will be entitled "Treatment and Correction". It will cover those portions of Parts III and IV of the Model Penal Code which seem to come within our mandate. Work on this Part has not yet begun.

This Study Draft is intended to be an internal working paper of the Commission. It should not be cited as an official statement of the Commission's views on any matter nor as an official statement of the law of this State.

Newark, New Jersey
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John G. Graham
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PART I. GENERAL PROVISIONS

ARTICLE 1. PRELIMINARY

Introductory Note

Some of the sections of this Article, particularly §§1.03 a 1.07-1.11, cover areas which might well be considered as procedural under Winberry v. Salisbury, 5 N.J. 240 (1950). They are included fo purposes of this Study Draft subject to a later consideration of whether they are appropriately the subject of legislation.

SECTION 1.01. TITLE AND EFFECTIVE DATE.

(1) This Act is called the Penal and Correctional Code and may be cited as P.C.C. It shall become effective on

(2) Except as provided in Subsections (3) and (4) of this Section, the Code does not apply to offenses committed prior to its effective date and prosecutions for such offenses shall be governed by the prior law, which is continued in effect for that purpose, as if this Code were not in force. For the purposes of this Section, an offense was committed prior to the effective date of the Code if any of the elements of the offense occurred prior thereto.

(3) In any case pending on or after the effective date of the Code, involving an offense committed prior to such date:

(a) procedural provisions of the Code shall govern, insofar as they are justly applicable and their application does not introduce confusion or delay;

(b) provisions of the Code according a defense or mitigation shall apply, with the consent of the defendant;

(c) the Court, with the consent of the defendant, may impose sentence under the provisions of the Code applicable to the offense and the offender.

(4) Provisions of the Code governing the treatment and the release or discharge of prisoners, probationers and parolees shall apply to persons under sentence for offenses committed prior to the effective date of the Code, except that the minimum or maximum period of their detention or supervision shall in no case be increased

* * * * *

§1.01 Commentary

1. This preliminary provision shows the method of transitio from the existing system to that of the Code. Ex post facto applicati is, of course, precluded but provisions granting a defense or mitigati and the sentencing provisions may be applied with the consent of the defendant. So too, procedural provisions may apply in cases based on offenses committed before enactment of the Code. MPC Tentative Draft No. 2, p. 2. (1954)

2. The general method applied by §1.01 (2) is to make existing law continue in force and apply if "any of the essential elements of the offense" charged occurred prior to the effective date of the Code, except as provided in paragraphs (3) and (4) of the Secti The three exceptions of paragraph (3) are: (a) Procedural provisions (to the extent they may be incorporated) govern "insofar as they are justly applicable and their applications does not introduce confusion or delay". This provision is drawn from Rule 59 of the Federal Rules of Criminal Procedure. (b) With the defendant's consent, provisions of the Code which accord a defense or mitigation apply. (c) With the defendant's consent, the sentencing provisions of the Code apply.

3. New Jersey's law as to changes in the substantive crimin law is now found in N.J.S. 1:1-15:

> "Offenses, liabilities, penalties and forfeitures committed or incurred under repealed acts not affected by such repeal.
>
> No offense committed, and no liability, penalty or forfeiture, either civil or criminal, incurred, previous to the time of the repeal or alteration of any act or part of any act, by the enactment of the Revised Statutes or by any act heretofore or hereafter enacted, shall be discharged, released or affected by the repeal or alteration of the statute under which such offense, liability, penalty or forfeiture already committed or incurred shall be thereby discharged, released or affected; and indictments, prosecutions and actions for such offenses, liabilities, penalties or forfeitures already committed or incurred shall be commenced or continued and be proceeded with in all respects as if the act or part of an act had not been repealed or altered, except that when the Revised Statutes, or other act by which such repeal or alteration is effectuated, shall relate to mere matters of practice or mode of procedure, the proceedings had thereafter on the indictment or in the prosecution for such offenses, liabilities, penalties or forfeitures shall be in such respects as far as is practicable in accordance with the provisions of the Revised Statutes or such subsequent act."

See State v. Closter Village, 31 N.J. Super. 566 (Co. Ct. 1954) affirmed sub. nom. State v. Low, 18 N.J. 179 (1955); State v. Bachelor, 52 N.J. Super. 379 (App. Div. 1958).

4. The exceptions to §1.01 (2) found in paragraph (4) of that Section deal with correction provisions. Here, provisions of the Code governing the treatment and the release or discharge of prisoners, probationers and parolees are applied to persons under sentence for offenses committed prior to the Code's enactment, except that the maximum or minimum period of detention or supervision may not be increased. New Jersey's existing position on changes in correctional law is that there is no power to increase a maximum or minimum sentence (In re Fitzpatrick, 9 N.J. Super. 511 (Co. Ct., 1950) affirmed o.b. 14 N.J. Super. 213 (App. Div. 1951) and approved In re Domako, 9 N.J. 443 (1952)), but that legislative changes in parole eligibility do not violate any rights of a prisoner. Zink v. Lear, 29 N.J. Super. 515 (App. Div. 1953); White v. Parole Board, 17 N.J. Super. 580 (App. Div. 1952); Mahoney v. Parole Board of New Jersey, 10 N.J. 269 (1952). In enacting a new Parole Act in 1948, however, our Legislature did provide that "any prisoner sentenced prior to the effective date of this act shall retain all rights of eligibility for parole available to him under any pre-existing law." N.J.S. 30:4-123. In fact, however, Zink v. Lear, supra, shows that statute did make changes, in some cases to the prisoner's detriment, and that they were legal.

SECTION 1.02. PURPOSES: PRINCIPLES OF CONSTRUCTION.

(1) The general purposes of the provisions governing the definition of offenses are:

(a) to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interest;

(b) to subject to public control persons whose conduct indicates that they are disposed to commit crimes;

(c) to safeguard conduct that is without fault from condemnation as criminal;

(d) to differentiate on reasonable grounds between serious and minor offenses.

(2) The general purposes of the provisions governing the sentencing and treatment of offenders are:

(a) to prevent the commission of offenses;

(b) to promote the correction and rehabilitation of offenders;

(c) to safeguard offenders against excessive, disproportionate or arbitrary punishment;

(d) to give fair warning of the nature of the sentences that may be imposed on conviction of an offense;

(e) to differentiate among offenders with a view to a just individualization in their treatment;

(f) to define, coordinate and harmonize the powers, duties and functions of the courts and of administrative officers and agencies responsible for dealing with offenders;

(g) to advance the use of generally accepted scientific methods and knowledge in the sentencing and treatment of offenders;

(h) to integrate responsibility for the administration of the correctional system in a State Department of Correction [or other single department or agency].

(3) The provisions of the Code shall be construed according to the fair import of their terms but when the language is susceptible of differing constructions it shall be interpreted to further the general purposes stated in this Section and the special purposes of the particular provision involved. The discretionary powers conferred by the Code shall be exercised in accordance with the criteria stated in the Code and, insofar as such criteria are not decisive, to further the general purposes stated in this Section.

§1.02 Commentary

1. "This section undertakes to state the most pervasive general objectives of the Code. The statement is included both for its own sake, as an explanation of the underlying legislative premises, and also as an aid in the interpretation of particular provisions and in the exercise of the discretionary powers vested in the courts and in the organs of correctional administration." MPC Tentative Draft No. 2, p. 4 (1954).

2. "Paragraph (2) defines the major purposes of the provisions dealing with the sentencing and treatment of offenders and the goals to be pursued in their administration. The section is drafted in the view that sentencing and treatment policy should serve the ends of crime prevention. It does not undertake, however, to state a fixed priority among the means to such prevention, i.e., the deterrence of potential criminals and the incapacitation and correction of the individual offender. These are all proper goals to be pursued in social action with respect to the offender, one or another of which may call for the larger emphasis in a particular context or situation. What the Code seeks is the just harmonizing of these subordinate objectives, rather than the concentration on some single target of this kind. It is also recognized that not even crime prevention can be said to be the only end involved. The correction and rehabilitation of offenders is a social value in itself, as well as a preventive instrument. Basic considerations of justice demand, moreover, that penal law safeguard offenders against excessive, disproportionate or arbitrary punishment, that it afford fair warning of the nature of the sentences that may be imposed upon conviction and that differences among offenders be reflected in the just individualization of their treatment. Finally, it is among the basic purposes of the [Code] to

define, coordinate and harmonize the powers, duties and functions of the courts and of correctional administration, to advance the use of generally accepted scientific method and knowledge in sentencing and treatment of offenders and to integrate responsibility for the administration of the state correctional system in a unified state agency.

"The sentencing and treatment plan proposed has been designed to further and, so far as possible, to harmonize these goals." MPC Tentative Draft No. 2, pp. 4-5 (1954).

3. If the Commission determines that its task is not to attempt to "integrate responsibility for the administration of the state correctional system in a unified state agency", then §1.02(2)(h) should be eliminated and Part IV of the Code ("Organization of Correction") will not be recommended.

4. New Jersey has no such comprehensive statement of the purposes of the criminal law not does it even have one of the very general statements found in many state codes. MPC Tentative Draft No. 4, p. 5 (1954). Spread throughout our case law, however, are many statements which lead to the conclusion that the goals of our present system largely coincide with those stated in §1.02(1) and (2). In State v. Ivan, 33 N.J. 197 (1960), our Supreme Court was concerned with the problem of the exercise of discretion by a trial judge in sentencing:

> "The philosophical justification for punishment has divided men for centuries. Suggested bases or aims are (1) retribution, (2) deterrence of others, (3) rehabilitation of the defendant, and (4) protection of the public by isolation of the offender. * * * * Today retribution is not a favored thesis, although some still claim a need to satisfy a public demand for vengeance. Perhaps it persists as an unarticulated premise in individual sentences. Present-day thinking emphasizes deterrence and rehabilitation. Few would permanently isolate the offender without regard to the nature of his crime upon a finding of incorrigibility.

That course, however defensible in abstract theory, cannot be seriously considered until future behavior is predictable with substantial certainty. The Legislature has adopted that approach only with respect to multiple convictions. Otherwise society may be secured against repetition of crime only within the limit of the maximum punishment authorized for the particular offense."

"Expressed in other terms, the prevailing theme is that punishment should fit the offender as well as the offense. * * * * Except where the Legislature has decreed a mandatory sentence, thereby determining the punishment should fit the offense without regard to the circumstances of the offender, the problem devolves upon the sentencing judge. Our Legislature has not stated the aims to be achieved by punishment. Indeed few legislatures have, and where they have, the statement has been 'too general to be of service.'"

After quoting §1.02(2) of the Code and the Drafters' notes accompanying it, as set forth above in Comment (2), the court noted that the Code "eschews the prescription of a formula" for the application of these purposes, and continued:

"No single aim or thesis can claim scientific verity of universal support. Agreement can hardly be expected until much more is known about human behavior. Until then, the sentencing judge must deal with the complex of purposes, determining in each situation how the public interest will best be served. * * * * His answer will be a composite judgment, a total evaluation of all the facets, giving to each the weight, if any, it merits in the context before him. There can be no precise formula. The matter is embedded deeply in individual discretion."

"As we have said, the judge must decide in what way the interest of the public will best be served. He seeks justice to society as well as to the individual, and of course justice to the individual is itself a phase of justice to the community. If the offense has strong emotional roots or is an isolated event unassociated with a pressing public problem, there is room for greater emphasis upon the circumstances of the individual offender. On the other hand, if the crime is a calculated one and part of a widespread criminal skein, the needs of society may dictate that the punishment more nearly fit the offense than the offender. There the sentencing judge may conclude he should give priority to punishment as a deterrence to others and as an aid to law enforcement. The doubts that may beset the deterrent effect of punishment when the crime is steeped in emotional pressures recede sharply when the motivation is pecuniary and the criminal event is part of a calculated 'business' venture. If the prevailing thinking does not strongly support this view, at least no one can demonstrate that those who act upon it do so without legal warrant." (33 N.J. 199-202)

As to the individual subsections of §1.02(1) and (2): See State v. Ivan, supra (§1.02(1)(a) and (b) and §1.02(2)(a) and (b)(e) and (g); State v. DiStasio, 49 N.J. 247 (1967) (same); State v. Gibbs, 79 N.J. Super. 315 (App. Div. 1963) (§1.02(1)(a) and (b) and (2)(c) and (e); State v. Sikora, 44 N.J. 453 (1965) (§1.02(1)(b)); State v. Lucas, 30 N.J. 37 (1959) (§1.02(1)(a) and (b) and (2)(a) and (b)); State v. Hudson County News Co., 35 N.J. 284, 293 (1961) and other cases discussed in connection with §2.05 (§1.02(1)(c)); State v. Meinken, 10 N.J. 348 (1952) (§1.02(1)(d) and (2)(d); State v. Provenzano, 34 N.J. 318 (1961) (same); State v. Carbone, 38 N.J. 19 (1962) (same); State v. Bess, 53 N.J. 10 (1968) (§1.02(2)(a) and (b)); State v. Johnson, 67 N.J. Super. 414 (App. Div. 1961) (§1.02(2)(c) and (e)).

5. Paragraph (3) accords the statements of objectives of paragraphs (1) and (2) an explicit significance for purposes of interpretation and the exercise of discretionary powers. It gives equal importance, however, to the special purposes of the particular provision involved. MPC Tentative Draft No. 2, p. 5 (1954). The Code does not, as such, preserve the rule that "penal laws must be strictly construed" although paragraphs (1)(d) and (2)(d) affirm that fair warning is one of its major purposes. Statutes in many other states follow the Code in de-emphasizing the rule of strict construction of penal statutes. See MPC Tentative Draft No. 2, pp. 5-6 (1954). The New Jersey cases set forth the rule of strict construction of penal statutes, under those cases, which means that the statute should not be extended by tenuous interpretation beyond the fair meaning of its terms. The rule is based on the need to avoid its being applied to persons or conduct beyond the Legislature's

contemplation. Having said this, however, our cases then go on and hold that the rule of strict construction does not mean that the Legislature's intention should be disregarded. A reasonable interpretation should be made based upon the legislative purpose as revealed by the composite thrust of the whole statute. State v. Meinken, 10 N.J. 348 (1952); State v. Provenzano, 34 N.J. 318 (1961); State v. Carbone, 38 N.J. 19 (1962); State v. Gattling, 95 N.J. Super. 103 (App. Div. 1967); State v. Edwards, 28 N.J. 292 (1958); State v. Congdon, 76 N.J. Super. 493 (App. Div. 1962); State v. Frost, 95 N.J. Super. 1 (App. Div. 1967); State v. Gibbs, 79 N.J. Super. 315 (App. Div. 1963) (statutory language must be given a reasonable construction in order to promote efficient enforcement of criminal law, prevent crime and advance the ends of justice); State v. Rucker, 46 N.J. Super. 162 (App. Div. 1957). See also N.J.S. 1:1-1.

6. As to the second sentence of paragraph (3) concerning the exercise of discretionary powers and the criteria to be used in doing so, see State v. Ivan, 33 N.J. 197, 200 (1960) and State v. DiStasio, 49 N.J. 247, 256 (1967).

7. Other State Codes

(a) New York (followed by Michigan and Connecticut). Penal Law §§1.05 and 5.00:

General purposes

"The general purposes of the provisions of this chapter are:

1. To proscribe conduct which unjustifiably and inexcusably causes or threatens substantial harm to individual or public interests;

2. To give fair warning of the nature of the conduct proscribed and of the sentences authorized upon conviction;

3. To define the act or omission and the accompanying mental state which constitute each offense;

4. To differentiate on reasonable grounds between serious and minor offenses and to prescribe proportionate penalties therefor; and

5. To insure the public safety by preventing the commission of offenses through the deterrent influence of the sentences authorized, the rehabilitation of those convicted, and their confinement when required in the interests of public protection."

Penal law not strictly construed.

"The general rule that a penal statute is to be strictly construed does not apply to this chapter, but the provisions herein must be construed according to the fair import of their terms to promote justice and effect the objects of the law."

(b) General Purposes

"The provisions of this Code shall be construed in accordance with the general purposes hereof, to:

(a) Forbid and prevent the commission of offenses;

(b) Define adequately the act and mental state which constitute each offense, and limit the condemnation of conduct as criminal when it is without fault;

(c) Prescribe penalties which are proportionate to seriousness of offenses and which permit recognition of differences in rehabilitation possibilities among individual offenders;

(d) Prevent arbitrary or oppressive treatment of persons accused or convicted of offenses."

SECTION 1.03. TERRITORIAL APPLICABILITY.

(1) Except as otherwise provided in this Section, a person may be convicted under the law of this State of an offense committed by his own conduct or the conduct of another for which he is legally accountable if:

(a) either the conduct which is an element of the offens or the result which is such an element occurs within this State; or

(b) conduct occurring outside the State is sufficient under the law of this State to constitute an attempt to commit an offense within the State; or

(c) conduct occurring outside the State is sufficient under the law of this State to constitute a conspiracy to commit an offense within the State and an overt act in furtherance of such conspiracy occurs within the State; or

(d) conduct occurring within the State establishes complicity in the commission of, or an attempt, solicitation or conspiracy to commit, an offense in another jurisdiction which also is an offense under the law of this State; or

(e) the offense consists of the omission to perform a legal duty imposed by the law of this State with respect to domicile, residence or a relationship to a person, thing or transaction in the State; or

(f) the offense is based on a statute of this State which expressly prohibits conduct outside the State, when the conduct bears a reasonable relation to a legitimate interest of this State and the actor knows or should know that his conduct is likely to affect that interest.

(2) Subsection (1)(a) does not apply when either causing a specified result or a purpose to cause or danger of causing such a result is an element of an offense and the result occurs or is designe or likely to occur only in another jurisdiction where the conduct charged would not constitute an offense, unless a legislative purpose plainly appears to declare the conduct criminal regardless of the place of the result.

(3) Subsection (1)(a) does not apply when causing a particular result is an element of an offense and the result is cause by conduct occurring outside the State which would not constitute an offense if the result had occurred there, unless the actor purposely or knowingly caused the result within the State.

(4) When the offense is homicide, either the death of the victim or the bodily impact causing death constitutes a "result", within the meaning of Subsection (1)(a) and if the body of a homicide victim is found within the State, it is presumed that such result occurred within the State.

(5) This State includes the land and water and the air space above such land and water with respect to which the State has legislative jurisdiction.

§1.03 Commentary

1. The existing basic rule is "that an essential element necessary to the invocation of jurisdiction in criminal cases is that the crime be committed in state in which the crime is tried". State v. McDowney, 49 N.J. 471 (1967); State v. Stow, 83 N.J.L. 14 (Sup. Ct. 1912); State v. Wycoff, 31 N.J.L. 65 (Sup. Ct. 1864); State v. Segal, 78 N.J. Super. 273 (App. Div. 1963); State v. Hunter, 40 N.J.L. 495 (Sup. Ct. 1859). This statement of the law is similar to the rule found in other states that, at common law, a prosecution could not be brought unless the "gist" of the offense occurred. Literally applied, these rules would have precluded the possibility of prosecution in more than one jurisdiction. The difficulty comes in finding where the "gist" occurred or where the offense was "committed".

Faced with an increasing importance of offenses based upon conduct which was interstate in its nature, many American legislatures enacted statutes extending the jurisdiction of the state to offenses committed at least partly outside the state. MPC Tentative Draft No. p. 3 (1956). New Jersey never had such a comprehensive legislative enactment but, recognizing the need to have some such broadening, it did copy an old English statute as to venue and jurisdiction over homicides. (N.J.S. 2:184-3 carried forward into R. 3:6-1; See State v. Wycoff, 31 N.J.L. 65 (Sup. Ct. 1864). It also entered into some interstate compacts (see State v. Federenko, 26 N.J. 119 (1958) and State v. Holden, 46 N.J. 361 (1966)) and enacted legislation extending its criminal jurisdiction three miles into the sea. (N.J.S. 40:18-5).

The Code would, in the Secretary's opinion, somewhat broade the criminal jurisdiction of New Jersey over that now found in our

cases. In view of the continued and increasing importance of criminal conduct which is interstate in nature and given the protection to the defendant from the provisions of §1.10 of the Code (Former Prosecution in Another Jurisdiction: When a Bar), this seems desirable. The Commission may, however, want either to recommend a more limited provision or, alternatively, propose a doctrine similar to the civil notion of forum non conveniens.

2. The offense may, under §1.03(1) be based upon either the person's own conduct or the conduct of another for which he is legally accountable. This latter is defined in §2.06. Under the Code, if the offense is committed wholly or partly within this state the accomplice is liable here even though his acts took place entirely outside the state. This follows the law found in many state statutes. MPC Tentat Draft No. 5, p. 4 (1956). It would, however, expand liability somewha from that found in our cases. In State v. Wycoff, 31 N.J.L. 65 (Sup. Ct. 1864), the court found that a person who was an accessory before the fact to a larceny in New Jersey could not, under the circumstances be convicted. He, while in another state, incited and procured his agent or accomplice to enter this state and commit the felony. The court recognized that if the defendant had sent an innocent agent into the state there would be jurisdiction--"otherwise the anomaly would exist of a crime but no responsible criminal"--but where "the instrumentality employed [is] a conscious guilty agent, with free will to act or to refrain from acting, there is no room for the doctrine of a constructive presence in the procurer". Ibid. Under the Code, the procurer would be "legally accountable" for the acts of the person within the state (§2.06(2)(c) and (3)(a)). There seems to be no reason, under modern law, to distinguish between various classes of accomplices, particularly based upon theories of "constructive presen

which were thought to be necessary to find the defendant within the state where the crime was "committed". See State v. LaFera, 35 N.J. 75, 89 (1961).

3. The Code establishes six instances in which a person may be convicted under the law of this state of an offense committed by his conduct or that of another for which he is legally accountable (§1.03(1)):

(a) Where either the conduct which is an element of the offense or the result is such an element occurs within this state. This is subject to §§1.03(2) and (3), concerning situations where the act is not criminal in the other state, and §1.03(4), concerning the definition of "result" in homicide cases. Both exceptions will be discussed below.

Our cases have many instances of situations which find either conduct which is an element or a result which is an element sufficient if done in this state. Thus, in State v. West, 29 N.J. 327 (1959), the Supreme Court found sufficient "offensive conduct within [New Jersey] even though an impact elsewhere is intended". 29 N.J. at 333-334. See also State v. Lang, 108 N.J.L. 98, at 102 (E.&A. 1931) (death in New Jersey, fatal blow in New York, victim transported to New Jersey by defendants); Hunter v. State, 40 N.J.L. 495, 548 (E.&A. 1878) (blow in New Jersey, death in Pennsylvania). However, there are instances where the Code would find jurisdiction but our courts have not. In State v. Carter, 27 N.J.L. 499 (Sup. Ct. 1859), the fatal blow occurred in New York but death did not result until two days later at which time the victim died in New Jersey. The victim had come to New Jersey voluntarily. No jurisdiction was found here because "no act [was] done in this state by the defendant". 27 N.J.L.

because a "result which is * * * an element" of homicide occurred here. Again, in State v. Stow, 83 N.J.L. 14 (Sup. Ct. 1912), the defendant was tried and convicted of attempting to counsel and advise another to violate the election laws of New Jersey. He had written to the other person and mailed the letter from New Jersey to Pennsylvania. It was never received by the addressee and came into the hands of prosecutor. New Jersey was found to be without jurisdiction to prosecute. The court reasoned that it is the place where the crime is committed which has jurisdiction and it is only "the completed act" which gives jurisdiction. 83 N.J.L. at 15-16. The Code in §1.03(1)(a) would find jurisdiction because conduct which is an element of the offense occurred here.

(b) The second class of conduct which is sufficient is where conduct occurs outside the state which is sufficient to constitut an attempt to commit an offense within the state. The Drafters of the Code state this to be the common law although they confess to being unable to find judicial precedents. MPC Tentative Draft, No. 5, pp. 1((1956). The Code would not require that any agency or instrumentality enter the state because "the security of the state is threatened by an attempt to commit a serious offense in the state from outside the state and this gives the state a sufficient interest to control such conduct." Ibid. This reasoning is clearly out of step with the early cases of Wycoff and Carter, supra, but is in step with the more recent cases of LaFera, infra, and West, supra.

(c) Paragraph (c) provides for jurisdiction over a conspiracy outside the state to commit a crime within the state, provided that an overt act in pursuance of the conspiracy occurs withi the state. It is the law in New Jersey and elsewhere. MPC Tentative Draft No. 5, p. 11 (1956). State v. LaFera, 35 N.J. 75, 89 (1961):

> "It is stated as a general rule that a conspiracy may be punished at the place of the illegal agreement or at the place where an overt act is committed in furtherance of it. * * * The rationalization is that the agreement is renewed at the place where the overt act is committed. Doubtless it is fictional to say conspirators renew their agreement at each such event, but the result is commanded by realities. Frequently there is no direct evidence of the conspiratorial agreement and hence the place cannot be shown. Further, it would be intolerable if a group of men could lay plans to execute a nefarious scheme in some distant jurisdiction, in the hope that the state where the scheme was devised will be little excited to act."
>
> * * *
>
> "Some doubt may perhaps arise if the overt act is negligible in character. . . . but where a conspiracy if formed in one jurisdiction to achieve an illegal purpose in another, there is no reason to deny the latter jurisdiction the power to prosecute on the basis of an overt act there."
>
> * * * * *
>
> "Hence, since here the alleged purpose of the conspiracy was to subvert and obstruct a law of the state by conduct within the State, it is of no moment where the agreement was made." (35 N.J. at 89-90.)

(d) Paragraph (d) deals with the situation where conduct within the state establishes complicity in the commission of, or attempt, solicitation or conspiracy to commit an offense in another jurisdiction. Here, the conduct contemplated must be both an offense in this state and in the state where the result is to take place. The Code's position would refuse to follow, People v. Buffum, 40 Cal. 2d 709 (1953), holding that it is not a crime in California to conspire to send a woman to Mexico to be aborted. The place of occurrence is thought to be immaterial. MPC Tentative Draft No. 5, pp. 5-6 (1956). No New Jersey cases were found although State v. LaFera, supra, (35 N.J. 75) assumes that prosecution in one state is proper even though the conspiracy is to be committed in another. Further, the reasoning of that case leads to the conclusion that the Code's view would be followed in New Jersey.

(e) Paragraph (e) deals with the offense which consists of an omission to perform a legal duty under circumstances where the failure is criminal. It provides that the offense is committed within the state if the duty was to be performed here regardless of the whereabouts of the accused at the time of his non-performance. The limitation as to "domicile, residence or a relationship to a person, thing or transaction in the state" is intended to reflect the constitutional limitation on state authority to impose a duty of performance upon an absent person. MPC Tentative Draft No. 5, p. 7 (1956). No New Jersey case was found. Cf., State v. Brewster, 87 N.J.L. 75 (Sup. Ct. 1915).

(f) Paragraph (f) deals with the situations in which a state may make conduct occurring wholly outside its borders criminal, when no element of the offense occurs within the state. It requires an express prohibition by the legislature of that conduct outside the state, that the conduct bear a reasonable relationship to a legitimate interest of the state and that the actor know or should know that his conduct is likely to affect that interest. MPC Proposed Final Draft, p. 6 (1962) and Tentative Draft No. 5, pp. 12-13 (1956). No cases on point were found. State v. Segal, 78 N.J. Super. 273 (App. Div. 1963), and State v. West, 29 N.J. 327 (1959), contain language which give rise to the belief that our courts, in appropriate circumstances, might find jurisdiction of this sort. See also State v. Holden, 46 N.J. 361 (1966) and State v. Federenko, 26 N.J. 119 (1958) (interstate compacts). But see State v. Stow, 83 N.J.L. 14 (Sup. Ct. 1912).

4. Subsections (2) and (3) limit the scope of Subsection (1)(a) in cases where conduct in this state causes a result in another state and where that other state treats the conduct as not being criminal. Here, a qualified legal effect is given to that other State's law: Where the result is designed or likely to occur in

another state which treats that result as non-criminal, conduct in this state leading to that result is not criminal "unless a legislative purpose plainly appears to declare the conduct criminal regardless of the place of the result." See MPC Tentative Draft No. 5, p. 6 (1956) Cf., State v. West, 29 N.J. 327 (1959) and In re Cohen, 10 N.J. 601 (1952). Where the result is caused by conduct occurring outside this state where it would not constitute an offense if the result had occurred there but instead it occurs in this state, it is not an offense unless the result was purposely or knowingly caused within this state (§1.03(3)). No New Jersey cases were found.

5. Subsection (4) establishes two special rules as to homicides:

(a) Either the death of the victim or the bodily impact causing death are sufficient to constitute a "result" within the meaning of Subsection (1)(a). This rule is established because of the "serious nature" of homicide, "the difficulty of detection and the fact that the act causing death and the death may be far apart geographically". MPC Tentative Draft No. 5, p. 9 (1956). The first provision is designed to cover the situation where the bodily impact causing death occurs within the state though the death occurs elsewhere. Ibid. A provision similar to this allowing the state to convict where there is conduct within the state constituting an attempt to commit homicide but the death actually occurs elsewhere was eliminated from the Code. Id. at 10. The second provision in the Code is where death occurs in the state. Though the place where the victim dies may be far removed from the place where the defendant's conduct occurred, practical considerations lead to this rule because it may be possible to determine where the victim died but not where the fatal blow was struck. New Jersey has many cases in accord with the second rule, i.e., of impact out of

the state and death within. State v. Lang, 108 N.J.L. 98, at 102 (E.&A. 1931); Hunter v. State, 40 N.J.L. 495, 546 (E.&A. 1878) overruling State v. Carter, 27 N.J.L. 499 (Sup. Ct. 1859). No cases were found on the first point, i.e., of impact in and death out. Carter assumes that in such a case jurisdiction would exist. As to venue, where analogous rules are applied, see R. 3:14-1; State v. Brook 136 N.J.L. 577 (E.&A. 1947); and State v. Hauptmann, 115 N.J.L. 412 (E.&A. 1935).

(b) The second special rule established is that if the body of a homicide victim is found within the state, it is presumed that such result occurred within the State. In State v. McDowney, 49 N.J. 471 (1967) our Supreme Court stated that "such circumstancial evidence as the presence of the body within the state has been held sufficient to allow the drawing of an inference that the crime was committed at that place". (49 N.J. at 475). As to venue, see R. 3:14-1(c) where an analogous rule is applied.

6. Paragraph (5) defines "this State" for purposes of the Code. Its scope is obvious. For New Jersey, two additional provisions should be added:

(a) We now have a statute which, by means of the definition of "county" extends the criminal jurisdiction of New Jersey three miles into the sea. N.J.S. 40:18-5. It would probably be well to include such a provision here.

(b) New Jersey has several interstate compacts concerni jurisdiction in its interstate boundaries with adjoining states. The validity of so extending jurisdiction over crimes is established. State v. Federanko, 26 N.J. 119 (1958); State v. Holden, 46 N.J. 361 (1966). Again a provision specifically recognizing jurisdiction when provided for in interstate compacts should be included at this point.

7. Other State Codes: New York has no general "Territorial Jurisdiction" provision. Only a provision concerning jurisdiction in the Atlantic Ocean was included. Michigan has recommended adoption of §1.03 of the Code with minor language changes. The Wisconsin provides as follows:

"939.03 Jurisdiction of state over crime

(1) A person is subject to prosecution and punishment under the law of this state if:

(a) He commits a crime, any of the constituent elements of which takes place in this state; or

(b) While out of this state, he aids and abets, conspires with, or advises, incites, commands, or solicits another to commit a crime in this state; or

(c) While out of this state, he does an act with intent that it cause in this state a consequence set forth in a section defining a crime; or

(d) While out of this state, he steals and subsequently brings any of the stolen property into this state.

(2) In this section "state" includes area within the boundaries of the state, and area over which the state exercises concurrent jurisdiction under Article IX, section 1, Wisconsin constitution."

The Illinois Code provides as follows:

"§1--5. State Criminal Jurisdiction

(a) A person is subject to prosecution in this State for an offense which he commits, while either within or outside the State, by his own conduct or that of another for which he is legally accountable, if:

(1) The offense is committed either wholly or partly within the State; or

(2) The conduct outside the State constitutes an attempt to commit an offense within the State; or

(3) The conduct outside the State constitutes a conspiracy to commit an offense within the State, and an act in furtherance of the conspiracy occurs in the State; or

(4) The conduct within the State constitutes an attempt, solicitation or conspiracy to commit in another jurisdiction an offense under the laws of both this State and such other jurisdiction.

(b) An offense is committed partly within this State, if either the conduct which is an element of the offense, or the result which is such an element, occurs within the State. In homicide, the "result" is either the physical contact which causes death, or the death itself; and if the body of a homicide victim is found within the State, the death is presumed to have occurred within the State.

(c) An offense which is based on an omission to perform a duty imposed by the law of this State is committed within the State, regardless of the location of the offender at the time of the omission.

SECTION 1.04. CLASSES OF CRIMES; VIOLATIONS.

(1) An offense defined by this Code or by any other statute of this State, for which a sentence of [death or of] imprisonment is authorized, constitutes a crime. Crimes are classified as felonies, misdemeanors or petty misdemeanors.

(2) A crime is a felony if it is so designated in this Code or if persons convicted thereof may be sentenced [to death or] imprisonment for a term which, apart from an extended term, is in excess of one year.

(3) A crime is a misdemeanor if it is so designated in this Code or in a statute other than this Code enacted subsequent thereto.

(4) A crime is a petty misdemeanor if it is so designated in this Code or in a statute other than this Code enacted subsequent thereto or if it is defined by a statute other than this Code which now provides that persons convicted thereof may be sentenced to imprisonment for a term of which the maximum is less than one year.

(5) An offense defined by this Code or by any other statute of this State constitutes a violation if it is so designated in this Code or in the law defining the offense or if no other sentence than a fine, or fine and forfeiture or other civil penalty is authorized upon conviction or if it is defined by a statute other than this Code which now provides that the offense shall not constitute a crime. A violation does not constitute a crime and conviction of a violation shall not give rise to any disability or legal disadvantage based on conviction of a criminal offense.

(6) Any offense declared by law to constitute a crime, without specification of the grade thereof or of the sentence authorized upon conviction, is a misdemeanor.

(7) An offense defined by any statute of this State other than this Code shall be classified as provided in this Section and the sentence that may be imposed upon conviction thereof shall hereafter be governed by this Code.

* * * *

§1.04 Commentary

1. Subsection (1) sets forth the proposition that any offense, whether defined by the Code or by any other statute of this State, for which a sentence of death or of imprisonment is authorized constitutes a crime. The Drafters of the Code explain this position in these words:

"If a sentence of imprisonment is authorized (as an immediate sanction upon conviction rather than merely to coerce the payment of a penalty) it is an inadmissible semantic manipulation to declare the offense is not a crime. Imprisonment, it is submitted ought not be available as a punitive sanction, unless the conduct that gives rise to it warrants the type of social condemnation that is and ought to be implicit in the concept 'crime.'" MPC Tentative Draft No. 2, p. 8 (1954).

As will be discussed below, the Code employs a non-criminal sanction, known as a "violation" for offenses which are not "crimes" and the only penalty available for their violation is a fine. §1.04(5).

This provision would work a major revision in the New Jersey law. At present, the entire Disorderly Persons Act (N.J.S. 2A:170-1 et seq; N.J.S. 2A:169-4, six months), some Motor Vehicle violations (see e.g., N.J.S. 39:4-96, Reckless Driving, 3 months, and N.J.S. 39:4-104, Speeding, 10 days) and many municipal or dinance violations (N.J.S. 40:49-5, 90 days, permit conviction and imprisonment. They are not, however, "crimes" within the meaning of our State Constitution. Rather, they are "petty offenses". This means that the rights accorded one accused of a crime--mainly the right to trial by jury and to indictment by the grand jury--are not available to these defendants. State v. Owens, 54 N.J. 153 (1969); State v. Maier, 13 N.J. 235 (1953); In re Buehrer, 50 N.J. 501 (1967). The reasoning upon which this is based is as follows:

"Below the grade of crime (i.e., misdemeanors and high misdemeanors) are lesser offenses, none of which carries the stigma or the disabilities which follow upon a conviction of crime....or authorized maximum penalties as severe as those which may be imposed upon a conviction for crime.

* * * *

"All of the offenses below the grade of crime come within the general category of 'petty offenses', not to suggest thereby that the authorized punishments are trivial but rather to say that because the consequences of a conviction are limited, these offenses are beyond the concept of 'crime' within the intent of our State Constitution's provisions for indictment and trial by jury". In re Buehrer, supra, (50 N.J. at 517 (1967)

Further, the State Legislature has power to decide into which category offenses should go by means of the determination of the penalty to be attached to its violation. State v. Maier, supra, State v. Owens, supra.

Adoption of this section of the Code view would be a decision to provide a jury trial and the right to indictment in all those matters now covered by the Disorderly Persons Act, Motor Vehicle laws and municipal ordinances in which imprisonment is possible. It is a major decision for the Commission.

An intermediate position would be to define that which is known in the Code as a "misdemeanor" (§1.04(3)) as a crime (the punishment being up to one year under §6.08) but not "petty misdemeanors" (defined in §1.04(4)), for which punishment of up to 30 days is available (§6.08). Under the Federal Constitution, a jury trial must be provided for all but "petty offenses". While the exact line between "petty" and major offenses is not clear, the dividing line is probably at the point where the sentence could exceed six months. Duncan v. Louisiana, 391 U.S. 145 (1968); State v. Owens, 54 N.J. 153 (1969). It was in reaction to the Duncan case that our Legislature reduced the available term of imprisonment under the Disorderly Persons Act from one year to six months. Should the Commission determine not to define "misdemeanors" as "crimes", then §6.08 should be changed to reduce the punishment to six months. The same problem arises as to the "extended terms" for petty misdemeanors for certain offenders. §7.04. Here punishment of up to two years applies. If the decision is not to classify petty misdemeanors as crimes, either the extended term punishment for them must be reduced or the concept of extended terms should not be used in their case.

2. Subsection (1) also classifies crimes using three categories: "felonies, misdemeanors or petty misdemeanors". The Drafters explain this:

> "This section reflects the important decision to retain the felony-misdemeanor classification which is so pervasive in existing law. While the retention of these categories has some disadvantages, in that the felony concept tends to be used for many, varied, unrelated purposes, their abandonment involves so large a dislocation of procedure that the gain would not offset the loss. Retaining the felony concept does not, of course, preclude critical attention to specific consequences of the classification, as in the law of arrest or murder. That is a question to be faced as those consequences are examined." MPC Tentative Draft No. 2, p. 7 (1954).

Our law does not now use this classification for sentencing purposes:

> "The distinction between felonies and misdemeanors is not observed in our criminal code. Statutory offenses if designated at all are called misdemeanors or high misdemeanors. Jackson v. State, [49 N.J.L. 252 (Sup. Ct. 1887) affirmed, p.c. 50 N.J.L. 175 (E.&A. 1888)]. The grade of the offense in our criminal code is determined by the character and degree of the punishment prescribed, rather than upon the common law classification of felonies and misdemeanors." Brown v. State, 62 N.J.L. 666, at 695-696 (E.&A. 1898)

The felony-misdemeanor distinction continues to have vitality in our law-particularly in defining the right to arrest and the right to use force in arresting. State v. Doyle, 42 N.J. 334 (1964); State v. Williams, 29 N.J. 27 (1959); Davis v. Hellwig, 21 N.J. 412 (1956); Brown v. State, supra. See also N.J.S. 2A:85-8 et seq. (habitual offenders) and 2A:113-1 and 2 (homicide-felony murder).

For purposes of comparison, the following table is submitted:

Present New Jersey:

Offense:	Term:
(1) High misdemeanors: (N.J.S. 2A:85-6) (Some crimes are not classified, i.e., murder, bigamy, treason)	7 years; $2000 fine (Unless otherwise provided)
(2) Misdemeanors: (N.J.S. 2A:85-7)	3 years; $1000 fine (Unless otherwise provided)

Offense:	Term:
(3) Disorderly Persons Act: (N.J.S. 2A:169-4)	6 months; $500 fine
(4) Municipal Ordinances: (N.J.S. 40:49-5)	Ninety days
(5) Traffic Ordinances: (N.J.S. Title 39)	Various, up to six months.

Model Penal Code:

Offense:	Ordinary Terms Minimum - Maximum		Extended Terms Minimum - Maximum	
Felony, first degree (§§6.06, 6.07)	1-10 years	Life	5-10 years	Life
Felony, second degree (§§6.06, 6.07)	1-3	10 years	1-5	10-20 years
Felony, third degree (§§6.06, 6.07)	1-2	5	1-3	5-10
Misdemeanors (§§6.08, 6.09)	1		1	3
Petty Misdemeanors (§§6.08, 6.09)	30 days		6 mos.	2 years

3. Section 1.04(2) defines a felony as an offense carrying a possible prison sentence in excess of one year. This is widely held (MPC Tentative Draft No. 2, p. 7 (1954) and is our law for arrest purposes. State v. Doyle, 42 N.J. 334 (1964). Under this section, as to crimes defined outside the Code, it is the sentence rather than the name attached to the offense which determines the classification as a felony. Thus, statutes outside the Code carrying penalties in excess of one year would become felonies.

4. Section (3) makes a crime a misdemeanor if it is so designated in the Code or elsewhere and Section (7) makes offenses outside the Code which are simply designated "crimes" into misdemeanors.

5. Subsection (4) makes all offenses now in existence outside the Code for which imprisonment for less than one year

is the potential penalty into petty misdemeanors. This would substantially reduce the existing penalty on many offenses which would have to be revised, if appropriate, to make them misdemeanors if they are to be retained. Most existing Disorderly Persons offenses would be replaced with crimes which are misdemeanors.

6. Subsection (5) defines "violations" as those offenses which carry only a fine, or a fine and forfeiture or other civil penalty or if it is defined by an existing statute which provides that the offense shall not constitute a crime. A "violation" is not a crime and gives rise to no disability upon conviction. This is justified as follows:

> "There is, however, need for a public sanction calculated to secure enforcement in situations where it would be impolitic or unjust to condemn the conduct involved as criminal. In our view, the proper way to satisfy that need is to use a category of non-criminal offense, for which the sentence authorized upon conviction does not exceed a fine or fine and forfeiture or other civil penalty, such for example, as the cancellation or suspension of a license. This plan, it is believed, will serve the legitimate needs of enforcement, without diluting the concept of crime or authorizing the abusive use of sanctions of imprisonment. It should, moreover, prove of great assistance in dealing with the problem of strict liability, a phenomenon of such pervasive scope in modern regulatory legislation. Abrogation of such liability may be impolitic but authorization of a sentence of imprisonment when the defendant, by hypothesis, has acted without fault seems wholly indefensible. Reducing strict liability offenses to the grade of violations may, therefore, be the right solution." MPC Tentative Draft No. 2, pp. 8-9 (1954).

7. Subsection (7) makes it clear that the intent is to superimpose the grading and sentencing plan of the Code upon offenses defined by statutes other than the Code and to supercede their own sentencing provisions. MPC Proposed Official Draft, p. 8 (1962). Thus, an offense presently in our statutes designated a misdemeanor and carrying a penalty of three years would (a) become a felony under §1.04(1) and (7) and (b) carry punishment as third degree felony

(minimum: 1-2; maximum: 5 years) under §§6.01 and 6.06.

8. Recent State Codes:

(a) New York:

§55.05 Classifications of felonies and misdemeanors

1. Felonies. Felonies are classified, for the purpose of sentence, into five categories as follows:

(a) Class A felonies;
(b) Class B felonies;
(c) Class C felonies;
(d) Class D felonies; and
(e) Class E felonies.

2. Misdemeanors. Misdemeanors are classified, for the purpose of sentence, into three categories as follows:

(a) Class A misdemeanors;
(b) Class B misdemeanors; and
(c) Unclassified misdemeanors.

§55.10 Designation of offenses

1. Felonies. The particular classification of each felony defined in this chapter is expressly designated in the section or article defining it. Any offense defined outside this chapter which is declared by law to be a felony without specification of the classification thereof, or for which a law outside this chapter provides a sentence to a term of imprisonment in excess of one year, shall be deemed a class E felony.

2. Misdemeanors.

(a) Each misdemeanor defined in this chapter is either a class A misdemeanor or a class B misdemeanor, as expressly designated in the section or article defining it.

(b) Any offense defined outside this chapter which is declared by law to be a misdemeanor without specification of the classification thereof or of the sentence therefor shall be deemed a class A misdemeanor.

(e)[1] Except as provided in paragraph (b) of subdivision three, where an offense is defined outside this chapter and a sentence to a term of imprisonment in excess of fifteen days but not in excess of one year is provided in the law or ordinance defining it, such offense shall be deemed an unclassified misdemeanor.

3. Violations. Every violation defined in this chapter is expressly designated as such. Any offense defined outside this chapter which is not expressly designated a violation shall be deemed a violation if:

(a) Notwithstanding any other designation specified in the law or ordinance defining it, a sentence to a term of imprisonment which is not in excess of fifteen days is provided therein, or the only sentence provided therein is a fine; or

(b) A sentence to a term of imprisonment in excess of fifteen days is provided for such offense in a law or ordinance enacted prior to the effective date of this chapter but the offense was not a crime prior to that date.

4. Traffic infraction. Notwithstanding any other provision of this section, an offense which is defined as a "traffic infraction" shall not be deemed a violation or a misdemeanor by virtue of the sentence prescribed therefor.

(b) Michigan:

[Classification of Felonies and Misdemeanors]

Sec. 1201. (1) Felonies are classified, for the purpose of sentence, into the following 3 categories:

(a) Class A felonies.
(b) Class B felonies.
(c) Class C felonies.

(2) Misdemeanors are classified, for the purpose of sentence into the following three categories:

(a) Class A misdemeanors.
(b) Class B misdemeanors.
(c) Class C misdemeanors.

(3) Violations are not classified.

[Designation of Offenses]

Sec. 1205. (1) The particular classification of each felony defined in this code, except murder in the first degree under section 2005, is expressly designated in the section or chapter defining it. Any offense defined outside this code which is declared by law to be a felony without specification of the classification thereof and of the penalty therefor is a Class C felony.

(2) The particular classification of each misdemeanor defined in this code is expressly designated in the section or chapter defining it. Any offense defined outside this code which is declared by law to be a misdemeanor without specification of the classification thereof and of the penalty therefor is a Class C misdemeanor.

(3) Every violation defined in this code is expressly designated as such. Any offense defined outside this code without specification as to felony or misdemeanor and of the penalty therefor is a violation."

SECTION 1.05. ALL OFFENSES DEFINED BY STATUTE: APPLICATION OF GENERAL PROVISIONS OF THE CODE.

(1) No conduct constitutes an offense unless it is a crime or violation under this Code or another statute of this State.

(2) The provisions of Part I of the Code are applicable to offenses defined by other statutes, unless the Code otherwise provides.

(3) This Section does not affect the power of a court to punish for contempt or to employ any sanction authorized by law for the enforcement of an order or a civil judgment or decree.

* * * *

§1.05 Commentary

1. Paragraph (1) establishes the point that the Code supercedes all common law offenses. "This result is intrinsic to the purpose of the project. While it will not be possible to re-examine all the areas of law in which the penal sanction is employed, it is at least essential that the area of common law offenses should be re-examined. If this is done, there can be no occasion for preserving any crimes at common law; to the extent they rest on desirable definitions, those definitions will be stated in the Code. To the extent (and the extent is large) that they require alteration, the alterations ought to be effected by the Legislature." MPC Tentative Draft No. 4, p. 106 (1955).

2. Presently, the New Jersey rule with respect to common law crimes is found in N.J.S. 2A:85-1:

> "Assaults, batteries, false imprisonments, affrays, riots, routs, unlawful assemblies, nuisances, cheats, deceits, and all other offenses of an indictable nature at common law, and not otherwise expressly provided for by statute, are misdemeanors."

Under this statute, offenses have been found for a multitude of offenses:

Conspiracy: State v. O'Brien, 136 N.J.L. 118, 124 (Sup. Ct. 1947); State v. Loog, 13 N.J. Misc. 536 (Sup. Ct. 1935) affirmed o.b.

aff. nom. State v. Henry, 117 N.J.L. 442 (E.&A. 1937); State v. Aircraft Supplies, Inc., 45 N.J. Super. 110 (Co. Ct. 1957). Assault and Battery: State v. McGrath, 17 N.J. 41 (1954); State v. Cybuski, 31 N.J. Super. 164 (App. Div. 1954)). Bribery: State v. Boeyn, 34 N.J. 35 (1961). Keeping a Disorderly House: State v. Western Union Telegraph Co., 12 N.J. 468 (1953) affirming 13 N.J. Super. 172 (Co. Ct., 1951). Obstructing Justice: State v. Cassalty, 93 N.J. Super. 111 (App. Div. 1966); State v. DeVita, 6 N.J. Super. 344 (App. Div. 1950). Misconduct in Office: State v. Boeyn, 34 N.J. 35 (1961); State v. Weleck, 10 N.J. 355, 365 (1952); State v. Lally, 80 N.J. Super. 502 (Law Div. 1963); State v. Silverste 41 N.J. 203 (1963) affirming 76 N.J. Super. 536 (App. Div. 1963); State v. McFeeley, 136 N.J.L. 103 (Sup. Ct. 1947). Contempt: Department of Health v. Roselle, 34 N.J. 331, 340 (1961). In re Buehrer, 50 N.J. 501, 513 (1967). Unlawful Assembly: State v. Luntig, 13 N.J. Super. 149 (App. Div. 1951); State v. Butterworth, 104 N.J.L. 579 (E.&A. 1928). Attempted Suicide: State v. Carney, 69 N.J.L. 479 (Sup. Ct. 1903); Being a Common Scold: State v. Barker, 53 N.J.L. 45 (Sup. Ct. 1890); Extortion: State v. Weleck, 10 N.J. 355, 371 (1952).

About one third of the states had, by 1955, abolished common law crimes. Several have since. In those which have not, it has been the case, as in New Jersey, that its greatest effect is in conspiracy and misconduct-in-office situations. MPC Tentative Draft No. 4, p. 106 (1955).

The decision to abolish common law crimes, a basic one for the Commission, requires recognition of several points: (1) Rising standards of notice and specificity give rise to doubts about the constitutionality of some of the common law crime standards and

definitions. Cf., State v. Zito, 54 N.J. 206 (1969) and (2) It can be quite confidently stated that the definitions of specific offenses of Part II of the Code have taken the common law crimes into consideration and, where appropriate have incorporated those definitions. (3) The decision to abolish common law crimes in our state is a reflection of a change in the basic responsibility for the growth and modernization of the criminal law--from court to legislature. It is important for the legislature to realize that the repeal of N.J.S. 2A:85-1 finally and completely places the responsibility upon the legislature to assure itself of the comprehensiveness of the statutory law.

3. Paragraph (2) provides that the provisions of Part I, i.e., the general provisions governing the underlying bases of liability, excuse, justification. responsibility, sentence, etc., apply to offenses defined by other statutes unless the Code itself provides otherwise. MPC Tentative Draft No. 4, p. 107 (1955).

> "Since the function of Part I is to articulate the norms that ought to govern any application of the penal sanction, this declaration also is intrinsic to the purpose of the project. It comports, moreover, with the usual assumption of the legislature, when it frames ad hoc enactments that a body of general principles will guide its application by the courts. To repeat the principles with each enactment is, of course, impossible. On the other hand, the fact that qualifying principles governing the constituents and scope of liability and general defenses are now so largely based upon unwritten law presents one of the greatest difficulties in the field. Their full articulation in the Code will not only simplify the problem of the courts; it will make it possible for legislative draftsmen to determine knowledgably what departures from these norms may be desired in connection with specific legislation. The ambiguity that beclouds these matters in the present state of penal legislation... can be dispelled, it is submitted, in no other way." Ibid.

4. The Code does not include a saving clause for any common law defenses. The British Draft Code of 1878 in section 10

provided, in this connection, as follows, because "cases may be imagined in which an accused person ought to have the benefit of a full discussion upon principle and analogy before he was convicted of a crime". III Stephen, History of the Common Law, p. 361:

> "All rules and principles of the common law which render any circumstances a justification or excuse for any act or a defense to any charge, shall remain in force and be applicable to any defense to a charge under this Act, except insofar as they are hereby altered or are inconsistent herewith."

Several other recent Codes have similar provisions. See, e.g., Connecticut Penal Code §5 (1969); Wisconsin Criminal Code §939.10. Contra, New York Penal Law §5.05(1); Michigan Revised Criminal Code--Final Draft (1967) §120(1). The Drafters' comments to this section left open the question whether to include such a provision pending drafting and approval of Articles 2 and 3. MPC Tentative Draft No. 4, p. 108 (1955). No such a provision is included in the final draft and it must, therefore, have been considered unnecessary. The Commission should decide whether such a provision is appropriate.

5. Paragraph (3) makes it clear that it is not a purpose of the Code to deal with the judicial power to punish for contempt or to use sanctions to enforce an order or a civil judgment or decree, even though imprisonment may be employed. Cf., In re Buehrer, 50 N.J. 501 (1967). It appears that this section of the Code indicates that the Uniform Desertion and Nonsupport Act, as partially enacted in New Jersey (N.J.S. 2A:100-2 through 7 would not be replaced.

6. Other State Codes:

(a) Michigan Revised Criminal Code (Final Draft, 1967)

[Offenses Defined by Statute]

> Sec. 110. Common law crimes are abolished, and no act or omission is a crime unless made so by this act or by other applicable statute.

(b) Connecticut Penal Code (1969):

§5. Saving clause with respect to principles of criminal liability.

The enactment of the provisions of this Article shall not be construed as precluding any court from recognizing other principles of criminal liability and other defenses not inconsistent with said provisions.

(c) Wisconsin Criminal Code:

939.10 Common-law crimes abolished; common-law rules preserved.

Common-law crimes are abolished. The common-law rules of criminal law not in conflict with the criminal code are preserved.

(d) Illinois Criminal Code:

§1-3. Applicability of Common Law

No conduct constitutes an offense unless it is described as an offense in this Code or in another statute of this State. However, this provision does not affect the power of a court to punish for contempt or to employ any sanction authorized by law for the enforcement of an order, civil judgment, or decree.

§1-4. Civil Remedies Preserved

This Code does not bar, suspend, or otherwise affect any right or liability to damages, penalty, forfeiture, or other remedy authorized by law to be recovered or enforced in a civil action, for any conduct which this Code makes punishable; and the civil injury is not merged in the offense.

SECTION 1.06. TIME LIMITATIONS.

(1) A prosecution for murder may be commenced at any time.

(2) Except as otherwise provided in this Section, prosecutions for other offenses are subject to the following periods of limitation:

(a) a prosecution for a felony of the first degree must be commenced within six years after it is committed;

(b) a prosecution for any other felony must be commenced within three years after it is committed;

(c) a prosecution for a misdemeanor must be commenced within two years after it is committed;

(d) a prosecution for a petty misdemeanor or a violation must be commenced within six months after it is committed.

(3) If the period prescribed in Subsection (2) has expired, a prosecution may nevertheless be commenced for:

(a) any offense a material element of which is either fraud or a breach of fiduciary obligation within one year after discovery of the offense by an aggrieved party or by a person who has legal duty to represent an aggrieved party and who is himself not a party to the offense, but in no case shall this provision extend the period of limitation otherwise applicable by more than three years; and

(b) any offense based upon misconduct in office by a public officer or employee at any time when the defendant is in public office or employment or within two years thereafter, but in no case shall this provision extend the period of limitation otherwise applicable by more than three years.

(4) An offense is committed either when every element occurs, or, if a legislative purpose to prohibit a continuing course of conduct plainly appears, at the time when the course of conduct or the defendant's complicity therein is terminated. Time starts to run on the day after the offense is committed.

(5) A prosecution is commenced either when an indictment is found [or an information filed] or when a warrant or other process is issued, provided that such warrant or process is executed without unreasonable delay.

(6) The period of limitation does not run:

(a) during any time when the accused is continuously absent from the State or has no reasonably ascertainable place of abode or work within the State, but in no case shall this provision extend the period of limitation otherwise applicable by more than three years; or

(b) during any time when a prosecution against the accused for the same conduct is pending in this State.

* * * *

§1.06 Commentary

1. Rationale of Time Limitations. The proposition that there should be prescribed periods of time within which prosecution for offenses must be commenced is widely accepted in the United States. New Jersey has such limitations. Despite extensive adoption of such statutes and the fact that the price paid for them is to allow guilty persons to escape conviction in some cases, little attention has been given to the evaluation of the objectives of the statutes. The Drafters of the Code list four separate objectives: (1) The desirability of requiring convictions to be based upon reasonably fresh evidence and the avoidance of the possibility of an erroneous conviction arising from delay. (2) If the person refrains from further criminal activity, the likelihood increases, with the passage of time that he has reformed, diminishing protanto the necessity for imposition of the criminal sanction. If he has repeated his criminal behavior, he can be prosecuted for recent offenses. (3) As time goes by, any community retributive impulse diminishes. (4) It is desirable to lessen the possibility of blackmail based on a threat to prosecute or to disclose evidence to enforcement officials. After a period of time, a person ought to be allowed to live without fear of prosecution. See MPC Tentative Draft No. 5, pp. 16-17 (1956).

2. Length of the Period. There is wide disparity among the states as to the length of the period. The drafters of the Code identify five questions to be answered in resolving this issue. These questions along with the Code's resolution and the existing New Jersey position are:

(a) Should there be a period of limitations for all offenses?

The Code provides for limitation for all offenses except for murder (§1.06(1)), the view being that it is desirable to maintain the common police practice never to close the files on an unsolved murder case. Granting the fact that there are other crimes of comparable gravity, the Drafters believe that these are less likely to present equal obstacles to prompt discovery of evidence or to have comparably long continued impact on the sense of general security of the community. Ibid. New Jersey makes a similar distinction except that it is between "any offense not punishable with death" and those which are. N.J.S. 2A: 159-2. Presently, certain kinds of murder, certain kinds of kidnapping and treason are punishable by death. The limitation for treason is provided in N.J.S. 2A:159-1. Thus, murder and kidnapping now fall in the excluded class. In State v. Brown, 22 N.J. 405 (1956), the Supreme Court upheld a conviction for second-degree murder where a short form indictment had been returned beyond the statutory period for non-capital offenses. The court's reasoning was based on the theory that the conviction was for murder which is a unified crime split into degrees only for purposes of punishment and that murder is a capital offense. 22 N.J. at 412. See Knowlton, Criminal Law and Procedure, 14 Rutgers L. Rev. 242, 248 (1961). Essentially, therefore, the New Jersey capital-noncapital distinction is the same as the Code's murder-other distinction, except for kidnapping. Presumably, a line of reasoning similar to that used in Brown as to murder, would be made in kidnapping so that the forms punishable by death and those not so punishable would all be excluded from the operation of N.J.S. 2A:159-2. The Commission should determine whether it is appropriate to include kidnapping in §1.06(1) as well as murder.

(b) How many gradations in periods of limitation should there be?

The Code provides four. The Drafters justify this on the basis that any more would be an "unnecessary refinement". MPC Tentative Draft No. 5, p. 17 (1956). These four distinctions are:

Felonies of the first degree: six years

Other felonies: three years

Misdemeanors: two years

Petty misdemeanors; violations: six months

The existing New Jersey limitations are:

Treason (N.J.S. 2A:159-1): three years

Offenses not punishable with death (N.J.S. 2A:159-2): five years

Disorderly Persons Violations (N.J.S. 2A:169-10): one year

(c) How long should each of the periods be?

The Code, as noted above, provides for periods of 6, 3, 2 years and six months. Our statute provides, generally, for 5 years and one year. There is no empirical data upon which to base a determination of the appropriate amount of time. The Drafters state that their recommendations conform roughly to existing law. MPC Tentative Draft No. 5, p. 20 (1956). To the extent that rationalization is possible, the periods must attempt to reflect the multiple varying and conflicting goals of the criminal law. Thus, the more serious the offense, the less society wishes to see the guilty escape and the chances of self-reform are less--but, also, for the more serious there is more at stake for the defendant and protection of procedural rights is more important. Ibid. It should be noted that the New Jersey Legislature extended the general period of limitations from two years

to five years in 1953. This should be compared with the offenses covered by the Code's six, three and two year categories.

(d) Should there be special provisions made for offenses which by their nature are particularly difficult to detect?

The Code is drafted on the theory that it is ordinarily desirable to start the running of the period of limitation at the time when a crime is committed rather than at the time the offense is detected or the offender discovered. The assumption is that most offenses are known at least to the victim at the time of or soon after its commission, or that the offense can be discovered by adequate investigation by enforcement officials. This is not likely to be true of certain offenses where the opportunity for prolonged concealment is great. These are dealt with separately by the Code in two categories: §1.06(3)(a) and (b).

(1) Paragraph (a) deals with cases involving fraud or a breach of a fiduciary obligation and provides that a prosecution may be brought within one year after discovery of the offense. The extension may not be for more than an additional three years.

(2) Paragraph (b) deals with misconduct by a public officer or employee. These are dealt with separately on the assumption of a special need to remove such persons from public office and the difficulty of detecting such offenses. Thus, the period is extended to any time when the defendant is in public office or employment or within two years thereafter. Again, the extension may not be for more than an additional three years.

New Jersey now has no such special exceptions as are set forth in §1.06(3). Several other states do. At one time, N.J.S. 2A:159-3 did have a special period of limitations of five years (as compared with the then two years generally applicable) for these categories.

Apparently, when the Legislature extended the general provision to five years, it was thought that any further extension for these categories would be unjust. Further, our courts have recognized that for these categories of defendants and offenses, special considerations demand extension of the period of limitations. This is accomplished by manipulation of the concepts of when the offense occurred (i.e, definition of certain crimes as "continuing offenses") and when the period begins to run. See State v. McFeeley, 136 N.J.L. 102, at 106 (Sup. Ct. 1947) (Police raided a gambling establishment but failed to discharge their duty by lodging a complaint against the offenders who were apprehended. Held that the statute of limitations on the charge of misconduct did not begin to run until the statute of limitations on the gambling offense had run, because throughout that time the officers had a continuing duty to file a complaint against them.); State v. Hozer, 19 N.J. 301, at 311-312 (1955) (nonfeasance, similar); State v. Marple, 13 N.J. Misc. 793 (Sup. Ct. 1935) (fiduciary situation); State v. Marchese, 14 N.J. 16 (1953); State v. Weleck, 10 N.J. 335, 374 (1952); cf., State v. Ireland, 126 N.J.L. 444 (Sup. Ct. 1941) appeal dismissed 137 N.J.L. 558 (E.&A. 1922). Thus, the concept of extension of the period in certain categories does seem to be recognized in our law. Overt recognition, such as in §1.06(3), seems desirable.

(e) Should special short periods of limitation be prescribed for offenses which by their nature are likely to be the subject of fraudulent prosecutions?

The Drafters recognize that some provision of this sort is needed and have chosen to include them with each such section defining the offense by a requirement, for instance, of a complaint being made by the victim within a prescribed period of time. An example is §213.6(5) (prompt complaint in sexual offenses). The practical effect here is to reduce the statute of limitations to six months.

3. When Does the Period of Limitations Start to Run?

The Code provides that the period of limitation starts to run when the offense is committed. This is in accord with the majority view and with existing New Jersey law. An offense is committed either (a) when every element occurs; or (b) in the case of continuing offenses, when the course of conduct or the defendant's complicity therein terminates.

As to (a) "element" is defined in §1.13(9). The statement is in accord with existing law. State v. Weleck, 10 N.J. 355, 374 (1952) (distinguishing noncontinuous offenses, such as extortion and attempted extortion, from continuing offenses, such as misconduct in office).

As to (b), "continuing offenses", the concept is well-established in our law although its application can be difficult. The Code, in effect, establishes a presumption against finding that an offense is a continuing one. Our cases have many instances of offenses found to be continuing. State v. Weleck, 10 N.J. 355 (1954) misconduct in office; State v. McFeeley, 136 N.J.L. 107 (Sup. Ct. 1947); State v. Hozer, 19 N.J. 301 (1955); State v. Greenberg, 16 N.J. 568 (1954) (nonsupport and desertion); State v. Garris, 98 N.J.L. 608 (Sup. Ct. 1923) (same); State v. Gregory, 93 N.J.L. 205 (E.&A. 1919) (conspiracy); State v. Ellison, 14 N.J. Misc. 635 (Sup. Ct. 1936) (same); State v. Unsworth, 85 N.J.L. 237 (E.&A. 1913) (same).

There can be difficulty in defining what is or is not a continuing offense for this purpose. The Drafters of the Code are particularly critical of State v. Ireland, 126 N.J.L. 444 (Sup. Ct. 1941) appeal dismissed 127 N.J.L. 558 (E.&A. 1941). In Ireland, the defendant, an architect, was convicted of creating a public nuisance where a bath house he designed in violation of the building code collapses thirteen years after it was built. No act, other than the building's collapse, was alleged subsequent to the original construction. The court held

that the two year statute did not apply because it was a continuing offense:

> " 'Continuous offenses (such as nuisances, carrying of concealed weapons, use of false weights, etc.) endure after the period of concoctions and as long as the offense by the defendant's action or permission continues to exist."... That nuisances such as obstructions of highways are continuing offenses has been held.... A public nuisance occurs when there is inconvenience and annoyance to the public by reason of any act or neglect....So it seems that since the death occurred within the two years of the indictment it is timely. The initial act of violating the building code constituted a continuing public nuisance, not to be barred because not discovered." (126 N.J.L. at 445)

The court then went on to rely upon conspiracy, bigamy and desertion cases. The case seems wrong and may well be inconsistent with other New Jersey authorities. State v. Rudner, 92 N.J.L. 20 (Sup. Ct. 1918) affirmed 92 N.J.L. 645 (E.&A. 1919) (tampering with a water-meter is not a continuing offense even though water is subsequently stolen.) "To the extent that a given offense does in fact proscribe a continuing course of conduct, no violence is done to the statute of limitations. Since the conduct extends within the period of limitation, it is subject to prosecution." MPC Tentative Draft No. 5, pp. 23-24 (1956)

4. The rule found in the last sentence of paragraph (4) that the time starts to run on the day after the offense is committed is the same as our law:

> "...in the absence of...legislative direction to the contrary, general statutes of limitations...are to be construed...[as] exclud[ing] the first day, and includ[ing] the last day unless it is a dies non, in which event the following day is included." State v. Rhodes, 11 N.J. 515 525 (1953).

5. When is a Prosecution Commenced?

The Code requires that " prosecution be commenced" within the period specified and that term is defined in §1.06(5) as when an indictment is found or a warrant or other process is issued, provided

that the warrant or process is executed without unreasonable delay. New Jersey now requires that an indictment be found, in the case of crimes (N.J.L. 2A:159-1, 2, 3) or a complaint filed, in the case of Disorderly Persons violations (N.J.S. 2A:169-10). "Finding" of an indictment requires both that it be voted by the Grand Jury and that it be properly returned into court. State v. Rhodes, 11 N.J. 515, 520 (1953). Unlike the Code, our law does not take the view that a warrant of arrest is sufficient (except for Disorderly Persons Violations). The Code's position is based on the view that the basic purpose of the statute is to insure that the accused will be informed of the decision to prosecute and the general nature of the charge sufficiently promptly to allow him to prepare defense before evidence of his innocence becomes weakened with age. MPC Tentative Draft No. 5, pp. 24-25 (1956). His right to have the case promptly disposed of is not covered by the Code.

The provision for execution of the warrant without unreasonable delay is intended to protect against its being left without any attempt to serve it. Factors such as defendant's being absent, etc., should be used to determine the reasonableness of the effort.

6. Tolling Provisions. Subsection (6) specifies those situations in which time is not counted against the period of limitation.

Paragraph (a) deals with the situation where the defendant is outside the state or has no reasonably ascertainable place of abode or work within the state. Here, the period may be extended three years. As originally drafted, the Code here would have required absence from the jurisdiction and proof of "a purpose thereby to avoid detection, apprehension or prosecution". MPC Tentative Draft No. 5, pp. 26-27 (1956). This was rejected in favor of the provision making continuous

absence from the state itself sufficient to toll the statute. New Jersey's statutes now state that they do not apply to any person "fleeing from justice". N.J.S. 2A:159-1, 2, 3, 4 and 2A:169-10. This has been interpreted to mean that mere absence of the accused from the jurisdiction is not enough and the state must show either flight from the jurisdiction or concealment within it plus an intent to avoid detection or prosecution. State v. Greenberg, 16 N.J. 568, 578 (1954); State v. Estrada, 35 N.J. Super. 459, 461 (Co. Ct. 1955); State v. Rosen, 52 N.J. Super. 210, 215 (L. Div. 1958) (18 year delay). The Commission should choose whether to follow existing New Jersey law or to adopt the Code view.

Paragraph (b) deals with the situation where proceedings are terminated prior to final adjudication. It provides that time during which a prosecution for the same conduct is pending against the accused in this state does not count against the period of limitation. No New Jersey authorities were found.

The Code does not provide, as many statutes in other states do, that the time does not run when commission of the crime has been "concealed". New Jersey agrees with the Code. Our statute does not speak in these terms and our cases make it clear that mere concealment is not enough. State v. Brown, 22 N.J. 405 (1956).

The Code also does not allow conviction of a lesser included offense which is barred by the statute when the prosecution is brought for a greater inclusive offense. The result is that there can be no conviction for any offense, included or otherwise, unless prosecution is commenced during the period of limitation applicable to that offense. Cf., State v. Brown, 22 N.J. 405 (1956). The Commission should decide if this is wise. A murder prosecution could not, after six years, lead to a manslaughter conviction.

7. Other State Codes. The recent codes of other states have, in essence, adopted the Model Code's format and position. There are minor variations as to time periods with some extension of some crimes to longer periods (e.g., arson, kidnapping, forgery, etc.)

SECTION 1.07. METHOD OF PROSECUTION WHEN CONDUCT CONSTITUTES MORE THAN ONE OFFENSE.

(1) Prosecution for Multiple Offenses; Limitation on Convictions. When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if:

(a) one offense is included in the other, as defined in Subsection (4) of this Section; or

(b) one offense consists only of a conspiracy or other form of preparation to commit the other; or

(c) inconsistent findings of fact are required to establish the commission of the offenses; or

(d) the offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct; or

(e) the offense is defined as a continuing course of conduct and the defendant's course of conduct was uninterrupted, unless the law provides that specific periods of such conduct constitute separate offenses.

(2) Limitation on Separate Trials for Multiple Offenses. Except as provided in Subsection (3) of this Section, a defendant shall not be subject to separate trials for multiple offenses based on the same conduct or arising from the same criminal episode, if such offenses are known to the appropriate prosecuting officer at the time of the commencement of the first trial and are within the jurisdiction of a single court.

(3) Authority of Court to Order Separate Trials. When a defendant is charged with two or more offenses based on the same conduct or arising from the same criminal episode, the Court, on application of the prosecuting attorney or of the defendant, may order any such charge to be tried separately, if it is satisfied that justice so requires.

(4) Conviction of Included Offense Permitted. A defendant may be convicted of an offense included in an offense charged in the indictment [or the information]. An offense is so included when:

(a) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or

(b) it consists of an attempt or solicitation to commit the offense charged or to commit an offense otherwise included therein; or

(c) it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission.

(5) Submission of Included Offense to Jury. The Court ll not be obligated to charge the jury with respect to an included ense unless there is a rational basis for a verdict acquitting the ndant of the offense charged and convicting him of the included ense.

* * * *

§1.07 Commentary

1. Scope. This section sets out the method of prosecution behavior constitutes more than one offense. Some aspects of iple criminality are covered by the New Jersey Rules and should not lealt with here. See, e.g., R. 3:7-6 and 7 (permissive joinder of nses and defendants).

Other aspects of the problem have important substantive lications and are thus properly dealt with by legislation. Thus, section defines the right of the prosecution to charge more than offense and to convict of an included offense which is not ifically charged in the indictment. The main objective of the ion, however, is the formulation of limitations upon unfair iplicity of convictions or prosecutions. The related problem of mulation of multiple sentences is dealt with in §7.06. MPC Tenta- Draft No. 5, p. 31 (1956).

2. It should be noted that our Supreme Court has, to some nt, criticized the Code in this area. In State v. Currie, 41 N.J. (1964), the Court pointed out that one of its prior cases nishes poignant evidence of the futility of efforts extended toward formulation of a single legal test to operate absolutely and lexibly throughout the field of double jeopardy...but Cf., Model l Code §§1.08-1.11..." 41 N.J. at 539. This will be further ussed below.

3. Prosecution for Multiple Offenses; Limitation on victions.

Subsection (1) states the proposition that a person whose conduct violates more than one provision of the law may be prosecuted for each offense. Subject to the Court Rules as to permissive joinder of offenses and parties (R. 3:7-6 and 7) and the Rule allowing the defendant to move for separate trials if joinder is prejudicial (R. #:15-1 and 2), the defendant may be charged in a single accusative pleading with all offenses which he has committed. State v. Riley, 97 N.J. Super. 542 (Co. Ct. 1967) affirmed 101 N.J. Super. 402 (App. Div. 1968); State v. Begyn, 34 N.J. 35 (1961); State v. Johnson, 67 N.J. Super. 414 (App. Div. 1961); State v. LaFera, 35 N.J. 75 (1961); State v. Coleman, 46 N.J. 16 (1965); State v. Manney, 26 N.J. 362 (1958). Whether charged in a single or in separate accusative pleadings, however, the number of convictions that can result is limited under the circumstances specified in this subsection.

Five situations are set forth in which a conviction may not be had for more than one offense:

(a) Paragraph (a) prohibits conviction of both an offense and an included offense based on the same conduct. Included offense is defined in Section (4), below. See State v. Riley, 28 N.J. 188 (1958) (rape and assault); State v. Hill, 44 N.J. Super. 110 (App. Div. 1957); State v. Jones, 94 N.J. Super. 137 (App. Div. 1967); but Cf., State v. Craig, 48 N.J. Super. 276 (App. Div. 1958) (breaking and entering conviction did not absorb charge of possession of burglary tools).

(b) Paragraph (b) prohibits, under certain circumstances, conviction for both a criminal conspiracy and a completed offense which was the object of the conspiracy. The Code takes the view that conspiracy to commit an offense, like attempt, may consist merely of preparation to commit that offense. Since, under the Code, the

conspiracy is punishable in the same degree as the completed offense, conviction of either adequately deals with such conduct. This is not true, however, where the conspiracy had as its objective engaging in a course of criminal conduct. This involves a distinct danger additiona to that involved in the actual commission of any specific offense. Therefore, the limitation of the Code is confined to the situation where the completed offense was the sole criminal objective of the conspiracy. There may be conviction of both a conspiracy and a completed offense committed pursuant to that conspiracy if the prosecution shows that the objective of the conspiracy was the commission of additional offenses. MPC Tentative Draft No. 5, pp. 32-33 (1956). In New Jersey today, conviction of both conspiracy and the completed offense is allowable. State v. Oats, 32 N.J. Super. 435 (App. Div. 1954); State v. Chevenoek, 127 N.J.L. 476 (Sup. Ct. 1942). This is not now true as to attempt--the failure to complete the crime being part of the definition of attempt. State v. Swan, 131 N.J.L. 67 (E.&A. 1943); State v. Schwarzbach, 84 N.J.L. 268 (E.&A. 1913). The Code's position taken with regard to conspiracy is proposed also in the case of any other conduct which is made criminal only because it is a form of preparation to commit another crime. If the preparatory conduct has other or further criminal objectives, here as in conspiracy, the limitation is inapplicable. MPC Tentative Draft No. 5, p. 33 (1956).

(c) Paragraph (c) prohibits the conviction for two offenses which require inconsistent findings of fact to establish their conviction. This is the law in New Jersey and elsewhere. State v. Dancyger, 51 N.J. Super. 150 (App. Div. 1958) reversed on other grounds 29 N.J. 76 (1959); State v. Shelbrick, 33 N.J. Super. 7 (App. Div. 1954); State v. Vanderhave, 47 N.J. Super. 483 (App. Div.

1957) affirmed sub. nom. State v. Giardina, 27 N.J. 313 (1958); See also, State v. Cormier, 46 N.J. 494 (1966). The paragraph does not preclude conviction on one count which is inconsistent with an acquittal on another count. The New Jersey cases have no clear holding on this point but the indication is that the rule is in accord with the Code allowing a verdict to stand here. State v. Coleman, 46 N.J. 16, 42 (1965); State v. Dancyger, 29 N.J. 76, 93 (1959).

(d) Paragraph (d) prohibits conviction under both a general and a specific statute. "Thus, a person could not be convicted, for the same conduct, under a general statute prohibiting lewd conduct and also under a specific statute prohibiting indecent exposure." MPC Tentative Draft No. 5, p. 33 (1955). See State v. Riley, 28 N.J. 188 (1958) (rape and assault); State v. Hill, 44 N.J. Super. 110 (App. Div. 1957) (robbery and assault); State v. Jones, 94 N.J. Super. 137 (App. Div. 1957). But Cf., State v. Craig, 48 N.J. Super. 276 (App. Div. 1958) (breaking and entry conviction does not absorb charge of possession of burglary tools); State v. Montague, 101 N.J. Super. 483 (App. Div. 1968) (threatening a police Officer's life does not merge with assault and battery upon a police officer).

(e) Paragraph (e) deals with the continuing offense. If a statute or the Code prohibits a continuing course of conduct, only one conviction is possible based upon a single uninterrupted course of such conduct. "Thus, a person violates an unlawful cohabitation statute only once, no matter how long his unlawful cohabiting continues, unless the conduct is interrupted, by issuance of process or otherwise, or unless the statute prescribes that specific periods constitute separate offenses." MPC Tentative Draft No. 5, pp. 33-34 (1956). In State v. Juliano, 52 N.J. 232 (1968), our Supreme Court

is proper and (2) separate convictions for both bookmaking on horse-races and bookmaking on baseball games on the same day is proper under N.J.S. 2A:112-3. The Court noted that "common sense" must be used in sentencing not to pyramid punishment, and thus affirmed the conviction because there had been a term given only on one charge and a suspended sentence on the others. 52 N.J. at 236. Presumably, the Code would overrule the first holding of Juliano, but not the second. If this is inappropriate, the bookmaking statute should be rewritten to make each day a separate offense.

4. Limitation on Separate Trials for Multiple Offenses.

Subsection (2) is designed to prevent the State from bringing successive prosecutions based upon essentially the same conduct, whether the purpose in so doing is to hedge against the risk of an unsympathetic jury at the first trial, to place a "hold" upon a person after he has been sentenced to imprisonment, or simply to harass by multiplicity of trials. The State must prosecute in a single prosecution all offenses committed under the circumstances specified in subsection (2). The penalty for failure to do so is that the State is thereafter barred from subsequently prosecuting for any such offense. See §1.09. Of course, the prosecutor is not required to prosecute for every offense of which the defendant may be guilty. His discretion remains. All that is required by Subsection (2) is that charges against the defendant, which are known to the proper prosecuting authority and within the jurisdiction of the court, be determined in a single rather than multiple trials. Subsection (3) permits the courts to grant relief from the requirement and order separate trials if it is satisfied that justice so requires. Subject to that possibility the defendant has the right, under the Code, to have his liability for essentially the same conduct litigated in a single trial. MPC Tentative Draft No. 5, p. 34 (1956).

The difficulty lies in defining "essentially the same conduct". Currently, several tests are found in the cases. See discussion of State v. Currie, 41 N.J. 531 (1964), below. The weakness of these tests, according to the drafters of the Code, is that they are so narrowly drawn as not to afford any real protection against cumulation of the number of prosecutions, the number of convictions, or the amount of punishment. MPC Tentative Draft No. 5, p. 35 (1956).

The Code deals with the problem by requiring all offenses to be prosecuted in a single trial in the situations set forth in subsection (2). There are two general prerequisites. First, the offenses must be known to the police or the prosecutor. The defendant ought not to be allowed to take advantage of the fact that he has successfully concealed part of his criminal activity from enforcement officials. The second requirement is that the offenses be within the jurisdiction of a single court. Under our venue rules, this imports a major limitation. MPC Tentative Draft No. 5, p. 36 (1956). See State v. LeJambre, 42 N.J. 315 (1964).

The Code uses two terms to define what has been characterized above as "essentially the same conduct". First, it forbids separate trials for multiple offenses "based on the same conduct", and second, for those "arising from the same criminal episode". "Conduct" is defined in §1.13(5) as "an action or omission and its accompanying state of mind, or, where relevant, a series of acts and omissions". According to the Drafters, included in this term is a single act or a single instance of negligence or recklessness which results in the commission of more than one offense. They also make it clear that no effort is made to be more specific than the above definitions

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ecause of the "infinite number of possible factual variations" and hat "the courts must be entrusted with interpretation in the light f the evident purpose of the section to eliminate undue harassment y successive trials, so far as that is feasible", MPC Tentative raft No. 5, p. 37 (1956). The variety of situations coming under he term "same criminal episode" is discussed in Id. at pp. 37-39.

Adoption of the Code approach of formulating a given legal test for when multiple trials are possible would be a major change in New Jersey law. The leading case is State v. Currie, 41 N.J. 531 (1964). There, the defendant was convicted in Municipal Court of Motor Vehicle Act violations of reckless driving and leaving the scene of an accident. Subsequently, he was indicted for atrocious assault and battery and attempted atrocious assault and battery for the same episode. He was convicted of atrocious assault and battery. On appeal, the Supreme Court found no violation of the rule against double jeopardy:

> "No one currently questions the great worth of the constitutional safeguard against double jeopardy. It justly assures that State with its great resources will not be permitted to harass and oppress the individual by multiple porsecution or punishment for the same offense. The difficulty arises in determing just when we are dealing with the same offense within the contemplation of the safeguard."

The Court then discussed various tests which are found in our cases: the "included offense doctrine" of State v. Cooper, 13 N.J.L. 361 (Sup. Ct. 1833); the "same transaction" test of State v. Mowser, 92 N.J.L. 474 (E.&A. 1919); and the "same evidence" test of State v. Hoag, 21 N.J. 496 (1956) affirmed 356 U.S. 464 (1958). See 41 N.J. at 536-538. After discussing Hoag, the Court continued:

> "In State v. Roller, 29 N.J. 339 (1959) this Court recently pointed out that neither test has proved to be entirely acceptable, while seeking the elusive ideal test the court has in each individual case conscientiously tried to safeguard the State's vital interest in bringing

the guilty to justice while at the same time protecting the accused from multiple trial and punishment. * * * All in all, the decision in the Hoag case furnishes poignant evidence of the futility of efforts extended towards the formulation of a single legal test to operate absolutely and inflexibly throughout the field of double jeopardy. * * * .... but cf. Model Penal Code §§1.08-1.11 (Proposed Official Draft 1962).

In applying the prohibition against double jeopardy, the emphasis should be on underlying policies rather than technisms. The primary considerations should be fairness and fulfillment of reasonable expectations in the light of the constitutional and common law goals. In State v. Labato, 7 N.J. 137, the defendant had lottery slips in his possession. He was charged in the ... police court with violation of ... N.J.S. 2A:170-18 which provided that anyone in possession of lottery slips could be adjudged to be a disorderly person. If found guilty as such, he could be fined or imprisoned for a term not exceeding a year. N.J.S. 2A:169-4. The defendant entered a plea of non vult in the police court and received a sentence of $200 fine or 30 days in jail. Thereafter, he was indicted for knowingly having the lottery slips in his possession in violation of the Crimes Act. N.J.S. 2A:121-3. The prosecution contended that since disorderly conduct is not viewed in our State as a crime and since the police court had no jurisdiction to try the crime charged in the indictment, the principle of double jeopardy was inapplicable. This contention was flatly rejected in an opinion for this Court by Justice Heher. * * * * He placed reliance on the same evidence test and noted that, since the lesser offense charged in the indictment, the conviction of the lesser barred prosecution of the greater under the holding in State v. Cooper, . . . 13 N.J.L. 361. More importantly, the defendant's possession was admittedly single and the charges were admittedly similar in nature; when he was tried and sentenced in the police court he reasonably expected that he would not be subjected to an independent later prosecution on a similar charge for the same possession; it would have violated considerations of fairness and the policies underlying the prohibition against double jeopardy to have exposed him to the subsequent prosecution.

Mark and Dixon, as well as Labato, reached results which were on their facts entirely fair and consistent with reasonable expectations in the light of the constitutional and common law goals. But they never intended to convey the thought that every magistrate's determination, no matter how minor the offense charged before him will necessarily preclude a subsequent criminal prosecution based in whole or in part on the same activity, no matter how aggravated the crime charged. Indeed in Labato itself, Justice Heher seems to have recognized the contrary by his flat statement that the doctrine under which a person acquitted or convicted of a minor offense may not generally be charged

again on the same facts in more aggravated form "does not apply when the subsequent charge is that of murder or manslaughter." 7 N.J. at p. 146.

In State v. Shoopman, . . . 11 N.J. 333, the defendant was involved in an accident which caused a death. He was charged with reckless driving in violation of the Motor Vehicle Act (R.S. 39:4-96) and was acquitted in the municipal court. Thereafter he was charged with causing a death by driving an automobile carelessly in violation of the Crimes Act. . . . N.J.S. 2A:113-9. The defendant's assertion of double jeopardy was rejected. In his opinion for this Court, Justice Wachenfeld stressed the fact that the offense charged in the municipal court was not a crime but a violation of a regulatory enactment for the protection of the public at large as to the way and manner a motor vehicle is to be driven (11 N.J., at p. 340); punishment for a first violation of that enactment could not at that time exceed a fine of $100 or imprisonment for 30 days or both. . . . He expressed the view that reckless driving in violation of the Motor Vehicle Act and death by reckless driving in violation of the Crimes Act were not the same offense and that prosecution for the latter after conviction or acquittal of the former did not violate either the spirit or the language of the constitutional mandate against double jeopardy or trespass upon fundamental justice. 11 N.J. at p. 336. In State v. Mark, supra, Shoopman was viewed as being based upon the incongruous disparity between a crime involving a death and mere violation of a traffic statute. 23 N.J. at P. 169.

The cited out-of-state decisions fully support the Shoopman result although the opinions embody legal formulations which do not articulate the relevant practical factors; there is little doubt that such factors play a vital part in the molding of double jeopardy doctrines. Cf. Abbate v. United States, 359 U.S. 187, 195, (1959); Bigelow, "Former Conviction and Former Acquittal", 11 Rutgers L. Rev. 487, 505 (1957). Motor Vehicle Act violations are generally tried quickly and informally before local police magistrates who are in some instances not even attorneys at law. The evidential presentation may be very limited and the legal representation may likewise be very limited or entirely absent. The maximum fines and terms of imprisonment are minor in comparison to those fixed for violation of our Crimes Act and indeed they are even much lower than those which may be imposed for violation of our Disorderly Persons Act. The defendant, if found guilty, may for the most part anticipate the imposition of a moderate fine. In the light of these circumstances, the refusal to permit the proceeding before the magistrate to bar subsequent criminal prosecution for the death or the serious injury caused by the defendant is readily comprehensible. The elements of oppression or harassment historically aimed at by the constitutional and common law prohibition are not significantly involved; and permitting the second prosecution would not violate the reasonable expectations attendant upon the first proceeding while barring it would operate with gross unfairness to the

State.

> The criminal charges against the defendant were not, as in Shoopman, based upon careless or reckless conduct resulting in death but were based upon intentional assaults and batteries resulting in maimings or woundings. The jury found that the defendant, acting with intent to do bodily harm to [the victim] deliberately committed atrocious assaults and batteries on them. Those criminal violations bore no semblance of identity with any Motor Vehicle Act violations and may not commonsensibly be considered, within the intendment of the constitutional and common law prohibition against double jeopardy, as being the same offenses as those tried before the magistrate. When the defendant appeared before the magistrate on the charges of reckless driving and leaving the scene of an accident, neither he nor the State could reasonably have expected that any determinations there would bar later charges under the Crimes Act for his having intentionally committed atrocious assaults and batteries. The making of the criminal charges carried no aspects of unfairness or vexatiousness and their barring would seriously impede the proper administration of justice. Although the defendant has placed some reliance on the fact that the determinations in the magistrate's court were confirmed on appeal in the County Court, that fact has no pertinence to the issues under consideration here. We are satisfied that, under the particular circumstances presented, the State's prosecution of the indictments was not barred by principles of double jeopardy or res judicata and collateral estoppel." (41 N.J. 538-545)

The holding of the Currie case, i.e., to not establish and follow any particular rule or test but instead to use all of them as guides in finding "underlying policies rather than technisms" and to give "primary consideration...to factors of fairness and fulfillment of reasonable expectations in the light of the constitutional goals" has been followed in State v. Berry, 41 N.J. 547 (1964) and State v. Cormier, 46 N.J. 494 (1966). Cormier was a case of an acquittal on a conspiracy charge followed by a conviction on the substantive charge. The Supreme Court held that double jeopardy would not prevent reprosecution--specifically noting that this is inconsistent with §1.07(2) of the Code for which "there is much to be said" but which has not, as yet, been enacted in this State. (46 N.J. at 504).

Collateral estoppel was, however, found to bar a second trial.

5. Relief from Joinder Requirement. Subsection (3) is substantially the same as our R. 3:15-2(b). The Drafters state that they include this provision in the Code because of its importance in relation to subsection (2). MPC Tentative Draft No. 5, pp. 39-40 (1956) (giving illustrations of reasons why joinder may be unfair to the defendant or to the prosecution). The existence of the provision in our Court Rules would make it unnecessary here. See State v. Manney, 26 N.J. 362 (1958); State v. Coleman, 46 N.J. 16 (1965); State v. Cormier, 46 N.J. 494 (1966); State v. Sinclair, 49 N.J. 525 (1967).

6. Conviction of Included Offense Permitted. Subsection (4) permits conviction for an offense which is not specifically charged in the accusative pleadings, provided that the offense is an included offense. With an important limitation, discussed below, this general principle is our law. Previously, it was contained in one of the Court Rules (R.R. 3:7-9(c)) but it was eliminated on recommendation of the Advisory Committee on the ground that it was "substantive law appropriately dealth with, e.g., in the court's charge to the jury, and not required to be provided for by court rule." Proposed Revision of the Rules Governing the Court of the State of New Jersey, pg. 231 (1966). The matter is now governed by the common law as found in our cases.

Before turning to the definition of included offense, it is important to discuss the existing limitation upon convictions for included offenses now in force in New Jersey. The decision as to whether to continue this rule is a major one for the Commission. In State v. McGrath, 17 N.J. 41 (1954), the Supreme Court held that the County Court had no power to deal with simple assault and battery

ecause the Legislature had provided that simple assault and battery as disorderly conduct and not a crime. Thus, such offenses are within the "sole jurisdiction of the municipal court" 17 N.J. at pp. 44 and 50. Thus, violations of the Disorderly Persons Act are not now included offenses in indictable crimes. Recently, in State v. Currie, 41 N.J. 531 (1964), the Court reaffirmed McGrath:

> "After the decision in McGrath, there were significant suggestions for modifying legislation which would enable the county court to deal with both atrocious assault and battery." See Knowlton, "Criminal Law and Procedure", 10 Rutgers L. Rev. 97, 98-99 (1955); State Bar Committee Report, Criminal Law, 77 N.J.L.J. 408 (1954). No such legislation has thus far been enacted and the defendant has presented nothing which would persuade us to depart at this time from the court's actual holding in McGrath. (41 N.J. at 547).

The Code defines "included offenses" as being three situations:

(a) Paragraph (a) provides that a lesser offense is necessarily included in a charge of the greater offense if the proof necessary to establish the greater offense will of necessity establish every element of the lesser offense. This is the majority view. MPC Tentative Draft No. 5, pp. 40-41 (1956). The rule of paragraph (a) is our law. State v. Midgeley, 15 N.J. 574 (1954); State v. Zelichowski, 52 N.J. 377 (1968); State v. Williams, 30 N.J. 105 (1959); State v. LaVera, 35 N.J. Super. 256 (App. Div. 1955); State v. O'Leary, 31 N.J. Super. 411 (App. Div. 1954); State v. Butler, 107 N.J.L. 91 (E.&A. 1930); State v. Staw, 97 N.J.L. 349 (E.&A. 1922).

(c) Paragraph (c) provides for two situations:

(1) The first is the case where the offense differs from the offense charged only in that it requires a lesser degree of culpability. This situation may not come within paragraph (a) since it may require proof of different facts than those required

for the offense charged. These are cases of offenses of lesser culpability rather than offenses different than the one charged. The rule that allows a conviction for manslaughter under an indictment charging murder may be viewed as an illustration of this principle. State v. Williams, 30 N.J. 105 (1959); State v. Zelichowski, 52 N.J. 377 (1968).

(2) Second is the case where the offense differs from the offense charged only in that less serious injury or risk of injury is necessary to establish its commission. New Jersey adopts this rule in the situation which arises most frequently, that is, the conviction for atrocious assault and battery under an indictment charging murder. State v. Zelichowski, 52 N.J. 377 (1968). See MPC Tentative Draft No. 5, pg. 42 (1956).

7. Submission of Included Offense to Jury. Subsection (5) states that the Court shall not be obligated to charge the jury on an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense. The words "be obligated to" were added to allow the court to submit an illogical included offense "if the court believes that it is proper to do so." MPC Proposed Official Draft, p. 13 (1962).

The New Jersey rule is found in State v. Sinclair, 49 N.J. 525, 540 (1967):

> "When the State's thesis is that the murder occurred during a robbery or attempted robbery, the evidence at trial may be such that only by sheer speculation or compromise could the jury return a verdict other than guilty of first degree murder or not guilty; if so, it is proper not to instruct the jury that second degree murder is a possible verdict. ... However, our cases also establish that if on the evidence it would not be idle to have the jury decide whether defendants committed an unlawful homicide other than in the course of an attempt to rob, it is error not to charge the possibility of second degree murder...."

See also State v. Mathis, 47 N.J. 455, 466 (1966); State v. Davis, 50 N.J. 16 (1967); State v. Pacheco, 38 N.J. 120, 131 (1962); State v. Lynn, 21 N.J. 264, 270 (1956); State v. Sullivan, 43 N.J. 209, 245 (1964). These cases lead to the conclusion that the present law in our State does not leave discretion to the trial court. He either does or does not charge according to the state of the evidence. This is how the Code was originally drafted. MPC Tentative Draft No. 5, pp. 30, 42-43 (1956). If the grant of limited discretion now found in the Code is thought to be inappropriate the words "be obligated to" should be eliminated.

8. Other State Codes:

(a) Illinois:

"§3--3. Multiple Prosecutions for Same Act

(a) When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense.

(b) If the several offenses are known to the proper prosecuting officer at the time of commencing the prosecution and are within the jurisdiction of a single court, they must be prosecuted in a single prosecution, except as provided in Subsection (c), if they are based on the same act.

(c) When 2 or more offenses are charged as required by Subsection (b), the court in the interest of justice may order that one or more of such charges shall be tried separately.

(b) Michigan:

In §150, the Revision Commission has recommended the adoption of a provision substantially the same as §1.07.

:CTION 1.08. WHEN PROSECUTION BARRED BY FORMER PROSECUTION FOR THE SAME OFFENSE

When a prosecution is for a violation of the same provision : the statutes and is based upon the same facts as a former prosecu- ion, it is barred by such former prosecution under the following :rcumstances:

(1) The former prosecution resulted in an acquittal. There s an acquittal if the prosecution resulted in a finding of not guilty y the trier of fact or in a determination that there was insufficient vidence to warrant a conviction. A finding of guilty of a lesser ncluded offense is an acquittal of the greater inclusive offense, lthough the conviction is subsequently set aside.

(2) The former prosecution was terminated, after the nformation had been filed or the indictment found, by a final order r judgment for the defendant, which has not been set aside, reversed, r vacated and which necessarily required a determination inconsistent ith a fact or a legal proposition that must be established for onviction of the offense.

(3) The former prosecution resulted in a conviction. There s a conviction if the prosecution resulted in a judgment of conviction hich has not been reversed or vacated, a verdict of guilty which has ot been set aside and which is capable of supporting a judgment, or a lea of guilty accepted by the Court. In the latter two cases failure o enter judgment must be for a reason other than a motion of the lefendant.

(4) The former prosecution was improperly terminated. :xcept as provided in this Subsection, there is an improper termination)f a prosecution if the termination is for reasons not amounting to an icquittal, and it takes place after the first witness is sworn but)efore verdict. Termination under any of the following circumstances ls not improper:

(a) The defendant consents to the termination or waives,)y motion to dismiss or otherwise, his right to object to the termination.

(b) The trial court finds that the termination is necessary because:

(1) it is physically impossible to proceed with the trial in conformity with law; or

(2) there is a legal defect in the proceedings which would make any judgment entered upon a verdict reversible as a matter of law; or

(3) prejudicial conduct, in or outside the courtroom, makes it impossible to proceed with the trial without injustice to either the defendant or the State; or

(4) the jury is unable to agree upon a verdict; or

(5) false statements of a juror on voire dire prevent a fair trial.

§1.08 Commentary

1. This Section states the circumstances in which a former prosecution is a bar to a subsequent prosecution for the same offense, in the narrowest sense of a violation of the same statute based upon the same facts. MPC Tentative Draft No. 5, p. 45 (1956). A bar arises in four general situations: (1) where the first prosecution results in an acquittal, (2) where res judicata operates, (3) where the first prosecution results in a conviction, or (4) where the first prosecution is improperly terminated after the first witness is sworn.

2. Former Finding of Not Guilty by the Trier of Fact. Several aspects of the problem of former acquittal merit discussion:

(a) Under Subsection (1) a finding of not guilty by the trier of fact or a determination by the judge that there is insufficient evidence to raise a jury question will preclude a subsequent prosecution for the same offense. This is our law. N.J. Constitution of 1947, Art. 1, para. 10. State v. Curry, 41 N.J. 531 (1964); State v. Farmer, 48 N.J. 145 (1966); State v. Labato, 7 N.J. 137 (1951).

Under the Code, the determination or verdict itself is sufficient to constitute the bar even though no judgment is entered. This is prevailing law. MPC Tentative Draft No. 5, p. 46 (1956).

(b) The Code requires that there be either a finding of not guilty by the trier of fact or a determination that there is insufficient evidence to support a conviction. This definition of "acquittal" is also used in §1.09(1) of the Code. This is our law. A formal acquittal such as on the ground of a variance or a dismissal of an indictment because of improper form or substance or to allow the prosecution to seek a new indictment is not an acquittal. State v. Fary, 16 N.J. 317 (1954)1 State v. Rosen, 52 N.J. Super. 210 (Law Div. (1958).

(c) The Code provides that a finding of guilty of a lesser included offense is an acquittal of the greater inclusive offense, although the conviction is subsequently set aside. This is our law. In State v. Williams, 30 N.J. 105 (1959), our Supreme Court held that a conviction of second degree murder operated as an acquittal of first degree murder so that a conviction of the latter offense was not possible after a reversal of the first judgment.

> ". . . we hold that when the jury announced that Williams was guilty of the specified degree of murder, they affirmed by irresistible implication that he was not guilty of first degree murder. A verdict of that type must operate as an acquittal of every crime of higher grade, of which he could have been convicted uner the issues framed by the indictment". (30 N.J. at 119)

Williams further held that this implied acquittal was an immunity which was not waived by a successful appeal from the second degree murder conviction. In State v. Wolf, 46 N.J. 301 (1966) the Court extended Williams to the situation where a defendant was convicted of first degree murder and received from the jury a recommendation of life imprisonment at his first trial. After a reversal of that conviction, the defendant may not be sentenced to the death penalty. The rules of the Williams and Wolf cases do not extend to the situation where the defendant pleads non vult to a murder indictment and is subsequently permitted to withdraw that plea:

> "In such case defendant's life has never been in jeopardy. If the trial judge accepts the non-vult plea he cannot sentence the accused to death....Therefore, when the plea is expunged on defendant's application, he should be put back in the position he occupied with respect to the indictment before the plea was entered, State v. Williams, 39 N.J. 471, 480...and the State may seek the death penalty at trial." (State v. Wolf, 46 N.J. 310).

3. Final Order or Judgment as Res Judicata. Subsection (2) provides that a final order or judgment is a bar to a subsequent prosecution for the same offense if (a) the final order or judgment

was entered after the information was filed or the indictment found; (b) the final order or judgment is not reversed, vacated or set aside pursuant to law; and (c) the final order to judgment required a determination inconsistent with a fact or legal proposition necessary for conviction of the offense. MPC Tentative Draft No. 5, p. 49 (1956).

(a) The Code holds that res judicata ought to apply to the Criminal law as well as the civil law. This is the New Jersey view. State v. Cormier, 46 N.J. 494 (1966). But see State v. Hoag, 21 N.J. 492 (1956) discussed in Cormier at 507.

(b) The Code provides that any final order or judgment, meeting the other requirements of this subsection, ought to constitute a bar even though entered prior to trial and thus prior to the attaching of jeopardy. This is said to be the rule based on "what little authority there is". MPC Tentative Draft No. 5, p. 50 (1956). A pre-trial determination that the statute of limitations had run seems to be the best illustration and the most frequently arising situation. Ibid. No New Jersey authorities were found.

(c) The order or judgment must be a final order or judgment. The rationale for this requirement is that if it is a final order or judgment the State can appeal (R. 2:3-1) and ought to do so, if dissatisfied, rather than to commence a second prosecution. MPC Tentative Draft No. 5, p. 50 (1956). No New Jersey authorities were found on the point.

(d) The determination may be either of law or of fact, if necessarily inconsistent with a proposition of law or fact that must be established for conviction. The fact must, therefore, be an "ultimate fact". MPC Tentative Draft No. 5, p. 51 (1956). State v. DiGiosia, 3 N.J. 413 (1950), State v. Emery, 27 N.J. 348 (1958), and

State v. Leibowitz, 22 N.J. 102 (1956) demonstrate that this rule is New Jersey's law. There are no New Jersey cases as to collateral estoppel on previous determinations of law. It is applied to such determinations elsewhere. MPC Tentative Draft No. 5, p. 51 (1956).

4. Former Conviction. Subsection (3) provides that a prior conviction is a bar to a subsequent prosecution in two situations: (1) Where there is an existing judgment of conviction, i.e., one that has not been reversed or vacated. (2) If no judgment was entered for reasons other than on motion of the defendant, then if there is a verdict or plea of guilty upon which judgment of conviction can be entered.

This rule is the law here and elsewhere. MPC Tentative Draft No. 5, p. 14 (1956). State v. LeFante, 12 N.J. 505 (1953); State v. Labato, 7 N.J. 137 (1951); State v. Turco, 99 N.J.L. 96 (Sup. Ct. 1923).

There is no need for inquiry as to whether the judgment of conviction is on the merits. The reason is that so long as the judgment remains unreversed and not vacated, the defendant is subject to punishment pursuant to it and ought not, while it stands, be subjected to a subsequent prosecution for the same offense. MPC Tentative Draft No. 5, p. 51 (1956). Problems as to failure to enter judgment are discussed in Id. at 52. No New Jersey authorities were found. A plea of guilty has the same effect as a verdict of guilty. As long as it stands and is capable of supporting a judgment, the defendant cannot be prosecuted again for the same crime.

5. Improper Termination of Trial. Subsection (4) dealing with improper termination of a trial, is based upon the premise that it is undesirable to allow the State to withdraw from a poorly presented or poorly received case and to start over again with the hope of better

success the second time. MPC Tentative Draft No. 5, p. 53 (1956). Our cases reflect this as the basis for the rules of law in this area. State v. Romeo, 43 N.J. 188, 194-195, n. 1 (1964); State v. Locklear, 16 N.J. 232, 236 (1954).

Two approaches to the problem are feasible: It can be assumed that any termination is proper unless for a prohibited reason or, it can be assumed that a termination is improper unless for a justifiable reason. The latter is the traditional approach. State v. Romeo, supra; State v. Locklear, supra; State v. Farmer, 48 N.J. 145 (1966).

To come within the ban of this section, the termination must take place after the first witness is sworn. This is a change from existing law which distinguishes between a trial before a court and a trial before a jury. When before a jury, jeopardy attaches when the jury is sworn. MPC Tentative Draft No. 5, p. 53 (1956). State v. Farmer, supra (48 N.J. at 169); State v. Locklear, supra (16 N.J. at 235); State v. Williams, 30 N.J. 105, 120 (1959).

Under the Code, a termination is improper unless it falls within two broad exceptions:

(1) First, where the defendant consents to the termination or waives his right to object to it. This is our law. State v. Wolak, 33 N.J. 399, 401 (1960) (Motion for mistrial denied; subsequently reconsidered on court's own motion and granted without objection by defense counsel. Held, no bar to subsequent prosecution); State v. Williams, supra; State v. Locklear, supra. Waiver problems are discussed in MPC Tentative Draft No. 5, p. 53 (1956).

(2) The second broad exception is where the termination is justified because of the circumstances then existing. Our Supreme Court has said that it is impossible to list all of the circumstances which will justify the termination of a trial prior to verdict.

State v. Farmer, 48 N.J. 145, at 170-171, 174 (1966). See also United States v. Perez, 22 U.S. 579, 580 (1824). In State v. Romeo, 43 N.J. 188 (1964), the Court stated the rule as follows:

> "The law in this State is thoroughly established that, while principles of double jeopardy may be applicable to bar a second trial where the first has been terminated short of verdict, yet * * * if the first trial was terminated or the jury discharged because of incapacitating illness of the judge or a juror or jurors or of the defendant, or misconduct or disqualification of some members of the jury, or on account of an untoward incident that renders a verdict impossible, or some undesigned matter of absolute necessity, or the failure of the jury to agree upon a verdict after a reasonable time for deliberation has been allowed, subsequent prosecution for the offense (is) not barred, for reasons of justice and public interest. * * * . . . we insist that the abortive termination be for a sufficient legal reason and an absolute or an over-riding necessity. . . and carefully review the trial court's action to be certain that these requirements are fairly met...".

See also State v. Farmer, supra ("manifest necessity"; "urgent necessity"); State v. Locklear, supra. Instead of using a phrase such as "manifest necessity", the Code sets forth five "somewhat more specific . . . general reasons" (MPC Tentative Draft No. 5, p. 54 (1956)). In view of our Supreme Court's view that no categorization is possible, it may be wise to rewrite this section to allow termination for "manifest necessity" and/or "a sufficient legal reason" and then set forth that the Code's five reasons are sufficient.

The five reasons for termination found sufficient by the Code are:

(1) Physical Necessity. "This may result from such contingencies as the death or illness of the judge, a juror, attorney or member of their immediate families." MPC Tentative Draft No. 5, p. 54 (1956). State v. Romeo, supra; State v. Williams, supra.

(2) Legal Necessity. This may result from a void indictment or some other serious procedural defect. See State v. Romeo, supra; State v. Farmer, supra; State V. Williams, supra.

(3) Prejudical Conduct. The prejudical conduct may be by ne of the lawyers, or the judge, or a juror, or by someone not irectly connected with the trial (as through a newspaper article). ee State v. Romeo, supra; State v. Farmer, supra; State v. Williams, upra.

(4) A "Hung Jury". Dismissal because of inability of the ury to reach a verdict is no bar to a subsequent prosecution. State v. oller, 29 N.J. 339 (1959); State v. Williams, supra.

(5) False Statements by a Juror on Voir Dire, Cf. State v. omeo, supra.

6. Other State Codes:

(a) New York (covering the law found in §1.08-1.11 of the Code):

§9. Former jeopardy

1. No person can be subjected to a second prosecution for an offense for which he has once been prosecuted, and duly convicted or acquitted.

2. When an act or omission which is made criminal and punishable in different ways, by different provisions of law, a conviction or acquittal under one provision bars a prosecution for the same act or omission under any other provision.

3. An act or omission declared punishable by the laws of this state is not less so because it is also punishable under the laws of another state, government or country, unless the contrary is expressly declared in some law of this state.

4. Where a defendant is acquitted or convicted, upon an indictment for an offense consisting of different degrees, he cannot thereafter be indicted or tried for the same offense, in any other degree, nor for an attempt to commit the offense so charged, or any degree thereof.

5. Whenever it appears upon the trial of an indictment, that the offense was committed in another state or country, or under such circumstances that the courts of this state or government had jurisdiction thereof, and that the defendant has already been acquitted or convicted on the merits upon a criminal prosecution under the laws

of such state, or country, founded upon the act or omission in respect to which he is upon trial, such former acquittal or conviction is a sufficient defense.

(b) Michigan, in §151 of its Code, has recommended adoption of §1.08.

(c) Illinois summarizes §1.08 of the Code:

"§3--4. Effect of Former Prosecution

(a) A prosecution is barred if the defendant was formerly prosecuted for the same offense, based upon the same facts, if such former prosecution:

(1) Resulted in either a conviction or an acquittal or in a determination that the evidence was insufficient to warrant a conviction; or

(2) Was terminated by a final order or judgment, even if entered before trial, which required a determination inconsistent with any fact or legal proposition necessary to a conviction in the subsequent prosecution; or

(3) Was terminated improperly after the jury was impaneled and sworn or, in a trial before a court without a jury, after the first witness was sworn but before findings were rendered by the trier of facts, or after a plea of guilty was accepted by the court.

A conviction of an included offense is an acquittal of the offense charged."

SECTION 1.09. WHEN PROSECUTION BARRED BY FORMER PROSECUTION FOR DIFFERENT OFFENSE.

Although a prosecution is for a violation of a different provision of the statutes than a former prosecution or is based on different facts, it is barred by such former prosecution under the following circumstances:

(1) The former prosecution resulted in an acquittal or in a conviction as defined in Section 1.08 and the subsequent prosecution is for:

(a) any offense of which the defendant could have been convicted on the first prosecution; or

(b) any offense for which the defendant should have been tried on the first prosecution under Section 1.07, unless the Court ordered a separate trial of the charge of such offense; or

(c) the same conduct, unless (i) the offense of which the defendant was formerly convicted or acquitted and the offense for which he is subsequently prosecuted each requires proof of a fact not required by the other and the law defining each of such offenses is intended to prevent a substantially different harm or evil, or (ii) the second offense was not consummated when the former trial began.

(2) The former prosecution was terminated, after the information was filed or the indictment found, by an acquittal or by a final order or judgment for the defendant which has not been set aside, reversed or vacated and which acquittal, final order or judgment necessarily required a determination inconsistent with a fact which must be established for conviction of the second offense.

(3) The former prosecution was improperly terminated, as improper termination is defined in Section 1.08, and the subsequent prosecution is for an offense of which the defendant could have been convicted had the former prosecution not been improperly terminated.

* * * *

§1.09 Commentary

1. This Section deals with those situations in which a former trial or proceeding prior to trial is a bar to a subsequent prosecution for a different offense, whether a violation of a different statute or a different violation of the same statute. MPC Tentative Draft No. 5, p. 56 (1956). There are five general situations in which a prosecution for a "different offense" may be barred by a previous trial or proceeding prior to trial:

2. First, under subsection (1)(a) there is a bar where the former prosecution resulted in an acquittal or in a conviction and the subsequent prosecution is for an offense of which the defendant could have been convicted at the previous trial. This is our law. State v. Williams, 30 N.J. 105 (1959); State v. Cooper, 13 N.J.L. 361 (Sup. Ct. 1833). The bar exists only so long as the judgment remains undisturbed. After reversal, it operates only to prevent conviction of a more serious offense of which the defendant was, by implication, acquitted at the first trial. State v. Williams, supra; State v. Wolf, 46 N.J. 301 (1966). See discussion of §1.08(1), above. If this is not implicit in the Code, it should be made explicit.

3. Second, under subsection (1)(b), there is a bar in any case where the subsequent prosecution is for an offense which should have been charged in a single prosecution under Section 1.07(2). The penalty for failure to join an offense, unless the court has granted leave, is that the State is precluded from subsequently charging the defendant with that offense. According to the Drafters, this provision does not apply if the first judgment has been reversed or if the failure to join was because the court granted a separate trial. MPC Tentative Draft No. 5, p. 57 (1956). Additionally, the State may subsequently prosecute for an offense which, although it arose out of the same transaction, was not consummated (e.g., assault conviction followed by the victim's death and a homicide prosecution) or was not known to the police or prosecutor at the time of the previous prosecution. Ibid.

This is not our law. We do not now have a compulsory joinder rule so that only when the strict rules of double jeopardy apply does a bar arise. State v. Cormier, 46 N.J. 494, 504 (1966); State v. Currie, 41 N.J. 531 (1964); State v. Berry, 41 N.J. 547 (1964).

4. Third, a bar arises under subsection (1)(c) whenever the second prosecution is for

> "the same conduct unless (i) the offense of which the defendant was formerly convicted or acquitted and the offense for which he is subsequently prosecuted each requires proof of a fact not required by the other and the law defining each of such offenses is intended to prevent a substantially different harm or evil, or (ii) the second offense was not consummated when the former trial began".

The requirement of the second offense being one by which the Legislature intended to prevent a "substantially different harm or evil" was added after the original draft. That draft simply followed the minimal protection of the case of Blockburger v. United States, 284 U.S. (1932), i.e., the same evidence test. MPC Tentative Draft No. 5, pp. 56-57 (1956). This was abandoned because the Blockburger test is frequently "mechanically applied" which results in subsequent prosecutions for essentially the same offense. MPC Proposed Official Draft, p. 17 (1962). This is intended to take care of those situations where there is no compulsory joinder under §1.07 because a severance was allowed.

Our cases have, at times, followed the Blockburger case in what may be characterized as a "mechanical application". State v. Shoopman, 11 N.J. 333 (1953). At other times, an analysis seemingly like that of the Code has been employed. State v. Cormier, 46 N.J. 494 (1966); State v. Currie, 41 N.J. 531 (1964). It seems clear, however, that the rule of this subsection of the Code is more stringent than the "reasonable expectations" test of the Currie and Cormier cases.

5. Fourth, subsection (2) defines the scope of res judicata as it applies to a subsequent prosecution for a different offense. See generally discussion of §1.08(2), supra, and State v. Cormier, supra. The provision applies whenever the previous determination is inconsistent with a fact which must be established to convict of the

Cormier, supra, is on point.

6. Fifth, subsection (3) provides a bar to a subsequent prosecution for a different offense if the former trial was improperly terminated and the offense for which the subsequent prosecution is brought is one of which defendant could have been convicted at the former trial had it not been improperly terminated. The protection here is narrower than that following an acquittal or conviction at the first trial. See §1.09(1)(b) above. This is based on the fact that improper termination is virtually always the result of a good faith, but erroneous ruling of the trial judge. MPC Tentative Draft No. 5, p. 59 (1956).

7. Other State Codes:

(a) For New York, see §1.08 Commentary, supra.

(b) Michigan's commission has recommended the adoption of §1.09.

(c) Illinois:

> "(b) A prosecution is barred if the defendant was formerly prosecuted for a different offense, or for the same offense based upon different facts, if such former prosecution:
>
> (1) Resulted in either a conviction or an acquittal, and the subsequent prosecution is for an offense of which the defendant could have been convicted on the former prosecution; or was for an offense with which the defendant should have been charged on the former prosecution, as provided in Section 3--3 of this Code (unless the court ordered a separate trial of such charge); or was for an offense which involves the same conduct, unless each prosecution requires proof of a fact not required on the other prosecution, or the offense was not consummated when the former trial began; or
>
> (2) Was terminated by a final order or judgment, even if entered before trial, which required a determination inconsistent with any fact necessary to a conviction in the subsequent prosecution; or
>
> (3) Was terminated improperly under the circumstances stated in Subsection (a), and the subsequent prosecution is for an offense of which the defendant could have been convicted if the former prosecution had not been terminated improperly."

SECTION 1.10. FORMER PROSECUTION IN ANOTHER JURISDICTION: WHEN A BAR.

When conduct constitutes an offense within the concurrent jurisdiction of this State and of the United States or another State, a prosecution in any such other jurisdiction is a bar to a subsequent prosecution in this State under the following circumstances:

(1) The first prosecution resulted in an acquittal or in a conviction as defined in Section 1.08 and the subsequent prosecution is based on the same conduct, unless (a) the offense of which the defendant was formerly convicted or acquitted and the offense for which he is subsequently prosecuted each requires proof of a fact not required by the other and the law defining each of such offenses is intended to prevent a substantially different harm or evil or (b) the second offense was not consummated when the former trial began; or

(2) The former prosecution was terminated, after the information was filed or the indictment found, by an acquittal or by a final order or judgment for the defendant which has not been set aside, reversed or vacated and which acquittal, final order or judgment necessarily required a determination inconsistent with a fact which must be established for conviction of the offense of which the defendant is subsequently prosecuted.

* * * *

§1.10 Commentary

1. This Section states those circumstances in which a previous prosecution in one jurisdiction bars a subsequent prosecution in another jurisdiction. United States v. Lanza, 260 U.S. 377 (1922) holds that in the absence of a statute the rule against double jeopardy does not apply as between separate sovereignties. Lanza was followed in State v. Cooper, 54 N.J. 330 (1969). This section must take a more limited approach than is the case where both prosecutions are in the same jurisdiction since compulsory joinder and permissive joinder rules may vary.

2. The Code does not bar a subsequent prosecution after a former prosecution in a foreign country. This is contrary to statutory law in fifteen jurisdictions. MPC Tentative Draft No. 5, p. 61 (1956). The Drafters believe it more appropriate to handle this through international agreements. Id. at 61-62.

3. Subsection (1) provides a bar when there has been a former acquittal as well as on former conviction in a federal court or court of another state. The Drafters feel that an acquittal should be as final and conclusive as a conviction. Ibid.

4. Two situations are covered by the Code:

(a) A subsequent prosecution is barred if it is based on the same conduct as was the former trial. See discussion of §1.07(2), above. "Same conduct" is meant to be broader than "same act". MPC Tentative Draft No. 5, p. 63 (1956). This is limited, however, by the rules that it does not apply if the first offense and the second offense each requires proof of a fact not required by the other and the law defining each was intended to prevent "a substantially different harm or evil" or if the second offense was not consummated when the first trial began. This is intended to abandon the Blockburger rule as in §1.09(1)(c), discussed previously. See MPC Proposed Official Draft, p. 18 (1962).

(b) Subsection (2) makes res judicata applicable between jurisdictions provided the adjudication in the foreign jurisdiction took the form of a final order or judgment on the merits. See §§1.08(2) and 1.09(2). Notice that, in this situation, the parties are not the same in both suits, i.e., there are different plaintiffs.

5. New Jersey now follows the strict "two sovereigns" rule. State v. Cooper, 54 N.J. 330 (1969).

6. Other State Codes:

(a) For New York, see §1.08 Commentary, supra.

(b) Illinois:

(c) A prosecution is barred if the defendant was formerly prosecuted in a District Court of the United States or in a sister State for an offense which is within the

concurrent jurisdiction of this State, if such former prosecution:

(1) Resulted in either a conviction or an acquittal, and the subsequent prosecution is for the same conduct, unless each prosecution requires proof of a fact not required in the other prosecution, or the offense was not consummated when the former trial began; or

(2) Was terminated by a final order or judgment, even if entered before trial, which required a determination inconsistent with any fact necessary to a conviction in the prosecution in this State.

(c) Michigan's commission has recommended adoption of §1.10.

SECTION 1.11. FORMER PROSECUTION BEFORE COURT LACKING JURISDICTION OR WHEN FRAUDULENTLY PROCURED BY THE DEFENDANT

A prosecution is not a bar within the meaning of Section 1.08, 1.09 and 1.10 under any of the following circumstances:

(1) The former prosecution was before a court which lacked jurisdiction over the defendant or the offense; or

(2) The former prosecution was procured by the defendant without the knowledge of the appropriate prosecuting officer and with the purpose of avoiding the sentence which might otherwise be imposed; or

(3) The former prosecution resulted in a judgment of conviction which was held invalid in a subsequent proceeding on a writ of habeas corpus, coram nobis or similar process.

* * * *

§1.11 Commentary

1. Section 1.11 sets forth three situations when a prosecution is not a bar to a subsequent prosecution within the meaning of Sections 1.08 through 1.10.

2. First, it is not a bar if the former prosecution was before a court which lacked jurisdiction over the defendant or the offense. This is the law in New Jersey and elsewhere. MPC Tentative Draft No. 5, p. 64 (1956). It is important to distinguish between error within the court's jurisdiction and jurisdictional error. The Code only bars prosecution in the latter situation. Ibid. The New Jersey case establishing the rule is State v. LeJambre, 42 N.J. 315 (1964). There, a magistrate had downgraded a robbery complaint and tried it as a petty larceny. He did not have the prosecutor's permission to do so. Subsequently, an indictment for robbery was returned and the Supreme Court held that the former conviction upon a plea of guilty was not a bar. In view of the fact that the magistrate had neither authority to try the robbery charge nor without the prosecutor's permission to amend it to charge larceny, his accepting

he plea of guilty was an act outside his authority. Consequently, t was a legal nullity and could furnish no basis for a plea of ouble jeopardy. The Court specifically relied upon §1.11(1) finding t to be "the traditional rule which has been followed generally hroughout the country and leads to a denial of the defendant's ouble jeopardy plea here". 42 N.J. at 319. See State v. Dixon, 40 N.J. 180 (1963) and cases cited in LeJambre, 42 N.J. at 319.

3. Second, it is not a bar if "the former prosecution was procured by the defendant without the knowledge of the appropriate prosecuting officer and with the purpose of avoiding the sentence which might otherwise be imposed". §1.11(2). Again, this is the law in New Jersey and elsewhere. The assumption is that the State's interest in avoiding connivance by the defendant to plead in a magistrate's court to a minor offense and thereby avoid prosecution of a major offense can be adequately protected if the appropriate prosecuting authority is given notice. MPC Tentative Draft No. 5, p. 65 (1956). The LeJambre case, supra, specifically referred to §1.11(2) and adopted it as our law:

> "The second subsection is designed to deal with a danger somewhat akin to that suggested by the record here. The very serious offense of robbery was clearly charged in the original complaint; when the magistrate voiced his mistaken understanding that the lesser offense of larceny was charged, the defendant's counsel stated his agreement; and the matter was then permitted to proceed as it did to the disparate sentence without the consent or knowledge of the county prosecutor. Under these circumstances, invocation of the bar of double jeopardy would operate with gross unfairness to the State and would tend to pervert the plea's legitimate and historic purpose of preventing oppression and harassment." 42 N.J. at 319-320.

See also State v. Dixon, 40 N.J. 180 (1963) and Cf., R. 3:25-1 and State v. Ashby, 43 N.J. 273 (1964) (law applicable after indictment).

Notice that, under Section (2), the State must prove (a) "procurement" of the first prosecution by the defendant, (b) lack of

tice, and (c) a "purpose of avoiding" a more serious charge. is high standard of proof means that in a case, like LeJambre, ere the original error as to the charge was made by the magistrate d defense counsel simply stated his agreement as to the charge, the cts could not be made to fit §1.11(2). The rule of §1.11(1) as to ck of jurisdiction was needed. Where the connivance is prior to the ling of the complaint that rule will not work and reliance must be id upon §1.11(2). Since "procurement" need be shown, perhaps the ilpability requirement need not be as high as "purposely". Knowing rocurement without purpose should suffice.

4. Third, is the situation where the former prosecution esulted in a judgment of conviction which was held invalid in a ubsequent proceeding on a writ of habeas corpus, coram nobis or imilar process. Again, it is no bar. §1.11(3). For our statute, he words "petition for post conviction relief" should be added to he list of subsequent proceedings. This also is the law in New ersey and elsewhere. "The courts agree that it should be immaterial whether the defendant attacks the judgment collaterally or by direct appeal." MPC Tentative Draft No. 5, p. 65 (1956). See In re Garofone, 80 N.J. Super 259 (Law Div. 1963) affirmed 42 N.J. 244 (1963); In re Carter, 14 N.J. Super. 591 (Co. Ct., 1951); State v. Lamoreaux, 20 N.J. Super. 65 (App. Div. 1952).

The same limitation upon a reprosecution found in §1.08(1) that a conviction of a lesser included offense is an acquittal of the greater offense, although the conviction is subsequently set aside, should apply here. If that is not considered to be implicit from §§1.08(1) and 1.11(3), it should be made explicit.

5. Other State Codes:

(a) For New York, see §1.08 Commentary, supra.

(b) Illinois:

(d) However, a prosecution is not barred within the meaning of this Section 3--4 if the former prosecution:

(1) Was before a court which lacked jurisdiction over the defendant or the offense; or

(2) Was procured by the defendant without the knowledge of the proper prosecuting officer, and with the purpose of avoiding the sentence which otherwise might be imposed;

(c) Michigan's commission has recommended adoption of §1.10.

:CTION 1.12. PROOF BEYOND A REASONABLE DOUBT; AFFIRMATIVE DEFENSES; BURDEN OF PROVING FACT WHEN NOT AN ELEMENT OF AN OFFENSE; PRESUMPTIONS.

(1) No person may be convicted of an offense unless each .ement of such offense is proved beyond a reasonable doubt. In the)sence of such proof, the innocence of the defendant is assumed.

(2) Subsection (1) of this Section does not:

(a) require the disproof of an affirmative defense unless .d until there is evidence supporting such defense; or

(b) apply to any defense which the Code or another :atute plainly requires the defendant to prove by a preponderance of ridence.

(3) A ground of defense is affirmative, within the meaning : Subsection (2)(a) of this Section, when:

(a) it arises under a section of the Code which so :ovides; or

(b) it relates to an offense defined by a statute other .an the Code and such statute so provides; or

(c) it involves a matter of excuse or justification eculiarly within the knowledge of the defendant on which he can .airly be required to adduce supporting evidence.

(4) When the application of the Code depends upon the inding of a fact which is not an element of an offense, unless the)de otherwise provides:

(a) the burden of proving the fact is on the prosecution r defendant, depending on whose interest or contention will be urthered if the finding should be made; and

(b) the fact must be proved to the satisfaction of the)urt or jury, as the case may be.

(5) When the Code establishes a presumption with respect to ny fact which is an element of an offense, it has the following onsequences:

(a) when there is evidence of the facts which give ise to the presumption, the issue of the existence of the presumed act must be submitted to the jury, unless the Court is satisfied hat the evidence as a whole clearly negatives the presumed fact; and

(b) when the issue of the existence of the presumed act is submitted to the jury, the Court shall charge that while the resumed fact must, on all the evidence, be proved beyond a reasonable oubt, the law declares that the jury may regard the facts giving rise o the presumption as sufficient evidence of the presumed fact.

(6) A presumption not established by the Code or inconsistent ith it has the consequences otherwise accorded it by law.

* * * *

§1.12 Commentary

1. This section, in paragraph (1) prescribes the conventional requirement that the prosecution prove a charge of crime beyond a reasonable doubt. Subsequent paragraphs recognize that this basic requirement is not wholly unqualified in application because of doctrines shifting the burden of adducing evidence, the burden of proof and presumptions. See MPC Tentative Draft No. 4, p. 108 (1955).

2. Paragraph (1) calls for proof beyond a reasonable doubt of "every element of the offense". That term is defined in §1.13(9) to mean such conduct or such attendant circumstances or such a result of conduct as (a) is included in the description of the forbidden conduct in the definition of the offense; or (b) establishes the required kind of culpability; or (c) negatives an excuse or justification for such conduct; or (d) negatives a defense under the statute of limitations; or (e) establishes jurisdiction or venue.

Our cases are generally in accord. In State v. D'Orio, 136 N.J.L. 204, at 208 (E.&A. 1947), the Court quoted, with apparent approval, a trial court charge which had said that "the defendant is presumed to be innocent...and unless the crime charged in each of its elements, is proven against him beyond a reasonable doubt, he is entitled to an acquittal." See also State v. Cutrone, 8 N.J. Super. 106, at 111 (App. Div. 1950) ("each and all of (the) elements (of the crime charged)"); State v. DiRienzo, 53 N.J. 360 (1969) (culpability); State v. Aiello, 91 N.J. Super. 457, 463 (App. Div. 1966); State v. Tonnison, 92 N.J. Super. 452, at 456 (App. Div. 1966) (exception in the statute); State v. Walsh, 9 N.J. Super. 43, at 46 (App. Div. 1950)

same); State v. Benny, 20 N.J. 238 (1955); State v. Chiarello, 59 N.J. Super. 479, 498 (App. Div. 1961) (excuse or justification); State v. Fair, 45 N.J. 77, at 91 (1965) (same); State v. Abbott, 36 N.J. 63, at 72 (1961) (same); State v. Dolce, 41 N.J. 422, 432 (1964) (same); State v. Garvin, 44 N.J. 268 (1965) (alibi-presence of defendant); State v. Estrada, 35 N.J. Super. 459 (Co. Ct. 1955) (Statute of Limitations). No cases were found as to the standard of proof in jurisdiction and venue. Cf., State v. O'Shea, 16 N.J. 1, at 5 (1954). In several states the law is that venue need only be proved by a preponderance of the evidence. In some, the same is true of jurisdiction. See MPC Tentative Draft No. 4, p. 109 (1955). The Drafters of the Code concede that there is much to be said for distinguishing for purposes of the standard of proof, between those facts which establish the criminality of the defendant's conduct and those which merely satisfy procedural requirements. They decided not to make such a distinction, however, because of the "larger difficulty in presenting to a jury different standards for appraising different features of the prosecution's case". Ibid.

3. The Code makes no effort to define "reasonable doubt" because of the Drafters' view that "definition can add nothing helpful to the phrase". Our cases define reasonable doubt in a negative way:

> "A reasonable doubt is not a mere possible or imaginary doubt; it is that state of the case, where, after an examination and comparison of all the evidence you cannot say that you feel an abiding conviction to a moral certainty of the guilt of the defendant." State v. Cutrone, 8 N.J. Super. 106, at 111 (App. Div. 1950).

4. The Code changes the verbiage of the usual reference to the "presumption of innocence" found in our cases. State v. Humphreys, 101 N.J. Super. 539 (App. Div. 1968); State v. Cutrone, supra; State v. D'Orio, supra. Because §1.12(5) of the Code defines the word "presumption" to carry particular procedural connotations,

e Code speaks of "assuming" the innocence of the accused.

5. Paragraph (2) is addressed to the first qualification the reasonable doubt provision, namely, the case of an affirmative fense. Subparagraph (a) deals with the case where the denomination a defense as affirmative relieves the prosecution of the burden of ducing evidence in the first instance on the issue; the evidencial rden is imposed upon the defendant. Unless there is evidence supporting e defense, there is no issue on the point to be submitted to the jury. en, however, there is evidence supporting the defense (whether esented by the prosecution or defendant), the prosecution has the rmal burden; the defense must be negatived by proof beyond a reasonable ubt. This is our law when a defense is characterized as affirmative. tate v. Abbott, 36 N.J. 63, 72 (1961); State v. Fair, 45 N.J. 77, 91 1965); State v. Chiarello, 69 N.J. Super. 479, 498 (App. Div. 1961); tate v. Dolce; 41 N.J. 422, 432 (1964).

The Code does not attempt to state how strong the evidence ust be to satisfy the test that "there is evidence" supporting the efense. The Drafters believed that this should be left to the courts ut stated that "it should suffice to put the prosecution to its proof eyond a reasonable doubt that the defendant shows enough to justify uch doubt upon the issue". MPC Tentative Draft No. 4, p. 110 (1955). hiarello so holds. Subsequent Supreme Court cases have not addressed hemselves to the issue although they seem to approve Chiarello in his regard. State v. Abbott, supra; State v. Fair, supra.

6. Having defined the effect of describing a particular lement as an "affirmative defense" in Section (2)(a), Section (3) efines when a ground of defense is affirmative. First, provision s made in subparagraphs (a) and (b) for the cases in which either the ode or some other statute outside the Code so provides. Second is an

tempt to state a general principle for other situations, i.e., when

> "it involves a matter of excuse or justification peculiarly within the knowledge of the defendant on which he can fairly be required to adduce supporting evidence."

The Drafters see the decision to make a particular matter into an affirmative defense as a "subtle balance which acknowledges that a defendant ought not be required to defend until some solid substance is presented to support the accusation but, beyond this, perceives a point where need for narrowing the issues, coupled with the relative accessibility of evidence to the defendant warrants calling upon him to present his defensive claim". MPC Tentative Draft No. 4, p. 111 (1955). The test of subparagraph (3)(c) seems to be that which has guided our courts in assigning the term "affirmative defense" to particular matters. See State v. Chiarello, supra; State v. Abbott, supra; State v. Fair, supra; State v. Dolce, supra; cf., State v. Garvin, supra; State v. New York Central R. Co., 37 N.J. Super. 42 at 50 (App. Div. 1955); State v. Blanca, 100 N.J. Super. 241, 248 (App. Div. 1968); State v. Rabatin, 25 N.J. Super. 24, at 31 (App. Div. 1953).

7. Paragraph (2)(b) sets forth a second exception to the proof beyond a reasonable doubt standard of Section (1). This is where a defense, under the Code or another statute, requires the defendant to prove it by a preponderance of the evidence. The statute must "plainly" require this. The Code's position is not to so shift the burden of proof except for "most exceptional considerations". MPC Tentative Draft No. 4, p. 112 (1955). Note that this is a situation where we are dealing with an element of the offense. When not an element, the matter is treated by Section (4). There is, of course, more constitutional doubt as to a statute which switches the burden of persuasion rather than merely switching the burden of going forward or raises a presumption. Id. at 113-114. New Jersey now has some

tuations where the burden of persuasion rests with the defendant. sanity is an example. State v. Molnar, 133 N.J.L. 327, 331 (E.&A. 45); State v. Cordasco, 2 N.J. 189, 196 (1949); State v. Selfo, 3 N.J. Super. 472, 480 (App. Div. 1959); See State v. Lucas, 30 .J. 37, 67 (1959).

8. Section (4) deals with findings of fact, called for in pplications of the Code, as to matters not an element of an offense ithin the meaning of §1.13(9). Illustrations are: a finding that efendant lacks mental capacity to proceed (§4.06(2)); a finding that he defendant is a persistent offender (§7.03); a claim of double eopardy where the issue is the identity of the person charged. ubparagraph (a) distributes the burden of proof to either the prose- ution or the defendant depending upon whose interest or contention ill be furthered if the finding should be made. This is said to be existing law. MPC Tentative Draft No. 4, p. 114 (1955). Our cases simply decide such issues without giving them explicit treatment. See State v. Janieo, 9 N.J. Super. 29, 32 (App. Div. 1950) affirmed, 6 N.J. 608 (1951). The standard of proof of Subparagraph (b), i.e., that the fact "be established to the satisfaction" of the tribunal, is intentionally ambiguous. It is said to mean at least proof by a preponderance of the evidence but beyond that the issue is left to the courts. The variety of situations requires flexibility. MPC Tentative Draft No. 4, p. 114 (1955).

9. Presumptions. Paragraph (5) deals with presumptions. It is addressed, however, only to presumptions established by the Code with respect to any fact which is an element of an offense. The Drafters of the Code believe that existing formulations--including that in our Rules of Evidence 13 and 14--are not "wholly satisfactory for criminal proceedings". MPC Tentative Draft No. 4, p. 114 (1955).

us, they suggest a new approach, with particular reference to the

ployment of presumptions in the drafting of a penal code:

> The procedural framework established by section 1.13 confines the need for the creation of presumptions within narrow bounds. If the legislative purpose is simply to impose on the defendant the burden of adducing exculpating evidence with respect to an element of an offense, that end can be accomplished by denominating the ground of exculpation an affirmative defense....There is no need to put the matter in the form of a presumption; and the position will be clearer if it is not put that way. So, too, if the legislative purpose is to impose a burden of persuasion upon the defendant on some single issue, the matter will be dealt with clearly by providing that the ground of exculpation claimed involves a defense which the defendant must establish by a preponderance of evidence. Thus it is only when these outright shifts of burden, whether of adducing evidence or of persuasion, do not produce the result desired that there can be any need for the creation of a presumption.
>
> The typical situation is the case where what is sought is a result that involves more than a shift in the evidential burden and less than a shift in the burden of persuasion. What is desired in this medial result is that the proof of given basic facts by the prosecution will shift to the defendant the burden of adducing exculpating evidence in disproof of the presumed fact (as in the case of an affirmative defense) but, more than this, that proof of the basic facts will assure that the issue will be submitted to the jury (unless the presumed fact is clearly disproved on all the evidence), without however altering the ultimate burden of persuasion.
>
> It is clear that such a device ought not be employed unless proof of the basic facts affords strong ground for inference of the existence of the presumed fact. ...
>
> To delineate the consequences of a Code presumption, two alternative formulations are presented.
>
> The first formulation [Which was ultimately adopted in the Code] provides that when there is evidence of the facts giving rise to a presumption, the issue of the existence of the presumed fact must be submitted to the jury, unless the court is satisfied that the evidence as a whole clearly negatives the presumed fact. When the issue is submitted to the jury, the court is to charge that the presumed fact must be proved on all the evidence beyond a reasonable doubt but that the law permits the jury to regard the facts giving rise to the presumption as sufficient evidence of the

presumed fact.

The alternative gives greater weight to the presumption. In the absence of evidence to the contrary of the presumed fact, it requires that fact to be treated as established by the proof beyond a reasonable doubt of the facts which give rise to the presumption. In such case there is no issue for the jury as to the existence of the presumed fact but only as to the facts which engender the presumption. ...

The view of a presumption as establishing a prima facie case with respect to the presumed fact and a permissive jury inference as to its existence is probably that reflected most commonly by the decisions in the field of penal law. * * * * It was considered by the [Institute] to go as far as it is desirable for the legislature to go in attempting to influence jury findings with respect to the presumed fact, given the right to jury trial and the general principle that calls for proof beyond a reasonable doubt.

The alternative is favored by the Reporter....[because :

(1) When there is no evidence to the contrary of the presumed fact, the presumption should have at least the effect of an ordinary affirmative defense, foreclosing the issue because the defendant has not sustained the burden of adducing evidence.

(2) When there is evidence to the contrary which does not clearly negative the presumed fact, so that the issue involved is submitted to the jury, it promotes the rationality of jury judgments for the court to charge not merely that the law permits the inference of the existence of the presumed fact from the basic facts but that the law declares that the basic facts, standing alone are strong evidence of the presumed fact."

Our present Evidence Rules provide as follows:

"A presumption is a rebuttable assumption of fact resulting from a rule of law which requires such fact to be assumed from another fact or group of facts found or otherwise established in the action. If evidence to the contrary of a presumed fact is offered, the existence or non-existence of such fact shall be for the trier of fact, unless the evidence is such that the minds of reasonable men would not differ as to the existence or non-existence of the presumed fact." (Rules 13 and 14).

The Code formulation is in accord with our present law, i.e., the presumption establishes a prima facie case with respect to the presumed fact and a permissive jury inference as its existence. State v. DiRienzo, 53 N.J. 360 (March 4, 1969); State v. Humphreys,

54 N.J. 406 (1969) reversing 101 N.J. Super. 530 (App. Div. 1968); State v. Corby, 28 N.J. 106 (1958). In the light of Rules 13 and 14 it probably is not necessary to enact §1.12(5) unless the Commission wishes to recommend the alternative for use in the Code.

10. The Code does not establish any presumptions unless the basic facts standing alone are strongly probative of the presumed fact in the light of general experience and unless the presumption does not cast an unfair burden on the defendant. Cf., State v. DiRienzo, supra; State v. Humphreys, supra.

11. The Code does not affect presumptions which are not established by the Code, unless they are inconsistent with it, as when a presumption has been superseded by particular provisions. See MPC Tentative Draft No. 4, pp. 117-118 (1955).

12. Other State Codes:

(a) Wisconsin:

§939.70 Presumption of innocence and burden of proof.

"No provision of the criminal code shall be construed as changing the existing law with respect to presumption of innocence or burden of proof.

(b) Illinois Criminal Code of 1961:

§3--1. Presumption of Innocence and Proof of Guilt.

Every person is presumed innocent until proved guilty. No person shall be convicted of any offense unless his guilt thereof is proved beyond a reasonably doubt.

§3--2. Affirmative Defense

(a) "Affirmative defense" means that unless the State's evidence raises the issue involving the alleged defense, the defendant, to raise the issue, must present some evidence thereon.

(b) If the issue involved in an affirmative defense is raised then the State must sustain the burden of proving the defendant guilty beyond a reasonable doubt as to that issue together with all the other elements of the offense.

(c) The Michigan Commission recommends adoption of

(d) New York Penal Law:

§25.00 Defenses; burden of proof.

1. When a 'defense', other than an 'affirmative defense', define by statute is raised at a trial, the people have the burden of disproving such defense beyond a reasonable doubt.

2. When an offense declared by statute to be an 'affirmative defense' is raised at a trial, the defendant has the burden of establishing such defense by a preponderance of the evidence."

ECTION 1.13. GENERAL DEFINITIONS.

In this Code, unless a different meaning plainly is required:

(1) "statute" includes the Constitution and a local aw or ordinance of a political subdivision of the State;

(2) "act" or "action" means a bodily movement whether oluntary or involuntary;

(3) "voluntary" has the meaning specified in Section !.01;

(4) "omission" means a failure to act;

(5) "conduct" means an action or omission and its accompanying state of mind, or, where relevant, a series of acts and omission;

(6) "actor" includes, where relevant, a person guilty of an omission;

(7) "acted" includes, where relevant, "omitted to act";

(8) "person", "he", and "actor" include any natural person and, where relevant, a corporation or an unincorporated association;

(9) "element of an offense" means (i) such conduct or (ii) such attendant circumstances or (iii) such a result of conduct as

(a) is included in the description of the forbidden conduct in the definition of the offense; or

(b) establishes the required kind of culpability; or

(c) negatives an excuse or justification for such conduct; or

(d) negatives a defense under the statute of limitations; or

(e) establishes jurisdiction or venue;

(10) "material element of an offense" means an element that does not relate exclusively to the statute of limitations, jurisdiction, venue or to any other matter similarly unconnected with (i) the harm or evil, incident to conduct, sought to be prevented by the law defining the offense, or (ii) the existence of a justification or excuse for such conduct;

(11) "purposely" has the meaning specified in Section 2.02 and equivalent terms such as "with purpose," "designed" or "with design" have the same meaning;

(12) "intentionally" or "with intent" means purposely;

(13) "knowingly" has the meaning specified in Section 2.02 and equivalent terms such as "knowing" or "with knowledge" have the same meaning;

(14) "recklessly" has the meaning specified in Section 2.02 and equivalent terms such as "recklessness" or "with recklessness" have the same meaning;

(15) "negligently" has the meaning specified in Section 2.02 and equivalent terms such as "negligence" or "with negligence" have the same meaning;

(16) "reasonably believes" or "reasonable belief" designates a belief which the actor is not reckless or negligent in holding.

* * * *

§1.13 Commentary

1. Except for paragraphs (9) and (10), none of the definitions in this section is independently important but they have influence upon the meaning of other important Code provisions. Their validity is best appraised in the specific context of those Code provisions where they appear.

2. Paragraphs (9) and (10) are of sufficient general significance to make comment upon them worthwhile, at this point:

> "The ingredients of criminal offenses necessarily consist of (1) specified conduct or (2) specified attendant circumstances or (3) a specified result of conduct, meaning by conduct, as paragraph (5) provides, action or omission and its accompanying state of mind. The term 'element' is commonly employed to designate any such ingredient of an offense. There are, however, ambiguities in current usage, especially whether 'element' includes those facts about the conduct or the circumstances which negative defenses on the merits (e.g., the fact that homicide was not in necessary self-defense) or show that it occurred within the period for which a prosecution is not barred by limitations or establish jurisdiction and venue. It has proved convenient for the pruposes of drafting to define 'element of an offense' broadly enough to include all such facts as 'element'. Paragraph (9) expressly so provides.
>
> While this broad definition of 'element' is useful for the purposes of the procedural provisions (cf. Section 1.12), it is obviously too broad for the purpose of the culpability provisions (Section 2.02 et.seq.). Here what is needed is a concept that delineates the types of elements to which

SECTION 2.01. REQUIREMENT OF VOLUNTARY ACT; OMISSION AS BASIS OF LIABILITY; POSSESSION AS AN ACT.

(1) A person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act or the omission to perform an act of which he is physically capable.

(2) The following are not voluntary acts within the meaning of this Section:

(a) a reflex or convulsion;

(b) a bodily movement during unconsciousness or sleep;

(c) conduct during hypnosis or resulting from hypnotic suggestion;

(d) a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual.

(3) Liability for the commission of an offense may not be based on an omission unaccompanied by action unless:

(a) the omission is expressly made sufficient by the law defining the offense; or

(b) a duty to perform the omitted act is otherwise imposed by law.

(4) Possession is an act, within the meaning of this Section, if the possessor knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession.

* * * *

§2.01 Commentary

1. Subsection (1) states the necessary condition for criminal liability that conduct must include a voluntary act or the omission to perform an act of which the actor is physically capable. The requirement is reflective of the fact that the law cannot hope to deter involuntary movement or to stimulate action which the actor cannot physically perform. Further, formal social condemnation through in a criminal conviction in such a situation would be inappropriate--other menas of social control should be employed. See MPC Tentative Draft No. 4, p. 119 (1955).

"Act" and "action" are defined in §1.13(2) "voluntary" in §1.13(3) and "omission" in §1.13(4).

The statement is reflective of the present law in New Jersey. State v. Labato, 7 N.J. 137, at 148, (1951) ("Some act of commission or omission lies at the foundation of every crime."); State v. Cooper, 13 N.J.L. 361 (Sup. Ct. 1833); State v. Gooze, 14 N.J. Super. 277 (App. Div. 1951); (Dizzy spell from a disease known as "Meniere's Syndrome" where defendant knew of his susceptibility to such incident); In re Lewis, 11 N.J. 217 (1953) (Falling asleep while driving under circumstances where defendant knew of his being extremely tired.).

2. The Drafter's Notes accompanying this provision make it clear that the formulation will not require that liability must be based on the voluntary act or the omission simpliciter, but rather that liability may be based upon conduct which includes such act or omission. MPC Tentative Draft No. 4, p. 120-121 (1955). This is intended not to preclude liability in situations such as the Gooze and Lewis cases, where liability is based upon the entire course of conduct, including the specific conduct that resulted in the injury. See also People v. Decina, 2 N.Y. 2d 133, 138 N.E. 2d 799 (1956).

3. Subsection (2) sets forth limitations upon the general rule of subsection (1) by defining certain items which are not to be found to be voluntary acts for this purpose. It is clear that reflex actions and convulsions must be excluded. The same is true of unconsciousness and of sleep when those terms signify a total collapse or coma. In the case of unconsciousness, there are states of physical activity where self-awareness is grossly impaired or even absent, such as epileptic fugues, amnesias, extreme confusions, etc. See authorities

cited in MPC Tentative Draft No. 4, p. 121 (1955). The same is true of sleep which may give rise to total unconsciousness, somnambulism or even to a clouded state between sleep and wakefulness. See Fain v. Commonwealth, 78 Ky. 183 (1879) and discussion in MPC Tentative Draft No. 4, p. 122 (1955). The Code's position is to define neither "unconsciousness" nor "sleep" but to leave the definition of these terms to the judiciary. The New Jersey case of State v. Gooze, supra, discusses both unconsciousness and sleep as being analogous to the situation it was there considering (i.e., severe dizziness while conscious) but it had no occasion to examine the fine meanings of these terms.

In the event the Commission wishes to exclude partial consciousness situations, as above discussed, from the definition of voluntary act, that should be done by replacing the word "unconsciousness" in §2.01(2)(b) with "coma" and/or adding the modifiers "total unconsciousness during" before the word "sleep". The effect of this would be to require persons who commit crimes during periods of active automatism to meet the test of responsibility set forth in §4.01.

4. Hypnotism has been the subject of extensive scholarly debate--and of virtually no cases. The Code's position is that, despite the actor's consciousness, his dependence upon the hypnotist should lead to the conclusion that his act is not voluntary. MPC Tentative Draft No. 4, p. 122 (1955). Some authorities have taken the opposite position based on the view that the weight of opinion is that a person, while hypnotized cannot be forced to perform acts which are repugnant to him. But see Williams, Criminal Law 768 (2Ed. 1961).

5. Paragraph 2(d) is intended to be a residual category of involuntary movements which "otherwise are not a product of the effort or determination of the actor, either conscious or habitual". The idea is to parallel the restatement of Torts definition of "act" [illegible] §2 of an "external manifestation of the actor's will"

but to avoid the use of the ideal of "will". It would cover the classic situation where the actor is moved by force.

6. Subsection (3) states the conventional provision as to when omissions unaccompanied by action suffice for liability. The omission must be one of two sorts: (a) it may be made expressly sufficient by the law defining the offense. Illustrative under present law is N.J.S. 9:6-3 ("Any parent...of any child, who shall...be... neglectful of such child...shall be deemed to be guilty of a misdemeanor.") Illustrative under the Code is §230.5 ("A person commits a misdemeanor if he persistently fails to provide support which he can provide and which he knows he is legally obliged to provide to a spouse, child or other dependent.") (b) It may arise out of a duty to perform the omitted act which is otherwise imposed by law. Thus, under the Code, as well as under existing law, the duty to act may arise under some branch of the civil law. MPC Tentative Draft No. 4, p. 123. Wechsler and Michael, A Rationale of the Law of Homicide, 37 Colum. L. Rev. 701, 751 (1937). State v. O'Brien, 32 N.J.L. 169 (Sup. Ct. 1867) (Failure of railroad switch-operator to perform employment duty).

7. Possession as an Act. At common law, an indictment charging a person with having had something in his possession for a criminal purpose was bad because it did not charge an act. Williams, Criminal Law: The General Part §5, p. 8 (2nd Ed. 1961). "Procuring" or "receiving" could, however, constitute a crime because it is an act and those acts could be evidenced by possession. Ibid. Today, many statutes make bare possession criminal. See e.g., NJS 2A:94-3 (possession of burglary tools); N.J.S. 2A: 112-2("keeps...any slot machine"); N.J.S. 2A:121-3 (possession of lottery paraphernalia); N.J.S. 2A:151-41 (carrying, holding or possessing weapons); N.J.S. 2A:151-59 (possessing or carrying bombs). The problem is that of

nterpreting the word "possession" so as to make it an "act" under 2.01(1). It is important to distinguish this question, i.e., the ental element necessary to make the possession an act, from the uestion of the mens rea or mental element with which the possession ust take place to make the possession criminal. This is done by 2.01(4) which provides that possession is an act if the "possessor knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession."

The Code provision is in accord with existing New Jersey law. In State v. Labato, 7 N.J. 137 (1951) the court was faced with the issue of interpreting the term "possession" in certain gambling statutes. The question arose in the context of a double jeopardy issue:

> "Here, it was the possession of the contraband memoranda that constituted the subject of both prosecutions; and thus there was the requisite identity of offenses, even though criminal intent or 'guilty knowledge' is an element of the one statutory class but not of the other....It was suggested on the oral argument that unknowing possession is punishable under the Disorderly Persons Act, while knowing possession is the offense denounced by the Crimes Act, and so they are separate and distinct offenses....But knowing possession, as distinguished from knowledge of the illegal character of the subject matter, is equally an element of the offense rendered punishable under the Disorderly Persons Act, for otherwise seeming 'possession' by accident or the design of another, without the knowledge of the accused, would suffice; and it is not within the competency of the lawgiver to render that criminal which in its very nature is innocent and essentially nonculpable....Some act of commission or omission lies at the foundation of every crime....
>
> "'Possession'...signifies an intentional control and dominion....Animus possidendi is of the essence of possession. Such was its primary meaning under Roman law. 'Possession is the occupation of anything with the intention of exercising the rights of ownership in respect to it.' ...Under the cited statutes, 'possession' imports 'corporal possession in fact.... The elements of this possession are: First, mental attitude of the claimant, the intent to possess to appropriate to oneself; and, second, the effective realization of this attitude. Effective realization involves the relation of the claimant to other persons, amounting to a security for their

> noninterference, and the relation of the claimant to the materils thing itself, amounting to a security for exclusive use at will. All the authorities agree that an intent to exclude others must coexist with the external facts, and must be fulfilled in the external physical facts, in order to constitute possession. It is this requirement which prevents the man in whose building, or automobile, or traveling bag, or pocket, liquor found, which was surreptitiously placed there by another, from being a violator of the law.'... There must be 'conscious' possession...This definition has general acceptance....The principle is embodied in the Restatement of the Law of Torts, section 216.
>
> "Knowing possession is not to be confused with criminal intent or guilty knowledge. * * * * ....The criminal mind is not essential where the Legislature has so willed. The doer of the act may be liable criminally even though he does not know the act is criminal and does not purpose to transgress the law. But it is quite another thing to assess with criminal or penal consequences the unknowing 'possession' of contraband articles. That would constitute an abuse of the police power."(7 N.J. at 147-150 (Citations omitted)).

Labato was followed in State v. DiRienzo, 53 N.J. 360, at 369-370 (196). There the court defined "possession" as "intentional control and dominion" over stolen property which was distinguished from the State's bruden of proving guilty knowledge, i.e., that the defendant possessed the goods knowing them to be stolen:

> "'Intentional control and dominion means merely that the defendant was aware of his possession: 'One who has the physical control of a chattel with the intent to exercise such control either on his own behalf or on behalf of another is in possession of the chattel.' Restatement Second, Torts §216, comment b."

8. Other State Codes:

(a) The California Penal Code Revision Project (Tentative Draft No. 1, 1967) has substantially recommended the adoption of §2.01. In defining "voluntary act", however, rather than using the negative definition of §2.01(2), it simply states:

> "A voluntary act is one performed consciously as a result of effort or determination." (§401(1)).

(b) New York and Michigan have identical statutes (New York Penal Law §§15.00(2), 15.10 and 15.00(3) and Michigan

ev. Criminal Code (Final Draft, 1967 §§301, 310) which seem to be

ıbstantially the same as the Code but which are somewhat condensed:

> "The minimal requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform an act which he is physically capable of performing.
>
> 'Voluntary act' means a bodily movement performed consciously as a result of effort or determination, and includes the possession of property if the actor was aware of his physical possession or control thereof for a sufficient period to have been able to terminate it.
>
> 'Omission' means a failure to perform an act as to which a duty of performance is imposed by law."

(c) Illinois has adopted a substantially more condensed

ersion (Ill. Criminal Code, §§4-1 and 4-2):

> "A material element of every offense is a voluntary act, which includes an omission to perform a duty which the law imposes on the offender and which he is physically capable of performing.
>
> Possession is a voluntary act if the offender knowingly procured or received the thing possessed, or was aware of his control thereof for a sufficient time to have been able to terminate his possession."

(d) The Connecticut, Wisconsin and New Mexico Codes

do not include a provision on the act requirement.

N 2.02. GENERAL REQUIREMENTS OF CULPABILITY.

(1) Minimum Requirements of Culpability. Except as provided tion 2.05, a person is not guilty of an offense unless he acted ely, knowingly, recklessly or negligently, as the law may require, espect to each material element of the offense.

(2) Kinds of Culpability Defined.

(a) Purposely.

A person acts purposely with respect to a material element offense when:

(i) if the element involves the nature of his t or a result thereof, it is his conscious object to engage in t of that nature or to cause such a result; and

(ii) if the element involves the attendant stances, he is aware of the existence of such circumstances believes or hopes that they exist.

(b) Knowingly.

A person acts knowingly with respect to a material element offense when:

(i) if the element involves the nature of his conduct attendant circumstances, he is aware that his conduct is of that or such circumstances exist; and

(ii) if the element involves a result of his conduct, aware that it is practically certain that his conduct will cause result.

(c) Recklessly.

A person acts recklessly with respect to a material element offense when he consciously disregards a substantial and unjusti- risk that the material element exists or will result from his t. The risk must be of such a nature and degree that, considering ture and purpose of the actor's conduct and the circumstances to him, its disregard involves a gross deviation from the standard duct that a law-abiding person would observe in the actor's ion.

(d) Negligently.

A person acts negligently with respect to a material element offense when he should be aware of a substantial and unjustifiable that the material element exists or will result from his conduct. isk must be of such a nature and degree that the actor's failure rceive it, considering the nature and purpose of his conduct and ircumstances known to him, involves a gross deviation from the ard of care that a reasonable person would observe in the actor's tion.

(3) Culpability Required Unless Otherwise Provided. When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly recklessly with respect thereto.

(4) Prescribed Culpability Requirement Applies to All Material Elements. When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears.

(5) Substitutes for Negligence, Recklessness and Knowledge. When the law provides that negligence suffices to establish an element of an offense, such element also is established if a person acts purposel knowingly or recklessly. When recklessness suffices to establish an element, such element also is established if a person acts pruposely or knowingly. When acting knowingly suffices to establish an element, such element also is established if a person acts purposely.

(6) Requirement of Purpose Satisfied if Purpose Is Conditional. When a particular purpose is an element of an offense, the element is established although such purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense.

(7) Requirement of Knowledge Satisfied by Knowledge of High Probability. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.

(8) Requirement of Wilfulness Satisfied by Acting Knowingly. A requirement that an offense be committed wilfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements appears.

(9) Culpability as to Illegality of Conduct. Neither knowledge nor recklessness or negligence as to whether conduct constitutes an offense or as to the existence, meaning or application of the law determining the elements of an offense is an element of such offense unless the definition of the offense or the Code so provides.

(10) Culpability as Determinant of Grade of Offense. When the grade or degree of an offense depends on whether the offense is committed purposely, knowingly, recklessly or negligently, its grade or degree shall be the lowest for which the determinative kind of culpability is established with respect to any material element of the offense.

* * * *

§2.02 Commentary

1. This section is one of the keystones of the Code. It

iculates the general mens rea requirements for the establishment liability, i.e., the general framework for defining the terms ich define the mental element necessary for each of the Code's ecific offenses.

There is nothing like this in the existing New Jersey atutes. Mental elements for crimes are now set forth by the use in atutes of terms such as "unlawfully", "maliciously", "intentionally", c. The task of defining those terms in such a way as to give them ie meaning appropriate for the particular crime is left to the udiciary.

2. The approach of the Code is based on the view that it is ecessary for clear analysis that the question of the kind of liability equired to establish the commission of an offense be faced squarely ith respect to each material element of the crime. As indicated in 1.13, the concept of "material element", include the facts that negative defenses on the merits as well as the facts included in the definition of the crime. MPC Tentative Draft No. 4, p. 123 (1955). The example given by the Drafters of the Code shows this approach to be in accord with the modern New Jersey cases. They point out that in a murder case the prosecution must normally prove an intent to kill or to cause grievous bodily harm to establish the required culpability with respect to the element of the crime involving the result of the defendant's conduct. But if self-defense is claimed, it is enough for the prosecution to show that the defendant's belief in the necessity to act did not rest upon reasonable grounds. Thus, as to the first element purpose or knowledge (as defined in the Code) is necessary whereas as to the second element negligence is sufficient. Id. at 123-124. Our cases are in accord. State v. Hipplewith, 33 N.J. 300, at 316 (1960); State v. Fair, 45 N.J. 77, at 90 (1965); see also

tate v. Williams, 29 N.J. 27 (1959).

"Under the Code, therefore, the problem of the kind of culpability that is required for conviction must be faced squarely with respect to each material element of the offense, although the answer may in many cases be the same with respect to each such element." MPC Tentative Draft No. 4, p. 124 (1955).

3."The [Code] acknowledges four different kinds of culpability: purpose, knowledge, recklessness and negligence. It also recognizes that the material elements of offenses vary in that they may involve (1) the nature of forbidden conduct or (2) the attendant circumstances or (3) the result of conduct. With respect to each of these three types of elements, the [Code] attempts to define each of the kinds of culpability that may arise. The resulting distinctions are, we think, both necessary and sufficient for the general purposes of penal legislation.

"The purpose of articulating these distinctions in detail is, of course, to promote the clarity of definitions of specific crimes and to dispel the obscurity with which the culpability requirement is often treated when such concepts as 'general criminal intent', 'mens rea', 'presumed intent', 'malice', 'wilfullness', 'scienter' and the like must be employed." MPC Tentative Draft No. 4, p. 124 (1955).

4. "In defining the kinds of culpability a narrow distinction is drawn between acting purposely and knowingly....Knowledge that the requisite external circumstances exist is a common element in both conceptions. But action is not purposive with respect to the nature or the result of the actor's conduct unless it was his conscious object to perform an action of that nature or to cause such a result. The distinction is no doubt inconsequential for most purposes of liability;

acting knowingly is ordinarily sufficient. But there are areas where the discrimination is required and is made under existing law, using the awkward concept of 'specific intent'." Id. at 124-125.

The New Jersey cases now embody such a concept of "purposely" although they do not employ such a term. Examples are State v. DiPaolo, 34 N.J. 279, 295 (1961) ("We are here concerned with the category described [in the murder statute] as a willful, deliberate and premeditated killing....As settled by judicial construction, the first element is premeditation, which consists of the conception of the design or plan to kill. Next comes deliberation. The statutory word 'deliberate' does not mean 'willful' or 'intentional' as the word is frequently used in daily parlance. Rather it imports 'deliberation' and requires a reconsideration of the design to kill, a weighing of the pros and cons with respect to it. Finally, the word 'willful' signifies an intentional execution of the plan to kill which had been conceived and deliberated upon."); State v. King, 37 N.J. 285 (1962); State v. Weleck, 10 N.J. 355 at 373 (1952) ("We recognize that to be guilty of an attempt to commit a crime a defendant must have intended to commit the crime itself."); State v. Davis, 38 N.J.L. 176 (Animus Furandi for larceny: "...it has been uniformly held that the felonious intent must manifest a purpose to deprive the owner wholly of his property."); State v. Fladger, 94 N.J. Super. 205 (App. Div. 1967) (obtaining money under false pretenses "with intent to cheat or defraud" under N.J.S. 2A:111-1).

5. "A broader discrimination is perceived between acting either purposely or knowingly and acting recklessly. As the Code uses the term, recklessness involves conscious risk creation. It resembles acting knowingly in that a state of awareness is involved but the awareness is of risk, that is of probability rather than certainty; the matter is contingent from the actor's point of view. Whether the

k relates to the nature of the actor's conduct or to the existence the requisite attendant circumstances or to the result that may ue is immaterial; the concept is the same. The [Code] requires, vever, that the risk thus consciously disregarded by the actor be bstantial and unjustifiable; even substantial risks may be created thout recklessness when the actor seeks to serve a proper purpose.... cordingly, to aid the ultimate determination, the [Code] points xpressly to the factors to be weighed in judgment: the nature and egree of the risk disregarded by the actor, the nature and purpose of is conduct and the circumstances known to him in acting."

"Some principle must articulated, however, to indicate what final judgment is demanded after everything is weighed. There is no way to state this value-judgment that does not beg the question in the last analysis; the point is that the jury must evaluate the conduct and determine whether it should be condemned. The [Code], therefore, proposes that this difficulty be accepted frankly and the jury asked if the defendant's conduct involved 'culpability of high degree'. The alternative suggested asks if it 'involves a gross deviation from proper standards of conduct'. This formulation is designed to avoid the difficulty inherent in defining culpability in terms of culpability, but the accomplishment seems hardly more than verbal; it does not really avoid the tautology or beg the question less. It may, however, be a better way to put the issue to a jury, especially as some of the conduct to which this section must apply may not involve great moral culpability, even when the defendant acted purposely or knowingly, as in the violation of some minor regulatory measure." MPC Tentative Draft No. 4, pp. 125-126 (1955).

As ultimately approved, the Code uses, as the final standard of judgment for recklessness, that the risk assumed

"must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person, would observe in the actor's situation". MPC §2.02(2)(c).

There are New Jersey cases which use language which seems to ecognize the distinction drawn by the Code between "knowingly" and recklessly" based on the degree of risk that the material element will ccur. It seems clear, however, that it is impossible to exactly quate our case definitions with those of the Code. For example, in tate v. Gooze, 14 N.J. Super. 277 (App. Div. 1951), the Court interreted a statute which required that the defendant act "carelessly and eedlessly in willful and wanton disregard of the rights and safety of others.":

"Generally, the negligence required to support a criminal charge for a death caused thereby is more than ordinary common law negligence and is something more and greater in degree than negligence to impose civil liability...'In this second class of cases the rule is a broad one, as it regards as criminal negligence any act or omission done or left undone, as the case may be, in reckless disregard of the life or safety of another'...Such negligence is often described as 'gross' negligence, the word 'gross' in this collocation implying an indifference to consequences...'The statute [in question] according to its plain words, makes the act of operating a motor vehicle in a way 'so that the lives or safety of the public might be endangered' a criminal offense. It is that act which is penalized. The intent with which the act is done is an immaterial factor.' Gross negligence includes a 'wanton or reckless disregard of the rights and safety of others.'...'To establish a willful or wanton injury it is necessary to show that one with knowledge of existing conditions, and conscious from such knowledge that injury will likely or probably result from his conduct, and with reckless indifference to the consequences, consciously and intentionally does some wrongful act or omits to discharge some duty which produces the injurious result...Our courts make a distinction between gross negligence and willful and wanton disregard of the rights and safety of others. To constitute willfulness, there must be design, purpose, intent to do wrong and inflict injury. To constitute wantonness, the party doing the act, or failing to act, must be conscious of his conduct, and, without having the intent to injure, must be conscious, from his knowledge of existing circumstances and conditions that his conduct will naturally and probably result in injury....To constitute willful or wanton misconduct, the wrongful act willfully done must be 'of such a nature that the injury complained of is the obviously natural result

to be expected therefrom. This is so because the law presumes that a wrongdoer intends what he knows, or should know, to be the natural consequence of his wrongful act'...'it is clear as is said by Dr. Wharton, in his work on Criminal Law (section 1003) that where death is the result of an occurrence unanticipated by the defendant, but which arose from his negligence or inattention, his criminal responsibility depends on whether or not the injury which casued the death was the regular, natural and likely consequence of defendant's conduct. If it was, then the defendant is subject to indictment. If it was not, he cannot properly be charged with a penal offense.'" 14 N.J. Super. at 282-283 (Citations omitted)

See also In Re Lewis, 11 N.J. 217 (1953) which, in interpreting the same statute, spoke of the requirement being of a

"high degree of probability of causing harm because of conditions known....It is not necessary to show ill will toward, or a positive intent to injure, another in order to estalbish that a motor vehicle was driven in willful or wanton disregard of the rights or safety of others. True, conduct which is willful or wanton, unlike conduct which is merely negligent, does import intent....However, the element of intent to harm is supplied by a constructive intention as to consequences, which entering into the intentional act which produces the harm...the law implies to the actor, so that conduct which otherwise would be merely negligent becomes, by reason of reckless disregard of the sagety of others, a willful or wanton wrong....The emphasis is upon the reckless indifference to consequences of the intentional act of driving the motor vehicle in the face of known circumstances presenting a high degree of probability of producing harm." (11 N.J. at 221-222).

See also State v. Williams, 29 N.J. 27, 40 (1959). There, discussing criminal liability for the excessive use of force by a police officer in making an arrest, the Court said:

"'Negligence, to be criminal, must be reckless and wanton and of such character as shows an utter disregard for the safety of others under circumstances likely to cause death' ... * * * When the force exceeds what reasonably appeared necessary, the forbidden conduct is shown but an excess as such is consistent with an honest error of judgment, and no public interest would be served by stamping as a criminal a man who, compelled to act, merely errs in his estimate. The force should be excessive to a point where some culpable attitude is evident. There should appear...'a wanton abuse'. * * * And in the context of an officer obliged to overcome

resistance, and to injure to the extent reasonably necessary to that end, wantonness means either a consciousness of the excessiveness of the force or such excess as reveals an utter disregard of the rights of the offender, as distinguished from a good faith but erroneous estimate of what was needed."

The New Jersey cases defining "knowingly" or "with knowledge", used in a criminal statute, are roughly in accord with the inition of "knowingly" found in §2.02(2)(b) and as supplemented by 02(7) (to be discussed below) of the Code. See State v. Doto, N.J. 397 (1954) ("one who willfully swears falsely" interpreted "knowingly"); State v. Sullivan, 24 N.J. 18 (1957); State v. siak, 16 N.J. Super. (App. Div. 1951) (receiving stolen goods knowing em to have been stolen); State v. Goldman, 65 N.J.L. 394 (Sup. Ct. 1900); ate v. Loomis, 89 N.J.L. 8 (Sup. Ct. 1916) affirmed 90 N.J.L. 216 E.&A. 1917); State v. D'Adame, 82 N.J.L. 315 (Sup. Ct. 1912) affirmed N.J.L. 386 (E.&A. 1913).

6. "The fourth kind of culpability is negligence. It is istinguished from acting purposely, knowingly or recklessly in that it oes not involve a state of awareness. It is the case where the actor reates inadvertently a risk of which he ought to be aware, considering its nature and degree, the nature and the purpose of his conduct and the care that would be exercised by a reasonable person in his situation. Again, however, it is quite impossible to avoid tautological articulation of the final question. The tribunal must evaluate the actor's failure of perception and determine whether, under all the circumstances, it was serious enough to be condemned. Whether that finding is verbalized as 'substantial culpability', as the [Code] proposes or as 'substantial deviation from the standard of care that would be exercised by a reasonable man under the circumstances', as the alternative would put it, presents the same problem here as in the case of recklessness. The jury must find fault and find it was substantial; that is all

hat either formulation says or, we believe, that can be said in egislative terms.

"A further point merits attention: the [Code] invites onsideration of the 'care that would be exercised by a reasonable erson in his [i.e., the actor's situation'.] There is an inevitable mbiguity in 'situation'. If the actor were blind or if he had just uffered a blow or experienced a heart attack, these would be under resent law. But the heredity, intelligence or temperament of the ctor would not now be held material in judging negligence; and could ot be without depriving the crtierion of all its objectivity...The Code] is not intended to displace discriminations of this kind, it is lesigned to leave the issue to the courts.

"Of the four kinds of culpability defined, there is, of course, least to be said for treating negligence as a sufficient basis for imposing criminal liability. Since the actor is inadvertent by hypotheses, it has been argued that the 'threat of punishment for negligence must pass him by, because he does not realize that it is addressed to him.'....So too it has been urged that education or corrective treatment not punishment is the proper social method for dealing with persons with inadequate awareness, since what is implied is not a moral defect....We think, however, that this is to over-simplify the issue. Knowledge that conviction and sentence, not to speak of punishment, may follow conduct that inadvertently creates improper risk supplies men with an additional motive to take care before acting, to use their faculties and draw on their experience in gauging the potentialities of contemplated conduct. To some extent, at least, this motive may promote awareness and thus be effective as a measure of control. Certainly legislators act on this assumption in a host

situations and it seems to us dogmatic to assert that they are
lly wrong. Accordingly, we think that negligence, as here defined,
not be wholly rejected as a ground of culpability which may suffice
r purposes of penal law, though we agree that it should not be
nerally deemed sufficient in the definition of specific crimes, and
at it often will be right to differentiate such conduct for the purposes
sentence. The content of the concept must therefore, be treated
this stage." MPC Tentative Draft No. 4, pp. 126-127 (1955).

As ultimately approved, the Code embodied a variation of the
ternative formulation of the standard, i.e., "a gross deviation
om the standard of care that a reasonable person would observe in
e actor's situation." §2.02(2)(d).

The New Jersey cases recognize a difference between civil
d criminal negligence both according to the risk assumed and according
the defendant's awareness of the risk. There does not appear to be
y New Jersey case which would find criminal liability based upon
egligence as defined by the Code. Our cases stress the fact of
he defendant's consciousness or awareness as being the element giving
lpability to his conduct. State v. Gooze, 14 N.J. Super. 277, at
81 (App. Div. 1951); State v. Williams, 29 N.J. 27 (1959); State v.
einer, 41 N.J. 21, 25-26 (1963).

7. "Paragraph (3) provides that unless the kind of culpability
fficient to establish a material element of an offense has been prescribed
y law, it is established if a person acted purposely, knowingly or
ecklessly with respect thereto. This accepts as the basic norm what
enally is regarded as the common law position. ...More importantly,
t represents the most convenient norm for drafting purposes, since
hen purpose or knowledge is to be required, it is normal to so state;

and negligence - [illegible]

liability." MPC Tentative Draft No. 4, p. 127 (1955).

8. "Paragraph (4) seeks to assist in resolution of a common ambiguity in penal legislation, the statement of a particular culpability requirement in the definition of an offense in such a way that it is unclear whether the requirement applies to all the elements of the offense or only to the element that it immediately introduces. ....

The [Code] proceeds in the view that if a particular kind of culpability has been articulated at all by the legislature, as sufficient with respect to any element of the offense, the normal probability is that it was designed to apply to all material elements. Hence this construction is required, unless a 'contrary purpose plainly appears'. When a distinction is intended, as it often is, proper drafting ought to make it clear." MPC Tentative Draft No. 4, p. 129 (1955).

9. "Paragraph (5) establishes that when negligence suffices for liability, purpose, knowledge or recklessness are sufficient a fortiori, that purpose and knowledge similarly substitute for recklessness and purpose substitutes for knowledge. Thus it is only necessary to articulate the minimal basis of liability for the more serious bases to be implied." Ibid.

10. "Paragraph (6) provides that a requirement of purpose is satisfied when purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense... This is we think a statement and rationalization of the present law." MPC Tentative Draft No. 4, p. 129 (1955). No New Jersey cases were found. The provision is in accord with the law elsewhere. Perkins, Criminal Law, pp. 579-582 (2nd Ed. 1969).

11. Subsection (7) deals with a problem known as "willful blindness" or "connivance", i.e., the situation where the defendant is aware of the probable existence of a material fact but does not satisfy himself that it does not in fact exist. The issue is whether such cases should be viewed as acting knowingly or merely recklessly.

"The [Code] proposes that the case be viewed as one of acting knowingly when what is involved is a matter of existing fact, but not when what is involved is the result of the defendant's conduct, necessarily a matter of the future at the time of acting. The position reflects what we believe to be the normal policy of criminal enactments which rest liability on acting 'knowingly', as is so commonly done. The inference of 'knowledge' of an existing fact is usually drawn from proof of notice of substantial probability of its existence, unless the defendant establishes an honest, contrary belief. The [Code] solidifies this usual result and clarifies the terms in which the issue is submitted to the jury." MPC Tentative Draft No. 4, p. 130 (1955).

The proposition that willful blindness satisfies for knowledge is established in our cases. State v. Jusiak, 16 N.J. Super. 177, 181 (App. Div. 1951); State v. Loomis, 89 N.J.L. 8 (Sup. Ct. 1916) affirmed 90 N.J.L. 216 (E.&A. 1917); Cf., State v. D'Adame, 84 N.J.L. 386 (E.&A. 1912) affirming 82 N.J.L. 315 (Sup. Ct. 1913) and State v. Doto, 16 N.J. 397 (1954).

12. "One of the most common terms in statutory crimes to designate the culpability requirement is 'wilfully'. Paragraph (8) equates the meaning of the term to that of acting knowingly. In this respect it follows many judicial decisions as well as legislation in a number of the states... * * *

"It is recognized, however, that in special situations courts

point is involved there is no need to state a special principle; the legal element involved is simply an aspect of the attendant circumstances, with respect to which knowledge, recklessness or negligence, as the case may be, is required for culpability by paragraphs (1) to (3). The law involved is not the law defining the offense; it is some other legal rule that characterizes the attendant circumstances that are material to the offense. If, on the other hand, no legal element is involved in the material attendant circumstances, there is no basis for contending that ignorance of such element has a defensive import; it is simply immaterial.

"The paragraph recognizes, however, that there may be special cases where knowledge of the law defining the offense should be an element of the offense i.e., where only conscious violation of the law, in the sense of an awareness that one's conduct is a violation of the law ought to engender a defense. Such a result may be brought about directly by the formulation of the definition of the crime, e.g., explicitly requiring awareness of a regulation, violation of which is denominated an offense. It also may be brought about by a general provision of the Code, as in the special circumstances dealt with by section 2.04(3). In either case, the result is exceptional and arises only when the governing law 'plainly so provides'." MPC Tentative Draft No. 4, p. 313 (1955).

See Cutter ads. State, 36 N.J.L. 125 (Sup. Ct. 1873) and discussion in connection with §2.04.

14. "Paragraph (10) is addressed to the case where the grade or degree of an offense is made to turn on whether it was committed purposely, knowingly, recklessly or negligently, a common basis of discrimination for the purposes of sentence. The position taken is that when distinctions of this kind are made, the grade or degree of a [illegible] ought to be the lowest for which the determinative kind

of culpability is established with respect to any material element of the offense. The theory is, of course, that when the kinds of culpability involved vary with respect to different material elements, it is the lowest common denominator that indicates the quality of the defendant's conduct.

"The best illustration is afforded by the case of homicide where an intentional killing is normally treated as an offense of higher degree than a homicide by negligence. But even though the actor meant to kill, he may have acted only negligently with respect to another material elementof the offense, e.g., he may have deemed the homicide to be in necessary self-defense or necessary to prevent a felony or to effect arrest, without sufficient ground for such belief. For purposes of sentence, such a homicide ought to be viewed as reckless or as negligent, since recklessness or negligence is all that is established with respect to justifying elements as integral to the offense as the killing itself. A person who believes that justifying facts exist but has been reckless or negligent in so concluding presents from the point of view of sentence the same type of problem as a person who acts recklessly or negligently with respect to the creation of a risk of death. * * * The Code formulation gives general application to the point that is involved." MPC Tentative Draft No. 4, p. 131 (1955).

This provision is a basic one to the Code. It has important meaning both for the definition of offenses and for the definition of the justification defenses. In that regard, the question of its adoption is extensively considered in connection with Article 3, below. In one instance, which may have much broader implications, our Supreme Court has adopted this theory. State v. Williams, 29 N.J. 27 (1959).

15. Variations on the various terms of culpability defined in §2.02 are defined in §1.13(11) through (16).

16. Other State Codes:

(a) New York has adopted a condensed variation of the Code's provisions. Connecticut has copied its provision from New York. Connecticut Penal Code §§4 and 6 (1969). Michigan has done the same with minor variations. Michigan Revised Penal Code (Final Draft 1967) §§305 and 315. The New York Code, in §§15.05 and 15.15 provides:

§15.05 Culpability; definitions of culpable mental states

The following definitions are applicable to this chapter:

1. 'Intentionally'. A person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct.

2. 'Knowingly'. A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of such nature or that such circumstance exists.

3. "Recklessly'. A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but in unaware thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto.

4. 'Criminal negligence'. A person acts with criminal negligence with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

§15.15 Construction of statutes with respect to culpability requirements.

"1. When the commission of an offense defined in this chapter, or some element of an offense, requires a particular culpable mental state, such mental state is ordinarily designated in the statute defining the offense by use of the terms 'intentionally', 'knowingly', 'recklessly' or 'criminal negligence', or by use of terms, such as 'with intent to defraud' and 'knowing it to be false', describing a specific kind of intent or knowledge. When one and only one of such terms appears in a statute defining an offense, it is presumed to apply to every element of the offense unless an intent to limit its application clearly appears.

2. Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of such offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such culpable mental state. A statute defining a crime, unless clearly indicating a legislative intent to impose strict liability, should be construed as defining a crime of mental culpability. This subdivision applies to offenses defined both in and outside this chapter."

(b) The California Penal Code Revision Project has, ssence, recommended adoption of §2.02. (Tentative Draft No. 1, 67, §§403-406). The Illinois Criminal Code adopts §2.02(1),(2),),(4) and (9) of the Code using somewhat different terminology.

SECTION 2.03. CAUSAL RELATIONSHIP BETWEEN CONDUCT AND RESULT; DIVERGENCE BETWEEN RESULT DESIGNED OR CONTEMPLATED AND ACTUAL RESULT OR BETWEEN PROBABLE AND ACTUAL RESULT.

(1) Conduct is the cause of a result when:

(a) it is an antecedent but for which the result in question would not have occurred; and

(b) the relationship between the conduct and result satisfies any additional causal requirements imposed by the Code or by the law defining the offense.

(2) When purposely or knowingly causing a particular result is an element of an offense, the element is not established if the actual result is not within the purpose or the contemplation of the actor unless:

(a) the actual result differs form that designed or contemplated, as the case may be, only in the respect that a different person or different property is injured or affected or that the injury or harm designed or contemplated would have been more serious or more extensive than that caused; or

(b) the actual result involves the same kind of injury or harm as that designed or contemplated and is not too remote or accidental in its occurrence to have a [just] bearing on the actor's liability or on the gravity of his offense.

(3) When recklessly or negligently causing particular result is an element of an offense, the element is notestablished if the actual result is not within the risk of which the actor is aware or, in the case of negligence, of which he should be aware unless:

(a) the actual result differs from the probable result only in the respect that a different person or different property is injured or affected or that the probable injury or harm would have been more serious or more extensive than that caused; or

(b) the actual result involves the same kind of injury or harm as the probable result and is not too remote or accidental in its occurrence to have a [just] bearing on the actor's liability or on the gravity of his offense.

(4) When causing a particular result is a material element of an offense for which absolute liability is imposed by law, the element is not established unless the actual result is a probable consequence of the actor's conduct.

* * * * *

§2.03 Commentary

1. This section is concerned with offenses which are so defined that causing a particular result is a material element of the

to define the causality relationship which should generally be required to establish liability for such offenses and also to deal with inevitable problems incident to variations between the result of the conduct and the result sought or contemplated by the actor or probable under the circumstances of the action.

2. The approach set forth here is a substantial change in the way in which these problems would be faced from that now in use. At the present time, the law is that the defendant's conduct must be both the actual cause and the proximate cause of the result with which he has been charged. As to actual causation, see State v. Weiner, 41 N.J. 21, at 36 (1963) (Conviction of defendant-doctor for manslaughter of twelve patients reversed for failure of prosecution to prove which of various theories of alleged criminally negligent acts actually caused the death of the patients) As to proximate causation, see State v. Reitze, 86 N.J.L. 407 (Sup. Ct. 1914) (Death must be "the natural and probable result....criminal responsibility depends upon whether or not the injury which caused the death was the regular, natural and likely consequence of defendant's conduct.") The latter concept, proximate cause, has presented enormously difficult problems because of the vagueness of the term. See State v. Reitze, supra; (Tavern owner not guilty of manslaughter of customer to whom he sold liquor while knowing him to be intoxicated. Death was from a fall outside tavern); State v. Loray, 41 N.J. 131 (1963) (Felony-murder prosecution arising out of a mugging-robbery in which decedent died of a heart attack. Defendant's conduct characterized as a "precipitating" and "contributing" cause); State v. Meyers, 7 N.J. 465 (1951) (Murder prosecution arising out of death of wife when she jumped into river on defendant-husband's command. Decedent's act was a dependent one

rather than a voluntary one so that the chain of causation was not broken); State v. Diamond, 16 N.J. Super. 26 (App. Div. 1951) (Effect of contributory negligence of decedent upon liability of defendant in an automobile manslaughter prosecution is that it may destroy proximate causation.) See generally Perkins, Criminal Law 690-738 (2nd Ed. 1969).

3. Rather than attempt to systematize these varient rules, the Code undertakes a fresh appraoch on what appear to be the central issues. MPC Tentative Draft No. 4, p. 132 (1955). The following is the Code's Drafters' reasoning for the approach taken:

> "Paragraph (1)(a) treats but-for cause as the causality relationship that normally should be regarded as sufficient, in the view that this is the simple, pervasive meaning of causation that is relevant for purposes of penal law. When concepts of 'proximate causation' disassociate the actor's conduct and a result of which it was a but-for cause, the reason always inheres in the judgment that the actor's culpability with reference to the result, i.e., his purpose, knowledge, recklessness or negligence, was such that it would be unjust to permit the result to influence his liability or the gravity of the offense of which he is convicted. Since this is so, the draft proceeds upon the view that problems of this kind ought to be faced as problems of the culpability required for conviction and not as problems of 'causation'.
>
> Paragraph (1)(b) contemplates, however, that this general position may prove unacceptable in dealing with particular offenses. In that event, additional causal requirements may be imposed explicitly....
>
> Paragraphs (2) and (3) are drafted on the theory stated. They assume that liability requires purpose, knowledge, recklessness or negligence with respect to the result which is an element of the offense and deal explicitly with variations between the actual result and that designed, contemplated or threatened, as the case may be, stating when the variation is considered immaterial.
>
> Paragraph (2) is addressed to the case there the culpability requirement with respect to the result is purpose or knowledge, i.e., where purposely or knowingly causing a specified result is a material element of the offense. Here if the actual result is not within the purpose or the contemplation of the actor, the culpability requirement is not established except in the circumstances set forth in subparagraphs (a) and (b).

"Sub-paragraph (a) deals with situation where the actual result differed from the result designed or contemplated only in the respect that a different person or different property was injured or affected or that the injury or harm designed or contemplated was more serious or more extensive than that caused. Such variations between purpose or contemplation and result are made immaterial, as almost certainly would be the view under existing law.

Sub-paragraph (b) deals with the situation where the actual result involved the same kind of injury or harm as that designed or contemplated but the precise injury inflicted was different or occurred in a different way. Here the [Code] makes no attempt to catalogue the possibilities, e.g., to deal with the intervening or concurrent causes, natural or human; unexpected physical conditions; distinctions between the infliction of mortal or non-mortal wounds. It deals only with the ultimate criterion by which the significance of such possibilities ought to be judged. [i.e.] ...that the question to be faced is whether the actual result is 'too accidental in its occurrence to have a just bearing on the actor's liability or on the gravity of his offense'. ...

It may be useful in appraising either treatment of the problem to note that what will usually turn on the determination will not be the criminality of a defendant's conduct but rather the gravity of his offense. Since the actor, by hypothesis, has sought to cause a criminal result, he will be guilty of some crime under a well-considered penal code even if he is not held for the actual result....Thus the issue in penal law is very different than in torts. Only in form is it, in penal law, a question of the actor's liability. In substance, it is a question of the severity of sentence which the Court is authorized or obliged to impose. Its practical importance thus depends on the disparity in sentence for the various offenses that may be involved, e.g., the sentences for an attempted and completed crime.

How far [a] Code ought to attribute importance in the grading of offenses to the actual result of conduct, as distinguished from results attempted or threatened, presents an issue of some difficulty which is of general importance in the Code. It may be said, however, that distinctions of this order are to some extent essential, at least when the severest sanctions are involved. For juries will not lightly find convictions that will lead to the severest types of sentence unless the resentments caused by the infliction of important injuries have been aroused. Whatever abstract logic may suggest, a prudent legislator cannot disregard these facts of life in the enactment of a penal code.
* * *

Viewed in these terms, it may be said that...the...

formulation should suffice for the exclusion of those situations where the actual result is so remote from the actor's purpose or contemplation that juries can be expected to believe that it should have no bearing on the actor's liability for the graver offense or, stated differently, on the gravity of the offense of which he is convicted. * * *

The advantage of putting the issue squarely to the jury's sense of justice is that it does not attempt to force a result which the jury may resist. It also leaves the principle flexible for application to the infinite variety of cases likely to arise. * * *

Paragraph (3) deals with the case where recklessness or negligence is the required kind of culpability and where the actual result is not within the risk of which the actor was aware, or, in the case of negligence, of which he should have been aware. The principles proposed to govern are the same as in the case where purposely or knowingly causing the specified result is the material element of the crime. If the actual result differed from the probable result only in the respect that a different person or different property was injured or affected, the variation is declared to be inconsequential. In other situations, if the actual result involved the same kind of injury or harm as the probable result, the question asked is whether it was too accidental in its occurrence to have just bearing on the actor's liability or on the gravity of his offense. * * * The governing considerations are the same as in the situation dealt with by paragraph (2)." (MPC Tentative Draft No. 4, pp. 132-135 (1955)).

4. In the Secretary's opinion, the adoption of the approach set forth in the Code will have a much greater effect upon the decisional process than it is likely to have upon the result in specific cases. For example, in the Loray case, supra, the issue to be put to the jury under §2.03(2)(b) would be whether the death of an elderly robbery-muggery victim from a heart attack during the crime (since it is the same kind of injury as that designed) was "too remote to have a just bearing on the gravity of [the actor's] offense." This would replace the question now put to the jury of whether the death was "proximate cause" of the attack in that it was a "precipitating" and "contributing" natural and probable consequence of it. 41 N.J. at 140-141. A similar analysis applied to the Reitze and Meyers cases show the same

result. Reitze would, in all likelihood, result in a judgment of acquittal on the ground that the fall resulting in death was too remote or accidental to have a just bearing on the actor's liability. The death in Meyers of the wife could be found by the jury not to be too remote or accidental in the light of the attack by the defendant upon her.

5. The rule in Section (2)(a) and (3)(a) as to the case of an unintended victim is, as stated by the Drafters of the Code, in accord with existing New Jersey law. State v. Gallagher, 83 N.J.L. 321 (Sup. Ct. 1912).

6. Other State Codes:

(a) The Michigan Study has recommended the adoption of §2.03, except that subsection (4) is omitted. See Michigan, Revised Criminal Code (Final Draft, 1967) §320. California has reorganized the section but has recommended adoption of it substance. California Penal Code Revision Project (Tentative Draft No. 2, 1968), §408.

(b) Connecticut, New York, Wisconsin, Illinois and New Mexico have all eliminated any causation section. This would leave the common-law principles in effect.

SECTION 2.04. IGNORANCE OR MISTAKE.

(1) Ignorance or mistake as to a matter of fact or law is a defense if:

(a) the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense; or

(b) the law provides that the state of mind established by such ignorance or mistake constitutes a defense.

(2) Although ignorance or mistake would otherwise afford a defense to the offense charged, the defense is not available if the defendant would be guilty of another offense had the siutation been as he supposed. In such case, however, the ignorance or mistake of the defendant shall reduce the grade and degree of the offense of which he may be convicted to those of the offense of which he would be guilty had the situation been as he supposed.

(3) A belief that conduct does not legally constitute an offense is a defense to a prosecution for that offense based upon such conduct when:

(a) the statute or other enactment defining the offense is not known to the actor and has not been published or otherwise reasonably made available prior to the conduct alleged; or

(b) he acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in (i) a statute or other enactment; (ii) a judicial decision, opinion or judgment; (iii) an administrative order or grant of permission; or (iv) an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense.

(4) The defendant must prove a defense arising under Subsection (3) of this Section by a preponderance of evidence.

* * * *

§2.04 Commentary

1. Mistake of Fact. This section states the traditional view that a mistake of fact may constitute a defense to a charge when it negatives the existence of an essential mental state required for the crime or when it establishes a mental state which is recognized by the law as a defense to the crime. See MPC Tentative Draft No. 4, p. 135 (1955). This would be true, of course, even if no special formulation were added to the Code:

"To put the matter this way is not, of course, to say anything that would not otherwise be true, even if no provision on the subject should be made. As Glanville Williams summarized the matter, the rule relating to mistake 'is not a new rule; and the law could be stated equally well without reference to mistake....It is impossible to assert that a crime requiring intention or recklessness can be committed although the accused laboured under a mistake that negatived the requisite intention or recklessness. Such an assetion carries its own refutation.' Criminal Law p. 137. This obvious point, is, however, sometimes overlooked in general formulations purporting to require that mistake be reasonable if it is to exculpate, without regard to the mode of culpability required to commit the crime....

It is true of course, that whether recklessness or negligence suffices as a mode of culpability with respect to a given element of an offense is often raised for the first time in dealing with a question of mistake....The fact that this may happen emphasizes the importance of perceiving that the question relates to the underlying rule as to the kind of culpability required with respect to the particular element of the offense involved." Id. at 136-137.

To illustrate these propositions see the following New Jersey cases: State v. Fair, 45 N.J. 77, at 90 (1965) (one who intervenes in a struggle under an honest and reasonable, although erroneous, belief that he is protecting another who he assumes is being unlawfully assaulted is exonerated from a charge of murder because it negates the existence of the essential element of malice); State v. Chiarello, 69 N.J. Super. 479 (App. Div. 1961) (same); State v. Bess, 53 N.J. 10 (1968); State v. Hipplewith, 33 N.J. 300 at 316 (1960) (same, self-defense); State v. Hudson County News Co., 35 N.J. 284 (1961); State v. Moore, 105 N.J. Super. 567 (App. Div. 1969) (attempt to prove reasonable mistake as to girl's age in carnal abuse prosecution rejected because no mens rea is necessary as to that element); State v. Koettgen, 89 N.J.L. 678 (E.&A. 1916) (statute interpreted as not requiring mens rea as to age of persons to whom defendant served liquor; proof of his reasonable belief thereto excluded.)

2. The Code does however, make two changes in existing law

as to mistake of fact. In the first place, under existing law, the mistake must be "reasonable". See State v. Fair, supra; State v. Chiarello, supra; State v. Bess, supra; State v. Hipplewith, supra. The Code does not set forth such a requirement. See Article III and the Introductory Note to that Article, infra. It should, however, be remembered that, under this Section, the mistake may be of such a nature as to demonstrate negligence or recklessness and, therefore, not be a defense to a crime requiring only one of those degrees of culpability.

3. The second change is found in §2.04(2). Mistake dogma is frequently stated as requiring that the mistake must be of such a nature as to make the conduct non-criminal. If it is not, the mistake does not excuse at all. This doctrine was first established in sex cases in which the courts seemed to adopt the position that a defendant who engaged in this immoral conduct ran his risk of being guilty of whatever the facts ultimately demonstrate regardless of his culpability. When the defendant would be guilty of some offense under his view of the facts, it is possible to (a) find him guilty of the graver offense, (b) find him guilty of the lesser offense, i.e., the offense of which he would have been guilty were the facts as he believed them, (c) find him guilty of the greater offense but limit sentence to the lesser, or (d) find him guilty of an attempt to commit the lesser offense. The Code alleviates the existing rule by stating that the defendant cannot be found guilty of the greater offense which is negated by the mistake but can be convicted of the offense which would have been committed if the facts had been as he mistakenly believed them to be, i.e., the third alternative, above. MPC Tentative Draft No. 4, pp.17-137 (1955) It is believed that there is no notice problem even where the lesser offense is not an included one. Id. at 137-138.

4. Mistake of Law. A great deal of confusion exists on
subject because of two types of situations are frequently
cussed under the same heading. It is important to distinguish
ween ignorance of the legal standard established by the statute the
endant is alleged to have violated and a mistake as to some external
y of law which may destroy the mens rea for the crime charged. The
ic proposition is that the accused need not be aware of the standard
ablished by criminal statute he is charged with having violated.
refore, ignorance of, or mistake about, that statute does not effect
culpability requirement nor constitute a defense. This is the
e of §2.02(9), discussed previously in the Commentary to that
tion. This is our law. State v. Hudson County News Co., 35 N.J.
(1961); State v. DeMeo, 20 N.J. 1 (1955); Morss v. Forbes, 24 N.J.
(1957); State v. Western Union Telegraph Co., 12 N.J. 468, at
-492 (1953); State v. Halstead, 41 N.J.L. 552 (E.&A. 1879); Cutter
s. State, 36 N.J.L. 125 (Sup. Ct. 1873).

Where, however, the crime requires mens rea and the mistake
ignorance negatives the particular culpability requirement under that
atute, the mistake or ignorance excuses. Into this category, fall
e "specific intent" cases ("purposely" under the Code) where a mistake
ignorance of the law destroys that intent. Cutter ads. State, supra.
enerally, such ignorance or mistake must be reasonable. However,
here there is no culpability requirement as to the element about
hich a mistake was made, a belief, no matter how reasonable, cannot
xcuse. In the leading case of State v. Long, 5 Terry 262 65 A2d 489
Sup. Ct. Del. 1949) the court held that this rule did not apply where
he defendant had, in good faith, consulted an attorney about the
alidity of his out-of-state divorce and thereby could demonstrate
y extrinsic proof his belief. The New Jersey Supreme Court refused

apply Long in a bigamy prosecution in which a Mexican mailorder divorce was disclosed to the clerk charged with issuing marriage license. State v. DeMeo, 20 N.J. (1955). The basis of Justice Jacobs' opinion for the Court is unclear and could have been (1) a refusal to expand the common law rule; (2) a belief that it was reasonable to believe that a mailorder Mexican divorce was valid; (3) a failure to equate the court clerk in DeMeo with the lawyer in Long.

The manner of approaching this areas is to equate the mistake of law to the mistake of fact. If the mistake, reasonable or unreasonable, negatives the culpability requirements of the criminal statute it is a defense regardless of what those requirements are. It would not be limited to "specific intent" situations. This constitutes a material enlargement of the defense. Of course, if another crime's requirements are met had the law been what the defendant mistakenly believed it to be, he would be guilty of that crime. §2.04(2)

5. The Code also estalbishes three exceptions to the rule of §2.02(9) that ignorance of the legal standard of the crime with which defendant is charged does not excuse: (a) It is a defense where the criminal statute itself provides that knowledge of its existence is necessary. §2.02(9). State v. Cutter, supra, is in accord. (b) It is a defense where the criminal statute itself has not been published nor made available. §2.04(3)(a). (c) It is a defense where the defendant relies upon some official pronouncement that his conduct was not criminal. §2.04(3)(b). All three of these categories dealt with in the formulation are said to involve situations where the act charged is consistent with entire law-abidingness of the actor, where the possibility of collusion is minimal and a judicial determination of the reasonableness of the belief in legality should not present

substantial difficulty. MPC Tentative Draft No. 4, p. 138 (1955). While section (3) would clearly work a change in New Jersey law, there are precedents which lead to the conclusion that it is not entirely out of step with our State's judicial thought. In 1873, the Supreme Court stated in Cutter ads. State, 36 N.J.L. 125, that the legal maxim that "ignorance of the law does not excuse" is subject to certain important exceptions, i.e., where the law is not settled, or is obscure and where the guilty intention being a necessary constituent of the particular offense, is dependent on a knowledge of the law. Further,

> "Where the act done is malum in se, or where the law which has been infringed was settled and plain, the maxim, in its rigor, will be applied; but where the law is not settled, or is obscure, and where the guilty intention, being a necessary constituent of the particular offense, is dependent on a knowledge of the law, this rule, if enforced, would be misapplied.

And in State v. DeMeo, supra, a bigamy prosecution, the court followed the traditional view that a mistake as to the right to remarry would not excuse but then went on to

> "expressly withhold determination as to the availability 'in situations not before us'...of a defense to a bigamy prosecution resting upon the defendant's honest belief, reasonably entertained, that he was legally free to remarry...." (20 N.J. at 14.)

See also Mr. Justice Wachenfeld's dissent in DeMeo 20 N.J. at 15. There are, however, strong statements in other opinions that would lead to the conclusion that reliance such as that set forth in §2.04(3) could never excuse. State v. Western Union Telegraph Co., 12 N.J. 468, 493 (1953) (advice of counsel); State v. Prusser, 127 N.J.L. 97 (Sup. Ct. 1941); State v. Atti, 127 N.J.L. 39, 44 (Sup. Ct. 1941) affirmed 128 N.J.L. 318 (E.&A. 1942); Morss v. Forbes, 24 N.J. 341 (1957); Halstead v. State, 39 N.J.L. 402 (Sup. Ct. 1877)

6. New York has substantially adopted the Code's provision has added a special provision to exclude the necessity of proving ens rea as to a child's age. N.Y. Penal Law §15.20 (Attached). higan had proposed adoption of the first paragraphs of the York Code but has added a special provision as to mistake of law. tached). California's Study Commission has substantially redrafted section to simplify it somewhat and to make the mistake of law ction more explicit as to what it is intended to do. (Attached). linois is substantially in accord with the Code. The Wisconsin de provision is also attached.

(a) New York Penal Law §15.20:

Effect of Ignorance or Mistake upon Liability.

"1. A person is not relieved of criminal liability for conduct because he engages in such conduct under a mistaken belief of fact, unless:

(a) Such factual mistake negatives the culpable mental state required for the commission of an offense; or

(b) The statute defining the offense or a statute related thereto expressly provides that such factual mistake constitutes a defense or exemption; or

(c) Such factual mistake is of a kind that supports a defense of justification as defined in article thirty-five of this chapter.

2. A person is not relieved of criminal liability for conduct because he engages in such conduct under a mistaken belief that it does not, as a matter of law, constitute an offense, unless such mistaken belief is founded upon an official statement of the law contained in (a) a statute or other enactment, or (b) an administrative order or grant of permission, or (c) a judicial decision of a state or federal court, or (d) an interpretation of the statute or law relating to the offense, officially made or issued by a public servant, agency or body charged or empowered with the responsibility or privilege of administering, enforcing or interpreting such state or law.

3. Notwithstanding the use of the term 'knowingly' in any provision of this chapter defining an offense in which the age of a child is an element thereof, knowledge by the defendant of the age of such child is not an element of any such offense and it is not, unless expressly so provided, a defense to a prosecution therefor that the defendant did not know the age

of the child or believed such age to be the same as or greater than that specified in the statute."

(b) Michigan Revised Criminal Code (Final Draft, 1967) §325:

Effect of Ignorance or Mistake upon Liability.

(1) [Same as Paragraph (1) of the New York Penal Law §15.20]

(2) [Same as Paragraph (2) of the New York Penal Law §15.20]

"(3) The burden of injecting the issue of mistake of law under subsection (2) is on the defendant, but this does not shift the burden of proof.

(4) A mistake of law other than as to the existence or meaning of the statute under which the defendant is prosecuted is relevant to disprove the specific state of mental culpability required by the statute under which the defendant is prosecuted."

(c) California Penal Code Revision Project (Tentative Draft No. 2, 1968) §500:

Ignorance or Mistake.

(1) A person's ignorance or mistake as to a matter of fact or law is a defense if it negatives the culpable mental state required for the offense or establishes a mental state sufficient under the law to constitute a defense.

(2) A person's belief that his conduct does not constitute a crime is a defense only if it is reasonable and,

(a) if the person's mistaken belief is due to his ignorance of the existence of the law defining the crime, he exercised all the care which, in the circumstances, a law-abiding and prudent person would exercise to ascertain the law; or

(b) if the person's mistaken belief is due to his misconception of the meaning or application of the law defining the crime to his conduct,

(i) he acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in a statute, judicial decision, administrative order or grant of permission, or an official interpretation of the public officer or body charged by law with the responsibility for interpreting, administering or enforcing the law defining the crime; or

(ii) he otherwise diligently pursues all means available to ascertain the meaning and application of the crime to his conduct and honestly and in good faith concludes his conduct is not a crime in circumstances in which a law-abiding and prudent person would also so conclude.

(3) The defendant must prove a defense arising under Subsection (2) of this section by a preponderance of the evidence.

[(3) Any defense arising under Subsection (2) of this section is an affirmative defense]"

(d) Wisconsin:

"(1) An honest error, whether of fact or of law other than criminal law, is a defense if it negatives the existence of a state of mind essential to the crime.

(2) A mistake as to the age of a minor or as to the existence or constitutionality of the section under which the actor is prosecuted or the scope or meaning of the terms used in that section is not a defense."

SECTION 2.05. WHEN CULPABILITY REQUIREMENTS ARE INAPPLICABLE TO VIOLATIONS AND TO OFFENSES DEFINED BY OTHER STATUTES; EFFECT OF ABSOLUTE LIABILITY IN REDUCING GRADE OF OFFENSE TO VIOLATION.

(1) The requirements of culpability prescribed by Sections 2.01 and 2.02 do not apply to:

(a) offenses which constitute violations, unless the requirement involved is included in the definition of the offense or the Court determines that its application is consistent with effective enforcement of the law defining the offense; or

(b) offenses defined by statutes other than the Code, insofar as a legislative purpose to impose absolute liability for such offenses or with respect to any material element thereof plainly appears.

(2) Notwithstanding any other provision of existing law and unless a subsequent statute otherwise provides:

(a) when absolute liability is imposed with respect to any material element of an offense defined by a statute other than the Code and a conviction is based upon such liability, the offense constitutes a violation; and

(b) although absolute liability is imposed by law with respect to one or more of the material elements of an offense defined by a statute other than the Code, the culpable commission of the offense may be charged and proved, in which event negligence with respect to such elements constitutes sufficient culpability and the classification of the offense and the sentence that may be imposed therefor upon conviction are determined by Section 1.04 and Article 6 of the Code.

* * * * *

§ 2.05 Commentary

1. The Code in this Section makes a "frontal attack" on absolute liability in penal law, whenever the offense carries the possibility of a sentence of imprisonment. MPC Tentative Draft No. 4, p. 140 (1955). The method used is not to abrogate such liability but to provide that when conviction rests upon that basis the grade of the offense is reduced to a "violation". Under § 1.04(5), a violation is not a crime and under § 6.02 only a sentence of a fine or a fine and a forfeiture or other civil penalty may result. If, on the other hand, the culpable commission of the offense has been established, the reduc-

tion in grade does not occur and, in cases of this kind, negligence is treated as sufficient culpability. Ibid.

2. This position is made to apply not only with respect to offenses defined by the Code but also to the State's entire body of law for which penal sanctions may be imposed. The Drafters of the Code believe this to be essential because most strict liability offenses are found in special regulatory legislation: "We have no doubt the attempt is one which should be made. The liabilities involved are indefensible in principle, unless reduced to terms that insulate conviction from the type of moral condemnation that is and ought to be implicit when a sentence of imprisonment may be imposed. In the absence of minimal culpability, the law has neither a deterrent nor corrective nor an incapacitative function to perform." MPC Tentative Draft No. 4, p. 140 (1955). The contrary argument which is made in favor of absolute liability is that it is necessary for enforcement of the particular statute where it obtains. "But if practical enforcement can not undertake to litigate the culpability of alleged deviation from legal requirements, we do not see how the enforcers rightly can demand use of the penal sanctions for that purpose. Crime does and should mean condemnation and no court should have to pass that judgment unless it can declare that the defendant's act was wrong. This is too fundamental to be compromised. The law goes far enough if it permits the imposition of a monetary penalty in cases where strict liability has been imposed." Ibid.

3. This section would work a very substantial change in existing New Jersey law. There are many instances in our law--both that which is traditionally criminal and that which is "regulatory"--

where strict liability is imposed. State v. Hudson County News Co., 35 N.J. 284, at 293 (1961) (particular statute held to require mens rea: "Since absolute criminal liability...may harshly result in the imprisonment of persons who are not morally culpable, it has understandably received criticism in academic circles. ...The modern judicial trend is fortunately the other way."); Morss v. Forbes, 24 N.J. 341, at 358 (1957) ("Within reasonable limits, the Legislature has the power and the right to designate the mere doing of an act as a crime, even in the absence of the mens rea which was a necessary prerequisite at common law....Where words clearly indicating the requirement of a criminal intent are omitted, the issue becomes one of statutory construction to ascertain the meaning of the legislative body."); State v. DeMeo, 20 N.J. 1, 8-11 (1955) (bigamy prosecution); State v. Lobato, 7 N.J. 137, 149-150 (1951); State v. Moore, 105 N.J. Super. 567 (App. Div. 1969) (carnal abuse prosecution--strict liability as to girl's age). For cases in other jurisdictions see MPC Tentative Draft No. 4, pp. 141-145 (1955).

4. Since the time of the drafting of the Model Penal Code and the comments justifying that position, there have been decisions of the Supreme Court of the United States indicating that the States will have less freedom than was once thought (see United States v. Balint, 258 U.S. 250 (1922) and Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57 (1910); United States v. Behrman, 258 U.S. 280 (1922)) in defining crimes without mens rea. See Robinson v. California, 370 U.S. 660 (1962); Lambert v. California, 355 U.S. 225 (1957); Smith v. California, 361 U.S. 147 (1959); but cf., Powell v. Texas, 392 U.S. 651 (1968). See also Morissette v. United States, 342 U.S. 246 (1952). These decisions, together with the strong anti-strict liability

of Mr. Justice Jacobs in the Hudson County News Co. case (35 N.J. at 289-294) lead to the conclusion that consideration of either the Code's position or some intermediate position would be appropriate.

5. Returning now to the draft of the Code, §2.05(1)(a) accepts strict liability for all offenses which are graded as violations, i.e., for which a sentence of imprisonment may not be imposed, unless a culpability requirement is included in the definition of the offense or the Court determines that application of such a requirement is consistent with effective enforcement of the law defining the offense. The assumption is that for these low grade offenses culpability requirements ordinarily will be stated expressly if the Legislature intends to include them. If the law is silent, the presumption is that strict liability should prevail and to require a culpability element the Court must make an affirmative determination that such is consistent with effective law enforcement. This device is intended to eliminate the large amount of uncertainty which now exists. MPC Tentative Draft No. 4, p. 145 (1955).

As to crimes, as distinguished from violations, the opposite presumption is applied and subsection (1)(b) accepts strict liability when crimes are defined by a statute other than the Code only if a legislative purpose to impose strict liability plainly appears. The Drafters of the Code express the view that a mere absence of words of culpability might be a sufficient expression of legislative intent to lead to the conclusion that strict liability was intended in some instances. Legislative acquiescence in a construction of a statute as a strict liability crime, without amending the statute, might reasonably be regarded, in their view, as evincing a legislative purpose

6. In light of the Drafters' view on strict liability, the Code itself does not impose strict liability for any crime which it undertakes to define.

7. As examples of positions taken by other states on this issue, the statutes drafted for New York and Illinois are attached.

(a) New York Penal Law §15.15(2):

"Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of such offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such culpable mental state. A statute defining a crime, unless clearly indicating a legislative intent to impose strict liability, should be construed as defining a crime of mental culpability. This subdivision applies to offenses both in and outside this chapter."

["Crime" is defined to mean a felony or a misdemeanor. "Violations" are not crimes but are punishable by imprisonment for up to 15 days. Pre-existing non-criminal offenses punishable for more than 15 days are also made violations. §§10.00, 55.10]

(b) Illinois Criminal Code §4-9:

A person may be guilty of an offense without having, as to each element thereof, one of the mental states described in Sections 4-4 through 4-7 if the offense is a misdemeanor which is not punishable by incarceration or by a fine exceeding $500, or the statute defining the offense clearly indicates a legislative purpose to impose absolute liability for the conduct described.

SECTION 2.06. LIABILITY FOR CONDUCT OF ANOTHER; COMPLICITY.

(1) A person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both.

(2) A person is legally accountable for the conduct of another person when:

(a) acting with the kind of culpability that is sufficient for the commission of the offense, he causes an innocent or irresponsible person to engage in such conduct; or

(b) he is made accountable for the conduct of such other person by the Code or by the law defining the offense; or

(c) he is an accomplice of such other person in the commission of the offense.

(3) A person is an accomplice of another person in the commission of an offense if:

(a) with the purpose of promoting or facilitating the commission of the offense, he

(i) solicits such other person to commit it; or

(ii) aids or agrees or attempts to aid such other person in planning or committing it; or

(iii) having a legal duty to prevent the commission of the offense, fails to make proper effort so to do; or

(b) his conduct is expressly declared by law to establish his complicity.

(4) When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense, if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense.

(5) A person who is legally incapable of committing a particular offense himself may be guilty thereof if it is committed by the conduct of another person for which he is legally accountable, unless such liability is inconsistent with the purpose of the provision establishing his incapacity.

(6) Unless otherwise provided by the Code or by the law defining the offense, a person is not an accomplice in an offense committed by another person if:

(a) he is a victim of that offense; or

(b) the offense is so defined that his conduct is inevitably incident to its commission; or

(c) he terminates his complicity prior to the commission of the offense and

(i) wholly deprives it of effectiveness in the commission of the offense; or

(ii) gives timely warning to the law enforcement authorities or otherwise makes proper effort to prevent the commission of the offense.

(7) An accomplice may be convicted on proof of the commission of the offense and of his complicity therein, though the person claimed to have committed the offense has not been prosecuted or convicted or has been convicted of a different offense or degree of offense or has an immunity to prosecution or conviction or has been acquitted.

* * * * *

§2.06 Commentary

1. General Purpose. The objective of this Section is to declare that criminal liability is based upon behavior and to delineate all situations in which criminal liability may rest in whole or in part upon behavior of another. Where such liability depends upon special considerations involved in the definition of particular offenses, this section calls attention to the fact that cases of this kind exist and points for their decision to the definition of the crime. But insofar as a determination rests upon general principles of liability, those principles are here set forth. MPC Tentative Draft No. 1, p. 13 (1953). The main areas of existing law thus covered by the section are those in which criminal liability rests on the behavior of an innocent or irresponsible agent, joint criminality or accessorial participation through aiding, abetting and conspiracy. Accessories after the fact are not included. They are treated as violating a separate crime under Article 242 of the Code. They are so treated under existing law. N.J.S. 2A:85-2. State v. Sullivan, 77 N.J. Super.

The Section differentiates the different modes of complicity in a crime for the purpose of developing their content. It does not, however, contemplate that such distinctions should have a procedural significance. MPC Tentative Draft No. 1, p. 13 (1953). As is true in New Jersey today, which has abolished the common law distinctions between principals and accessories, it is sufficient under the Code to charge commission of a crime. Id. at 13-14. N.J.S. 2A:85-14; State v. Western Union Telegraph Co., 12 N.J. 468, 494-495 (1953); State v. Cooper, 10 N.J. 532 (1952); State v. Jacques, 99 N.J. Super. 224, 235 (App. Div. 1968). Notice that the system employed by the Code does not employ the term "principal", finding that unnecessary. MPC Tentative Draft No. 1, p. 14 (1953).

2. Subsection (1) establishes the basic principle, which is now true in New Jersey and under all other systems, that criminal liability may be based upon either one's own behavior or the behavior of another. Ibid.

There is legislation now in effect making it a substantive offense to aid particular activities, which may or may not be criminal themselves. See, e.g., N.J.S. 2A:104-1 through 12 (Aiding certain escapes). There is also much legislation making criminal specific conduct which is proscribed for the reason that it furthers or facilitates commission of a crime. See, e.g., N.J.S. 2A:112-3 (Keeping a gambling resort); N.J.S. 2A:121-3(c) (Owning a building used for lottery business); N.J.S. 2A:139-4 (Purchasing certain items from children). The provisions of Section 2.06 are not intended to displace such special legislation (to the extent it is retained or incorporated into the Code) though the Section "should be deemed judicially to

they occur in formulations of this kind." MPC Tentative Draft No. 1, p. 15 (1953).

3. Subsection (2) sets forth the situations in which one is "legally accountable" for the conduct of another person:

(a) Innocent or irresponsible agents. It is universally acknowledged that one is no less guilty of the commission of a crime because he uses the overt behavior of an innocent or irresponsible agent. He is accountable as if such conduct were his own. MPC Tentative Draft No. 1, p. 15 (1953). The existing New Jersey statute which, somewhat obscurely, establishes this principle is the second paragraph of N.J.S. 2A:85-14: "Any person who wilfully causes another to commit a crime is punishable as a principal." The New Jersey cases are in accord. State v. Lisena, 129 N.J.L. 569 (Sup. Ct. 1943) affirmed o.b. 131 N.J.L. 39 (E & A 1943); State v. Faunce, 91 N.J.L. 33 (E & A 1917); Noyes v. State, 41 N.J.L. 418 (Sup. Ct. 1879); and State v. Wycoff, 31 N.J.L. 65 (Sup. Ct. 1864). Reasons why the existing New Jersey statutory formulation is an unsatisfactory way of stating the rule are found in MPC Tentative Draft No. 1, pp. 16-18 (1953).

(b) Made accountable by law. This paragraph leaves undisturbed those situations where special legislation has explicitly imposed or has been construed to impose an extraordinary measure of accountability for the behavior of another. MPC Tentative Draft No. 1, p. 18 (1953). The paragraph is so drafted as to make it clear that such liability is not supported by general principle, rather it must rest upon a special legislative will manifested in the definition of the particular offense. Most situations involve liability for acts of agents or employees in the course of their employment. In some

instances, such liability may be based upon explicit legislation. If so, liability is retained. In others, where the law does not explicitly impose vicarious liability, the New Jersey cases state our law to be that such liability will not be imposed in the absence of proof that the principal aided, encouraged or connived in the perpetration of the act done by the agent or that the illicit act was habitually done in the usual course of business. State v. Pinto, 129 N.J.L. 255 (Sup. Ct. 1943) (Alcoholic Beverage Law); State v. Weiner, 41 N.J. 21, at 26 (1963) (Manslaughter prosecution: ...."If defendant is to be criminally liable with respect to an act or omission of his nurse, it could not merely be because he was her employer. He could be so liable only if he directed her conduct or assented to it or failed to act with respect to it in circumstances which indicate the....wantonness or recklessness [necessary for a criminal prosecution]."; State v. Pennsylvania R.R. Co., 84 N.J.L. 550 (Sup. Ct. 1913) (Nuisance prosecutions for smoke emissions); State v. American Alkyd Ind., Inc., 32 N.J. Super. 150 (Co. Ct. 1954). Thus, by incorporating existing law, the only situations in which vicarious liability would be imposed would be those where the Legislature has explicitly determined to do so.

(c) Accomplices. Finally, one is "legally accountable" for the conduct of another when he is an "accomplice" of the other person "in the offense". By "the offense" is meant that crime charged for which guilt is in question under §2.06(1). The basis and scope of complicity under this paragraph is set forth in §2.06(3) below. "Accomplice" is meant to be "employed as the broadest and least technical [term] available to denote criminal complicity." MPC Tentative Draft No. 1, p. 20 (1953).

4. Subsection (3), in defining "accomplice" sets forth the modes and extent of complicity in criminal behavior, delineating both the nature of the action or omission and the mental state that will suffice for liability. It is said that it does not differ markedly from current statutes, except in avoidance of redundancy, and in articulating the requirements of purpose or of knowledge that the legislation now ignores. MPC Tentative Draft No. 1, p. 20 (1953). The New Jersey language which this would replace is found in N.J.S. 2A: 85-14 and provides that "any person who aids, abets, counsels, commands, induces or procures another to commit a crime is punishable as a principal." See State v. Kuznitz, 36 N.J. Super. 521, 531 (App. Div. 1955).

5. The Draft diverges from the language of the New Jersey cases, although not from the language of the New Jersey statute, in that it does not make "conspiracy" alone a basis for complicity in substantive offenses committed in furtherance of its aims. It asks instead the more specific question of whether the defendant commanded, encouraged, aided or agreed to aid in the commission of the crime charged. The reason given for this treatment is because there appears to be no other or no better way to confine within reasonable limits the scope of liability to which conspiracy may theoretically give rise. Specifically, finding liability for each of the substantive offenses (in addition to liability for the conspiracy and any substantive offenses which can be "brought home" to the particular defendant) in sprawling conspiracies should be prohibited. See, e.g., People v. Luciano, 277 N.Y. 348, 14 N.E.2d 433 (1938); United States v. Bruno, 105 F.2d 921 (2 Cir. 1939) reversed on other grounds, 308 U.S. 287 (1939); Anderson v. Superior Court, 78 C.A.2d 22, 177 P.2d 315 (1947). According to the Drafters of the Code, no cases actually press the

liability for substantive crimes arising out of conspiracies as far as the rule would theoretically allow and the cases which declare the doctrine normally involve defendants who had a hand in planning or directing or in executing the crimes charged. When this is so, the other principles of accessorial responsibility establish liability under the Code, i.e., commanding, aiding or agreeing to aid in planning or committing the crime. MPC Tentative Draft No. 1, p. 22 (1953). The New Jersey cases, while speaking in terms of "conspiracy", do so in cases where the Code would clearly find liability. State v. Cooper, 10 N.J. 532, 568 (1952) ("All those who conspire to commit a crime and participate some way in its commission are joint principals."); State v. Jacques, 99 N.J. Super. 230, 235 (App. Div. 1968). In evaluating the Code's position on this issue, account should be taken of the fact that conspiracy is evidentially important and may, evidentially, be sufficient to prove command, encouragement, agreement to assist, assistance, etc. The Code's position is that the jury should not be told that it establishes complicity as a matter of law. MPC Tentative Draft No. 1, p. 23 (1955).

6. The Draft originally limited the scope of liability to crimes which the accomplice had the purpose of promoting or facilitating and to those which he knowingly facilitated substantially. The Institute subsequently rejected the latter as a basis of liability so that as the Code now stands the jury must find that the defendant had a "purpose of promoting or facilitating the crime's commission." §2.06(3)(a), MPC Proposed Official Draft, p. 35 (1962). Essentially, inclusion of the eliminated provision is a question of the extent to which the Commission deems it appropriate to require persons to avoid dealing with known criminals. While one does not want to burden normal

channels of trade, one also wants to have dealers avoid making a profit from crime. An excellent discussion of the issues is found in MPC Tentative Draft No. 1, pp. 27-32 (1953). The rejected Code formulation was an intermediate position between those who would require a purpose to join (i.e., a "stake in the outcome") and those would require avoidance of any facilitation.

No New Jersey case directly presents the issue. State v. Ellrich, 10 N.J. 146 (1952) was a case in which a physician referred a girl to an abortionist. The Court speaks of certain evidence giving rise to inferences of "guilty knowledge" and a "knowledge of the criminal nature of the transaction" and a "consciousness' of the illegal character. Subsequent language in the opinion leads to the conclusion that mere guilty knowledge (with assistance) would not be enough and that he must be "an active partner in the intent." (10 N.J. at 150). It is, of course, clear that mere knowledge, without more, cannot lead to criminal liability. State v. Sullivan, 77 N.J. Super. 81 (App. Div. 1962); State v. Fox, 70 N.J.L. 353 (Sup. Ct. 1904). Even though the Ellrich case is not completely clear on the issue, the factual pattern there presented is a good one in which the Commission may determine whether a purpose should be required or knowing substantial facilitation should suffice. Our other cases in the area speak in general terms such as "shared in the intent." See State v. Fair, 45 N.J. 77, 95 (1965); State v. Smith, 32 N.J. 501, 521 (1960); State v. Jacques, 99 N.J. Super. 230, 235 (App. Div. 1968); State v. Cooper, 10 N.J. 532, 568 (1952). Some of our cases speak in terms of a person being responsible only for the "natural and probable consequences" of the crime actually intended. State v. Carlino, 98 N.J.L. 48, 52 (Sup. Ct. 1922), affirmed 99 N.J.L. 292 (E & A, 1923). Such is the

law elsewhere. MPC Tentative Draft No. 1, p. 25 (1953). However, these statements are usually made in homicide cases where doctrines of transferred intent, felony-murder and liability for recklessness present a special situation. (The Code would not extend liability beyond the purpose the defendant shares or what he knows. Probabilities are said to have an important evidential bearing on this issue but they are not independently sufficient. Id. at 26.)

7. If the Commission desires to include substantial knowing facilitation as an additional basis for liability, language such as either of the following two alternatives should be added:

> (1) "Acting with knowledge that such other person was committing or had the purpose of committing the crime, he knowingly, substantially facilitated its commission", or
>
> (2) "Acting with knowledge that such other person was committing or had the purpose of committing the crime, he knowingly provided means or opportunity for the commission of the crime, substantially facilitating its commission."

8. The Code includes in §2.06(3)(a) not only those who command, request, encourage, provoke or aid but also those who agree or attempt to aid in the planning or execution. It also includes one who has a legal duty to prevent the crime who fails to make proper effort to do so. This is said to represent an exhaustive description of the ways in which one may purposely enhance the probability that another will commit a crime. MPC Tentative Draft No. 1, pp. 26-27 (1953). There being a purpose (i.e., a "specific intent") to further or facilitate, there is no risk of innocence.

9. Subsection (3)(b) preserves all special legislation declaring that particular behavior suffices for complicity, whether or not it would suffice under the above standards. MPC Tentative Draft No. 1, p. 33 (1953).

10. Subsection (4) provides that complicity in conduct causing a particular criminal result leads to accountability for that result so long as the accomplice has the purpose or the knowledge with respect to the result that is demanded by the definition of the crime. Thus, when a homicide occurs in the commission of a robbery, if the homicidal act was a means to committing or facilitating the robbery, accomplices in the robbery are accomplices in that act under Subsection (3). If, further, the intention to commit a robbery suffices to make the homicide a murder, as that crime is legally defined under existing law, all accomplices in the robbery are guilty of murder. State v. Smith, 32 N.J. 501, 521 (1960); State v. Loray, 41 N.J. 131, 139 (1963). But should the definition of murder be altered to demand an intent to kill, accomplices could not then be held under this Section unless they shared that purpose. MPC Tentative Draft No. 1, p. 34 (1953). Moreover, if the homicidal act was not a means to the commission of the robbery--as if one party shoots an enemy in satisfaction of a merely private grudge--complicity in robbery would not imply complicity in murder, because it did not comprehend the causative behavior. Ibid. The effect of this provision is to combine the policy that accomplices are equally accountable within the range of their complicity with the policies embodied in the definition of particular crimes. The result of the Subsection is to make the Code be in accord with existing New Jersey law which phrases the rule as follows:

> "While each participant may be guilty 'as a principal'.... he is not necessarily guilty in the same degree. If both parties enter into the commission of a crime with the same intent and purpose each is guilty to the same degree; but each may participate in the criminal act with a different intent. Each defendant may thus be guilty of a higher or lower degree of crime than the other, the degree of guilt depending entirely upon his own actions, intent and state of mind." State v. Fair, 45 N.J. 77, at 95 (1965).

11. Subsection (5) provides that a person who is legally incapable of committing a particular offense himself may be guilty thereof if it is committed by the conduct of another person for which he is legally accountable, unless such liability is inconsistent with the purpose of the provision establishing his incapacity. The Drafters said that this provision is "a fair statement of existing law. One who is not a bankrupt may be an accomplice of a bankrupt in concealing assets, for example, or one who is not a public official may be an accomplice of a public official in committing a breach of official duty, et cetera". Proceedings, 39th Meeting, American Law Institute 80 (1962). The statement that the provision is in accord with existing law is well supported both by the text writers (Clark and Marshall, Crimes, §8.10, p. 536 (7th Ed. 1967)) and by some New Jersey cases. State v. Warady, 78 N.J.L. 687 (E & A 1910) (Conviction for bigamy of a man who did not himself marry the woman but who was present at the marriage, urged it and aided its being contracted); State v. Marshall, 97 N.J.L. 10 (Sup. Ct. 1922) (a person may be convicted as an aider and abettor of the crime of embezzling money as a tax collector notwithstanding that the person is not himself a tax collector); State v. Goldfarb, 96 N.J.L. 71 (Sup. Ct. 1921) (Rape by a woman); State v. Jackson & Kisinger, 65 N.J.L. 105 (Sup. Ct. 1900) (Statutory rape by a woman). However, in State v. Aiello, 91 N.J. Super 457, at 463 (App. Div. 1966), the Appellate Division held that defendant Guiliano could not be convicted of a violation of a statute which provides that "Any person who....being the owner of a building or place where any business of lottery....is carried on knowingly, by himself or his agent, permits such premises to be so used--is guilty"....of a crime. The Court said:

> "One of the essentials of this crime is 'ownership' of the building. Guiliano was not an owner of the building where the lottery was allegedly carried on. He could not, therefore, be legally convicted of a violation of [that statute].
>
> * * * * *
>
> "It is also argued by the state that this conviction can be sustained on the theory that Guiliano was an aider and abettor of Aiello. We think not. The State cites no case wherein a non-owner was held liable as an abettor of the owner where the statute made ownership a condition of criminal liability. One charged with a crime is entitled to require the State to make strict proof of each statutory element of the crime charged." (91 N.J. Super. at 462-463).

While the court may have correctly reversed the conviction of Guiliano on other grounds, as written, the case is out of step with the Code, with authorities elsewhere and with prior New Jersey authorities. In your Secretary's opinion, it is wrong. To the extent it represents the law which our Supreme Court would follow, it should be legislatively overruled.

12. Subsection (6) sets forth exceptions to the general principles of accessorial liability established above.

(a) Victims. The victim of a crime is excluded from liability for an offense, although his conduct in a sense assists in the commission of the crime, because to view the victim as involved in the commission of the crime "confounds the policy embodied in the prohibition; it is laid down, wholly or in part, for their protection." MPC Tentative Draft No. 1, p. 35 (1953). See Regina v. Tyrell (1894), 1 Q.B. 710 (Female in statutory rape is not an accomplice) and Gebardi v. United States, 287 U.S. 112 (1932) (Woman is not guilty under the Mann Act of conspiracy to transport herself.) New Jersey recognizes that a victim of a crime should not be capable of being convicted of the crime. Classifying a woman upon whom an abortion has been committed as a victim, the cases hold her incapable of being convicted of

that crime or of aiding and abetting it. In re Vince, 2 N.J. 443, at 450 (1949); State v. Murphy, 27 N.J.L. 112, 114 (Sup. Ct. 1858); State v. Hyer, 38 N.J.L. 598, 600 (Sup. Ct. 1877); State v. Thompson, 56 N.J. Super. 438, at 444 (App. Div. 1959) reversed on other grounds 31 N.J. 540 (1960).

(b) Conduct "inevitably incident". The Code also provides that when the offense is so defined that the person's conduct is "inevitably incident to its commission" then he is not an accomplice. Our cases concur. State v. Aircraft Supplies, 45 N.J. Super. 110 (Co. Ct. 1957). This is subject to a general exception to subsection (6) of "unless otherwise provided by the Code or by the law defining the offense". Many situations may arise in which a judgment as to appropriate exceptions from liability must be defined. Conflicting policies and strategies lead to the conclusion that a person should be excluded from liability in one instance but that normal principles of accessorial liability should apply in another where his conduct is "inevitably incident". In addition to the problem of abortion, there is the problem of whether a man who has intercourse with a prostitute should be viewed as an accomplice to the act of prostitution, whether the purchaser should be viewed as an accomplice to an unlawful sale, the unmarried party to a bigamous marriage an accomplice of the bigamist, the bribe-giver an accomplice of the taker, etc. MPC Tentative Draft No. 1, p. 35 (1953). Factors to be considered include the need to obtain the testimony of that person, the need to corroborate that testimony, the ability of the prosecutor to obtain convictions and the public view of the appropriateness of such convictions. Id. at 36.

Because the Drafters of the Code view it as impossible to attempt systematic legislative resolution of these issues, they leave

the question to be resolved as each issue arises before the Legislature. The presumption, under the Code, is that conduct which is "inevitably incident" does not lead to accessorial liability unless the legislation specifically so provides.

This method will be sufficient for the definitions of specific crimes in the Code itself, because the Drafters specifically had the rule in mind. nduct may well be "inevitably incident" under existing laws, which would not be replaced by the Code, and yet lead to liability. See State v. Purdy, 51 N.J. 303 (1968) (possession of lottery slips by a bettor when the slips are notations of his own bets is within the general possession of lottery slip statute even though the lottery statute does not include the act of placing a bet and the possession of one's own slip might be viewed as "inevitably incident" thereto). If the Code's approach is to be taken here, statutes outside the Code will have to be redrafted in the light of this provision to account for it. The Commission might also want to consider the approach of adopting this view for crimes within the Code (since it was drafted with this in mind) but removing the presumption for statutes outside the Code and leaving the issue to the judiciary for case-by-case resolution, as it presently is handled. See, e.g., State v. Dancyger, 51 N.J. Super 150 (App. Div. 1958) reversed 29 N.J. 76 (1959) (Receiver is not an accessory to the theft).

It should be noted that the decision as to who is a "victim" and what conduct is "inevitably incident" is not self-defining.

While the Drafters of the Code view the woman in an abortion situation as doing acts "inevitably incident" to the crime, the New Jersey cases view her as a victim.

(c) Termination of Complicity. A person is not an accomplice under the Code if he terminates his complicity and, by so doing, "wholly deprives it of effectiveness in the commission of the offense". §2.06(6)(c)(i). "Though action that suffices for complicity may have occurred, the law does and should contemplate that liability may be averted if the reason for its imposition disappears before the crime has been committed." MPC Tentative Draft No. 1, p. 37 (1953). The Code anticipates that the action needed to comply with this provision will vary with the accessorial behavior that has preceeded the decision to withdraw. Ibid. It should be noted that this provision will remove liability for the substantive offense but not for any conspiracy which has been committed. As to conspiracy renunciations, see §5.03(6).

In some instances, it will be impossible to deprive his conduct of effectiveness in the commission of the offense without making independent efforts to prevent the crime. In that case, §2.06(6)(c)(ii) requires giving warning to the police or "otherwise making proper effort" to prevent the crime in order to gain immunity. The Drafters here intentionally avoided attempting to write a more specific rule because the effort which should be demanded of a defendant depends so largely upon the circumstances. MPC Tentative Draft No. 1, pp. 37-38 (1953).

This defense is not now recognized in New Jersey. Our cases hold that, in order to escape the penalty denounced against a crime, the defendant must cease to act in complicity as soon as he has knowledge of the criminal character of the conduct of the persons who he is accompanying. State v. DeFalco, 8 N.J. Super. 295, 299 (App. Div. 1950); State v. Churchill, 105 N.J.L. 123 (E & A 1928); Engeman v.

State, 54 N.J.L. 247 (Sup. Ct. 1892). Cf State v. Zuprosky, 127 N.J.L. 218 (E & A 1941).

13. Subsection (7) is concerned with procedural problems concerning the distinctions between principles and accessories. First, the paragraph follows the modern legislation which deprives the distinction between principals and accessories of its common law procedural significance. MPC Tentative Draft No. 1, p. 38 (1953). Thus, the law would continue to be that the distinction between principal and accomplice or aider and abettor has been abolished in New Jersey for purposes of indictment and punishment. N.J.S. 2A:85-14. State v. Cooper, 10 N.J. 532, 568 (1952); State v. Western Union Telegraph Co., 12 N.J. 468, 495 (1953); State v. Ellrich, 10 N.J. 146 (1952); State v. Kuznitz, 36 N.J. Super. 521, 531 (App. Div. 1955); State v. Seaman, 10 N.J. Super. 439, 444 (App. Div. 1949) certif. denied 6 N.J. 456 (1951); State v. Wilson, 80 N.J.L. 467 (E & A 1910) affirming 79 N.J.L. 241 (Sup. Ct. 1910). See Schlosser, Criminal Laws of New Jersey §115 (1953 Ed., 1967 Supp.) Such is not true where a statute sets forth an exception to N.J.S. 2A:85-14 and establishes a different punishment for an aider and abettor from that provided for the principal. State v. Seaman, supra; State v. Woodworth, 121 N.J.L. 78 (Sup. Ct. 1938); Schlosser, Criminal Laws of New Jersey, §113, p. 83, n. 4 (1953). Further, the same is not true as to an accessory after the fact. N.J.S. 2A:85-2; State v. Sullivan, 77 N.J. Super. 81 (App. Div. 1962).

It is still true under the Code, as under existing law, that (1) the commission of the crime and (2) the defendant's complicity therein must be proved and found by the jury as the elements of the liability of the accomplice. State v. Thompson, 31 N.J. 540 (1960),

reversing 56 N.J. Super 438 (App. Div. 1959); State v. Marshall, 97 N.J.L. 10 (Sup. Ct. 1922); Schlosser, Criminal Laws of New Jersey §115 (1953).

However, in addition to following the change from the common law in these regards, the Code also goes on to allow conviction of an accomplice though the principal actor "has not been prosecuted or convicted or has been convicted of a different offense or degree of offense or has an immunity to prosecution or conviction or has been acquitted." §2.06(7). The Drafters of the Code recognized that this provision opens the possibility that an accomplice may be prosecuted after the person charged with the commission of the crime has been acquitted and that this is, to some extent, undesirable as leading to inconsistent verdicts. But, in their view, "while inconsistent verdicts of this kind present a difficulty, they are intrinsic to the jury system and appear to be a lesser evil than granting immunity to the accomplice because justice has miscarried in the charge against the person who committed the offense." MPC Tentative Draft No. 1, p. 38 (1953). Schlosser states the rule in New Jersey to be that when the person who is charged with the commission of the crime, i.e., the principal in the first degree is acquitted, all aiders and abettors and accessories must also be acquitted. For this he cites early common law text writers and State v. Marshall, 97 N.J.L. 10 (Sup. Ct. 1922). Schlosser, New Jersey Criminal Laws §115, pp. 87-88, nn. 3-4 (1953). The Marshall case, however, involved a situation where one defendant, Caithness, was indicted for embezzlement by a tax collector and the other defendant, Marshall, was indicted for aiding and abetting that embezzlement. The proofs actually showed that Marshall was the embezzler. Her conviction as a principal could not be sustained under

that statute because she was not legally capable of performing the act--she was not a tax collector. At least one other case adopts Schlosser's view. In State v. Thompson, 56 N.J. Super 434 (App. Div. 1960) reversed on other grounds 31 N.J. 540 (1960), it was held that a man who aided and abetted a woman to abort herself could not be convicted:

> "Obviously to be an aider and abettor the existence of a principal is indispensable. On the evidence presented here there were but two persons who could have inserted an instrument in the body of the victim. One was the victim, the other the defendant. Since the requirement of N.J.S. 2A:85-14 is that one 'must * * * aid * * * another to commit a crime', the legal incapacity of the victim to commit the crime of abortion precluded conviction of the defendant as an aider and abettor even though he may consciously have been an essential link in the chain of events leading up to the fatality." (56 N.J. Super. at 444) (Emphasis in original).

Several New Jersey cases indicate that the law is, in fact, not as stated by Schlosser but rather is closer to the Code's view. In an early case, State v. Warady, 78 N.J.L. 687 (E & A 1910) the Court held that proof of the conviction of the principal actor of bigamy was unnecessary to find an accessory guilty. Further, in State v. Oates, 32 N.J. Super. 435 (App. Div. 1954), the Court held that there was no "manifest injustice" such that the defendant should be allowed to withdraw a non-vult plea in a situation where he pleaded to a conspiracy charge and his alleged co-conspirator was acquitted by a jury after the defendant's plea but prior to the time of his sentencing. The Court found it unnecessary, because of the procedural posture of the case, to decide the issue outright but the opinion seems to indicate a leaning toward the view that acquittal of one should not necessarily lead to acquittal of the other. Oates was followed in State v. Goldman, 95 N.J. Super. 50 (App. Div. 1967). Again, in State v. Cooper, 10 N.J. 532, 568 (1952), the Court held that acquittal of the one of a group of felons who actually killed the decedent (because of a failure of proof

not prevent conviction of the others of felony murder. The Court recognized that individual consideration of guilt could well lead to varying results in the jury's verdict. The Marshall case, supra, was specifically distinguished. Finally, in State v. Fair, 45 N.J. 77, at 94-96 (1965), the Supreme Court considered a situation in which two actors might have been guilty to different degrees:

> "If both parties enter into the commission of a crime with the same intent and purpose each is guilty to the same degree; but each may participate in the criminal act with a different intent. Each defendant may thus be guilty of a higher or lower degree of crime than the other, the degree of guilt depending entirely upon his own actions, intent and state of mind." (45 N.J. at 95.)

The Court's emphasis in Fair upon individual consideration of guilt leads to the conclusion that the view set forth in the Code would be adopted in the acquittal, no prosecution, conviction of a different offense and immunity situations as well as the degree of guilt situations.

14. Recent State Codes

(a) New York Penal Law §§20.00, 20.05, 20.10, 20.15:

> "Criminal liability for conduct of another
> "When one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct.
>
> "Criminal liability for conduct of another; no defense
> "In any prosecution for an offense in which the criminal liability of the defendant is based upon the conduct of another person pursuant to section 20.00, it is no defense that:
> "1. Such other person is not guilty of the offense in question owing to criminal irresponsibility or other legal incapacity or exemption, or to unawareness of the criminal nature of the conduct in question or of the defendant's criminal purpose or to other factors precluding the mental

state required for the commission of the offense in question; or

"2. Such other person has not been prosecuted for or convicted of any offense based upon the conduct in question, or has previously been acquitted thereof, or has legal immunity from prosecution therefor; or

"3. The offense in question, as defined, can be committed only by a particular class or classes of persons, and the defendant, not belonging to such class or classes, is for that reason legally incapable of committing the offense in an individual capacity.

"Criminal liability for conduct of another; exemption

"Notwithstanding the provisions of sections 20.00 and 20.05, a person is not criminally liable for conduct of another person constituting an offense when his own conduct, though causing or aiding the commission of such offense, is of a kind that is necessarily incidental thereto. If such conduct constitutes a related but separate offense upon the part of the actor, he is liable for that offense only and not for the conduct or offense committed by the other person.

"Convictions for different degrees of offense

"Except as otherwise expressly provided in this chapter, when, pursuant to section 20.00, two or more persons are criminally liable for an offense which is divided into degrees, each person is guilty of such degree as is compatible with his own culpable mental state and with his own accountability for an aggravating fact or circumstance."

(b) Connecticut Penal Code (1969) §§9-11:

Substantially the same as New York Code, set forth above, except that it makes renunciation an affirmative defense:

"1. In any prosecution in which the criminal liability of the defendant is based upon the conduct of another person, pursuant to section 9, it is an affirmative defense that the defendant terminated his complicity prior to the commission of the offense under circumstances:

(a) wholly depriving it of effectiveness in the commission of the offense, and

(b) manifesting a complete and voluntary renunciation of his criminal purpose."

"Renunciation" is defined by Connecticut as in §5.01(4) of the Code.

(c) The Illinois Code, in §§5-1 to 5-3, substantially adopts the Model Code's provisions, using substantially condensed language:

"Accountability for Conduct of Another

A person is responsible for conduct which is an element of an offense if the conduct is either that of the person himself, or that of another and he is legally accountable for such conduct as provided in Section 5-2, or both.

When Accountability Exists

A person is legally accountable for the conduct of another when:

(a) Having a mental state described by the statute defining the offense, he causes another to perform the conduct, and the other person in fact or by reason of legal incapacity lacks such a mental state; or

(b) The statute defining the offense makes him so accountable; or

(c) Either before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense. However, a person is not so accountable, unless the statute defining the offense provides otherwise, if:

(1) He is a victim of the offense committed; or

(2) The offense is so defined that his conduct was inevitably incident to its commission; or

(3) Before the commission of the offense, he terminates his effort to promote or facilitate such commission, and does one of the following: wholly deprives his prior efforts of effectiveness in such commission, or gives timely warning to the proper law enforcement authorities, or otherwise makes proper effort to prevent the commission of the offense.

Separate Conviction of Person Accountable

A person who is legally accountable for the conduct of another which is an element of an offense may be convicted upon proof that the offense was committed and that he was so accountable, although the other person claimed to have committed the offense has not been prosecuted or convicted, or has been convicted of a different offense or degree of offense, or is not amenable to justice, or has been acquitted

(d) New Mexico's Study Commission has recommended a statute similar to our existing law (N.J.S. 2A:85-14). It adds a provision similar to §2.06(7) of the Code.

(e) Michigan, Revised Criminal Code (Final Draft 1967):

"§401 [same as MPC §2.06(1), but substitutes "behavior" for "conduct" and makes other minor changes.]

§405 "A person is legally accountable for the behavior of another person if he is made accountable for the conduct of such person by the statute defining the offense or by specific provision of this code."

§410 "(1) A person is legally accountable for the behavior of another if, acting with the culpable mental state sufficient for the commission of the offense in question, he causes an innocent person to engage in such behavior.

(2) As used in this section, an 'innocent person' includes any person who is not guilty of the offense in question, despite his behavior, because of

(a) Criminal irresponsibility or other legal incapacity or exemption.

(b) Unawareness of the criminal nature of the conduct in question or of the defendant's criminal purpose.

(c) Any other factor precluding the mental state sufficient for the commission of the offense in question."

§415 "A person is legally accountable for the behavior of another constituting a criminal offense if:

(a) [substantially the same as MPC §2.06(3)(a) except replaces "purpose" with intent, and, in (ii), "agrees or attempts to aid" with "abets".]

(b) Acting with knowledge that such other person was committing or had the purpose of committing the offense, he knowingly provided means or opportunity for the commission of the offense that substantially facilitated its commission."

§420 [substantially the same as MPC §2.06(6).]

§425 "In any prosecution for an offense in which criminal liability is based upon the behavior of another person pursuant to this chapter, it is no defense that:

(a) Such other person has not been prosecuted for or convicted of any offense based upon the behavior in question or has been convicted of a different offense or degree of offense.

(b) The defendant belongs to a class of persons who by definition of the offense are legally incapable of committing the offense in an individual capacity."

(f) California Penal Code Revision Project (Tent. Draft No. 1, 1967):

§450 [substantially the same as MPC §2.06(2)(a)]

§451 Criminal Liability for the Conduct of Another: Complicity

"A person is guilty of an offense if, with the intention of promoting or assisting in the commission of the offense, he induces or aids another person to commit the offense. If the definition of the offense includes lesser offenses, the offense of which each person shall be guilty shall be determined according to his own culpable mental state and to those aggravating or mitigating factors which apply to him."

§452 Criminal Liability for the Conduct of Another: Criminal Facilitation

"A person is guilty of criminal facilitation when, knowing that another person intends to engage in conduct which in fact constitutes an offense, he knowingly furnishes substantial assistance to him."

[Criminal facilitation is split into 3 degrees for sentencing.]

§453 Criminal Liability for the Conduct of Another: No Availability of Defenses

[Substantially the same as N.Y. Penal Law §20.05(2) & (3).]

§454 Criminal Liability for the Conduct of Another: Defenses

"Unless otherwise provided by law, in any prosecution in which the criminal liability of the defendant is based upon the conduct of another person, it is a defense that:

(1) the defendant was a victim of the offense; or

(2) the defendant was either expressly or by implication made not accountable for the conduct by the law defining the offense; or

(3) under circumstances manifesting a voluntary abandonment of the culpable mental state required by law, the defendant withdrew from participation in the offense and made a substantial effort to prevent its commission."

15. New York has included a definition of a lesser offense for the area rejected by the American Law Institute of "knowing substantial facilitation". This provision is as follows:

Criminal Facilitation:

> "A person is guilty of criminal facilitation in the second degree when, believing it probable that he is rendering aid to a person who intends to commit a crime, he engages in conduct which provides such person with means or opportunity for the commission thereof and which in fact aids such other person to commit a felony." (New York Penal Law §115.00)

(See also §115.20 which provides that if the principal is irresponsible or is not guilty because he lacks the mens rea, or is acquitted or not prosecuted, it is no defense for the facilitator.)

SECTION 2.07. LIABILITY OF CORPORATIONS, UNINCORPORATED ASSOCIATIONS AND PERSONS ACTING, OR UNDER A DUTY TO ACT, IN THEIR BEHALF.

(1) A corporation may be convicted of the commission of an offense if:

(a) the offense is a violation or the offense is defined by a statute other than the Code in which a legislative purpose to impose liability on corporations plainly appears and the conduct is performed by an agent of the corporation acting in behalf of the corporation within the scope of his office or employment, except that if the law defining the offense designates the agents for whose conduct the corporation is accountable or the circumstances under which it is accountable, such provisions shall apply; or

(b) the offense consists of an omission to discharge a specific duty of affirmative performance imposed on corporations by law; or

(c) the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment.

(2) When absolute liability is imposed for the commission of an offense, a legislative purpose to impose liability on a corporation shall be assumed, unless the contrary plainly appears.

(3) An unincorporated association may be convicted of the commission of an offense if:

(a) the offense is defined by a statute other than the Code which expressly provides for the liability of such an association and the conduct is performed by an agent of the association acting in behalf of the association within the scope of his office or employment, except that if the law defining the offense designates the agents for whose conduct the association is accountable or the circumstances under which it is accountable, such provisions shall apply; or

(b) the offense consists of an omission to discharge a specific duty of affirmative performance imposed on associations by law.

(4) As used in this Section:

(a) "corporation" does not include an entity organized as or by a governmental agency for the execution of a governmental program;

(b) "agent" means any director, officer, servant, employee or other person authorized to act in behalf of the corporation or association and, in the case of an unincorporated association, a member of such association;

(c) "high managerial agent" means an officer of a corporation or an unincorporated association, or, in the case of a

partnership, a partner, or any other agent of a corporation or association having duties of such responsibility that his conduct may fairly be assumed to represent the policy of the corporation or association.

(5) In any prosecution of a corporation or an unincorporated association for the commission of an offense included within the terms of Subsection (1)(a) or Subsection (3)(a) of this Section, other than an offense for which absolute liability has been imposed, it shall be a defense if the defendant proves by a preponderance of evidence that the high managerial agent having supervisory responsibility over the subject matter of the offense employed due diligence to prevent its commission. This paragraph shall not apply if it is plainly inconsistent with the legislative purpose in defining the particular offense.

(6) (a) A person is legally accountable for any conduct he performs or causes to be performed in the name of the corporation or an unincorporated association or in its behalf to the same extent as if it were performed in his own name or behalf.

(b) Whenever a duty to act is imposed by law upon a corporation or an unincorporated association, any agent of the corporation or association having primary responsibility for the discharge of the duty is legally accountable for a reckless omission to perform the required act to the same extent as if the duty were imposed by law directly upon himself.

(c) When a person is convicted of an offense by reason of his legal accountability for the conduct of a corporation or an unincorporated association, he is subject to the sentence authorized by law when a natural person is convicted of an offense of the grade and the degree involved.

* * * *

1. This Section deals with four areas: (1) the circumstances under which a corporation may be held criminally liable; (2) the circumstances under which an unincorporated association may be held criminally liable; (3) it establishes certain principles for interpreting statutes dealing with these two areas; and (4) it deals with certain problems relating to individual criminal liability of persons acting on behalf of corporations and associations.

2. Corporations: "In the early years the recognition of corporate responsibility was inhibited by certain procedural difficulties ...and certain conceptual notions....The most persistent of the latter was the idea that a corporation might not be held for a crime involving

swept aside. The modern development, however, has proceeded largely without reference to any intelligible body of principle and the field is characterized by the absence of articulate analysis of the objectives thought to be attainable by imposing criminal fines on corporate bodies." MPC Tentative Draft No. 4, p. 146 (1955).

3. The above statement is a fair capsulization of the development and the present state of the law in New Jersey. It would appear that there are virtually no crimes, including those requiring a criminal intent or a corrupt motive, of which a corporation may not be guilty. The early law permitted only conviction of crimes for which nonfeasance was sufficient but New Jersey soon allowed conviction also for misfeasance. State v. Morris and Essex R. Co., 23 N.J.L. 360 (Sup. Ct. 1852) (maintaining a public nuisance); State v. Lehigh Valley R. Co., 90 N.J.L. 372 (Sup. Ct. 1892) (manslaughter); State v. Passaic Co. Agri. Soc. 54 N.J.L. 260 (Sup. Ct. 1870) (keeping a disorderly house); Joseph L. Sigretto and Sons, Inc. v. State, 127 N.J.L. 578 (Sup. Ct. 1942) (obtaining money under false pretenses); State v. Continental Purchasing Co., 119 N.J.L. 257 (Sup. Ct. 1938) affirmed 121 N.J.L. 76 (E.&A. 1938) (conspiracy); State v. Western Union Telegraph Co., 13 N.J. Super. 172 (Co. Ct. 1951) affirmed 12 N.J. 468 (1953) (maintaining a disorderly house); State v. Graziani, 60 N.J. Super. 1 (App. Div. 1959) affirmed o.b. 31 N.J. 538 (1960). In this regard, i.e., allowing a corporation to be charged with almost any crime, the New Jersey cases are probably somewhat ahead of the cases in many other States. Clark and Marshall, Crimes, §6.17, pg. 453 (7th Ed. 1967). In New Jersey, a corrupt or evil intent, when necessary for conviction of a crime, may be imputed to the corporation fr[illegible] agents. Joseph L. Sigretto and Sons, Inc. v. State, supra; St[illegible]

supra; State v. Graziani, supra. There is little discussion in the cases of the level of authority at which a person who has the requisite mens rea must stand in order to allow the intent to be imputed. In the Sigretto case, cited above, the issue under consideration was the sufficiency of the indictment and no facts were set forth in the opinion. In the Passaic County case, supra, even though the court was reviewing a conviction, the facts are not set forth and the holding is purely conclusionary. Both the Graziani case and the Western Union case give some indication of the level at which intent must exist among subordinates in order to be imputed. Graziani was an easy case. The knowledge of the illegal activity was held by the president of a close corporation (he owning all but one share of it) and by his brother, the corporation's secretary (he owning the only other share). The Court stated, as the rule, that the "guilty intent of corporate officers may be imputed to a corporation to prove the corporation's guilt". 60 N.J. Super. at 17. In the Western Union case, the issue was the sufficiency of an indictment alleging that the corporate defendant sent messages in aid of an illegal business, contrary to a state statute, but which did not allege through what agent or agents the defendant acted. The Court found it unnecessary to make this allegation. The implication is that the guilty knowledge of the telegraph company's branch manager is sufficient. See 6 Rutgers L. Rev. 211, n. 27. It should be noted that the statements in the early (1852) case of State v. Morris and Essex R. Co., supra, that a corporation is incapable of performing crimes of "treason, felony or other crimes involving malus animus in its commission" or, as stated later in the opinion, of "perjury...treason...murder....(or) any crime, involving corru intent" (23 N.J.L. at 364, 370) can no longer be considered as

4. Subsection (1) sets forth three situations in which a corporation may be criminally responsible:

(a) Acts of an Agent. Paragraph (a) identifies the situations in which a corporation may be held liable for the conduct of an agent acting within the scope of his office or employment. The act must be performed "in behalf of the corporation" to avoid extension of liability to situations where some cases have held the corporation responsible where the act was done for the purpose of defrauding the corporation. MPC Tentative Draft No. 4, p. 147 (1955). The rule of paragraph (a) as to agents seems to be in accord with New Jersey law, to the extent sufficient cases exist to draw a generalization. State v. Western Union Telegraph Co., supra. See also, 6 Rutgers L. Rev. 211, n. 27.

As to the kinds of offenses for which the corporation may be convicted under this paragraph, two are set forth: first, "violations" (as defined in §1.04(5)), i.e., those offenses for which the only punishment is a fine and, second, offenses outside the Code "in which a legislative purpose to impose liability on corporations plainly appears". The purpose of this provision is to maintain criminal liability in the large area of regulatory legislation now in effect which specifically imposes criminal liability upon corporations. This section would probably not be acceptable for use in New Jersey as drafted. Many regulatory criminal statutes in New Jersey speak in terms of "persons". (see, e.g., N.J.S. 2A:108-1 through 9, "Foods and Drugs") whereas the intent clearly is to include corporations. As the law now is, the presumption is to include them. N.J.S. 1:1-2, State v. Natelson Bros., 21 N.J. Misc. 186 (Comm. Pleas 1943). Thus, to enact this part of the Code would remove corporate criminal liability in a large body of regulatory legislation where the Legislature clearly

intended it to exist when the legislation was enacted.

(b) Omissions. Paragraph (b) recognizes the responsibility of corporations for the commission of offenses consisting of the omission of a duty imposed by law on such bodies. Several such duties exist under present law.

(c) General Rule. Paragraph (c) states the general principle of corporation liability, governing any situations not covered by paragraphs (a) and (b). The drafters of the Code justify their position as follows:

> "In approaching the analysis of corporate criminal capacity, it will be observed initially that the imposing of criminal penalties on corporate bodies results in a species of vicarious criminal liability. The direct burden of a corporate fine is visited on the shareholders of the corporation. In most cases, the shareholders have not participated in the criminal conduct and lack the practical means of supervision of corporate management to prevent misconduct by corporate agents.
>
> It would seem that the ultimate justification of corporate criminal responsibility must rest in large measure on an evaluation of the deterrent effects of corporate fines on the conduct of corporate agents. Is there reason for anticipating a substantially higher degree of deterrence from fines levied on corporate bodies than can fairly be anticipated from proceeding directly against the guilty officer or agent or from other feasible sanctions of non-criminal character?
>
> It may be assumed that ordinarily a corporate agent is not likely to be deterred from criminal conduct by the prospect of corporate liability when, in any event, he faces the prospect of individually suffering serious criminal penalties for his own act. ....
>
> Yet the problem cannot be resolved so simply. For there are probably cases in which the economic pressures within the corporate body are sufficiently potent to tempt individuals to hazard personal liability for the sake of company gain especially where the penalties threatened are moderate and where the offense does not involve behavior condemned as highly immoral by the individual's associates. This tendency may be particularly strong where the individual knows that his guilt may be difficult to prove or where a favorable reaction to his position by a jury may be anticipated even where proof of guilt is strong. A number of appellate

opinions reveal situations in which juries have held the corporate defendant criminally liable while acquitting the obviously guilty agents who committed the criminal acts.

* * * *

This may reflect more than faulty or capricious judgment on the part of the juries. It may represent a recognition that the social consequences of a criminal conviction may fall with a disproportionately heavy impact on the individual defendants where the conduct involved is not of a highly immoral character. It may also reflect a shrewd belief that the violation may have been produced by pressures on the subordinates created by corporate managerial officials even though the latter may not have intended or desired the criminal behavior and even though the pressures can only be sensed rather than demonstrated. Furthermore, the great mass of legislation calling for corporate criminal liability suggests a widespread belief on the part of legislators that such liability is necessary to effectuate regulatory policy....

The case so made out...tends to suggest that such liability can best be justified in cases in which penalties directed to the individual are moderate and where the criminal conviction is least likely to be interpreted as a form of social moral condemnation. This indicates a general line of distinction between the 'malum prohibitum' regulatory offenses, on the one hand, and more serious offenses, on the other. The same distinction is suggested in dealing with the problem of jury behavior. The cases [discussed] above involving situations in which individual defendants were acquitted are all cases of economic regulations. It may be doubted that such results would have followed had the offenses involved a more obvious moral element. In any event, it is not clear just what conclusions are to be drawn from [these] cases. In each, the jury had corporate liability available as an alternative to acquittal of all the defendants. Conceivably, if that alternative had not been available, verdicts against the individuals in some of the cases might have been returned. Thus, it is at least possible that corporate liability encourages erratic jury behavior. It may be true that the complexities of organization characteristic of large corporate enterprise at times present real problems of identifying the guilty individual and establishing his criminal liability. It would be hoped, however, that more could be pointed to in justification of placing the pecuniary burdens of criminal fines on the innocent than the difficulties of proving the guilt of the culpable individual. Where there is concrete evidence that the difficulties are real, however, the effectuation of regulatory policy may be thought to justify the means.

In surveying the case law on the subject of corporate criminal liability one may be struck at how few are the types of common-law offenses which have actually resulted in corporate criminal responsibility. They are restricted for the most part to thefts (including frauds) and involuntary manslaughter. Conspiracy might also be included, ... No cases have been found in which a corporation was sought to be held criminally liable for such crimes as murder, treason, rape or bigamy. In general, such offenses may be effectively punished and deterred by prosecutions directed against the guilty individuals. One would not anticipate the same reluctance on the part of juries to convict which seems sometimes to be present where the offense is a regulatory crime. Moreover, in many of the situations. such as those involving involuntary manslaughter, there is a strong possibility that the shareholders will be called upon to bear the burden of tort recoveries. The prospect of tort recoveries may also be expected to encourage supervision of subordinate employees by executive personnel.

The burden of this analysis may suggest the conclusion that corporate criminal responsibility should be withheld from serious crimes defined by the...Code. There are considerations, however, which indicate the prudence of retaining responsibility on a more restricted basis for these crimes. As noted above, the acquisitive offenses... traditionally have constituted one of the major categories of corporate crime. In a rough way, also, corporate fines in these cases may be employed to deprive a corporation of an unjust enrichment resulting from the commission of offenses by its agents. Moreover, there may be situations in which it is highly desirable to retain a degree of corporate responsibility for the Code offenses as when the crime is committed in the State by a foreign corporation but where the guilty individual agent is outside the jurisdiction and hence not amenable to prosecution in the State.

The approach of paragraph (c) is to provide for a more restricted basis of liability for all cases not included within the terms of paragraphs (a) and (b). The general <u>respondeat superior</u> approach of paragraph (a) is rejected for these cases, and corporate liability is confined to situations in which the criminal conduct is performed or participated in by the board of directors or by corporate officers and agents sufficiently high in the hierarchy to make it reasonable to assume that their acts are in some substantial sense reflective of the policy of the corporate body. The agents having such power to bind the corporation criminally are described by the terms of paragraph (c) as those 'having responsibility for the formation of corporate policy' or 'high managerial agent(s) having supervisory responsibility over the subject matter of the offense.'

> The phrase 'high managerial agent' is defined in subsection (2)(c). Given the wide variations in corporate structure, these criteria are necessarily very general. ....
>
> The limitations on corporate liability imposed in cases falling within paragraph (c) are generally consistent with the position of the English courts and those of some American states....
>
> In practical effect, paragraph (c) would result in corporate liability for the conduct of the corporate president or general manager but not for the conduct of a foreman in a large plant or of an insignificant branch manager in the absence of participation at higher levels of corporate authority. Paragraph (c) thus works a substantial limitation on corporate responsibility in cases in which the deterrent effects of corporate fines are most dubious but preserves it in cases in which the shareholders are most likely to be in a position to bring pressure to bear to prevent corporate crime." MPC Tentative Draft No. 4, pp. 148-151 (1955).

5. Section (2) is in accord with New Jersey law. It assumes the imposition of criminal responsibility in absolute liability offenses unless a contrary intent is shown in the statute. N.J.S. 1:1-2; State v. Natelson Bros., supra.

6. Unincorporated Associations. Section (3) imposes liability upon unincorporated associations in two paragraphs which coordinate with §2.07(1)(a) and (b) as to corporations. A general provision, analogous to §2.07(1)(c) was eliminated as "raising too many controversial questions to be feasibly included in the Code". MPC Proposed Official Draft, p. 38 (1962). See MPC Tentative Draft No. 4, pp. 152-154. No New Jersey cases were found discussing the issue of criminal responsibility of unincorporated associations.

7. Section (4) defines "corporation" "agent" and "high managerial agent" for this Section.

8. Subsection (5) is based on the assumption that a primary purpose of corporate fines is to "encourage diligent supervision of corporate personnel by managerial employees in those cases

in which the corporation is bound by the conduct of inferior personnel. Where that diligence can be shown...exculpation should follow except in those cases where such a defense is clearly inconsistent with the legislative purpose manifested in defining the particular offense". MPC Tentative Draft No. 4, p. 154(1955). If the Legislature has imposed strict liability, there is no reason to exculpate. Ibid.

There is no analogous rule of law in New Jersey. Presumably, the factor would be taken into account in sentencing.

9. Corporate Agents. Section (6) is designed to overcome certain difficulties in the direct imposition of criminal sanctions on guilty corporate agents and supplements the provisions of §2.06.

(a) Paragraph (a) makes certain that the corporate agent will not escape liability because all or part of his conduct is performed through or in the name of the corporation. This is now New Jersey law. State v. Western Union Telegraph Co., supra; State v. Pincus, 41 N.J. Super. 454 (App. Div. 1956).

(b) Paragraph (b) deals with the case in which the offense consists of an omission by the corporation or association to perform a duty imposed on it by law. Under the existing law of accessorial liability the corporate officer, even though he be under affirmative obligation to perform duty in behalf of the corporation, generally escapes individual liability if his conduct consists of non-action. See People v. Clark, 8 N.Y. Crim. Rep. 179, 211, 14 N.Y. Supp. 642 (1891). Paragraph (b) provides for individual liability of the corporate officer having the primary responsibility for performance of the duty in behalf of the corporation. MPC Tentative Draft No. 4, p. 155 (1955). No New Jersey cases were found.

(c) "Paragraph (c) avoids the difficulties suggested by People v. Duncan, 363 Ill. 495, 2 N.E. 2d 705 (1936). In that case defendant, a corporate officer, was convicted as an accomplice of the corporation and was fined on certain counts and sentenced to imprisonment on others. The court, in setting aside defendant's sentence, ruled that since the principal (the corporation) could not be imprisoned, such a penalty could not properly be imposed on the accessory. More than that, even if the individual accessory were fined, the statutory provisions calling for imprisonment to compel payment of the fine would be inapplicable since such sanctions could not be imposed on the corporate principal. This result seems clearly unjustifiable as a matter of policy, and in precluding such a holding the provisions of paragraph (c) are consistent with the objectives of Section 2.06(6)...of the...Code as presently drafted." MPC Tentative Draft No. 4, p. 155 (1955). No New Jersey case was found.

10. Recent State Codes:

(a) The New York Code (§§20.20 and 20.25) has been adopted in Connecticut (§12) and proposed for Michigan (§§430, 435). It provides as follows:

§20.20 Criminal Liability of Corporations

Paragraph (1) defines "agent" and "high managerial agent" in a manner similar to MPC §2.07(4) but applies only to corporations.

"2. A corporation is guilty of an offense when:

(a) [substantially the same as MPC §2.07(1)(b)]

(b) The conduct constituting the offense is engaged in, authorized, solicited, requested, commanded, or recklessly tolerated by the board of directors or by a high managerial agent acting within the scope of his employment and in behalf of the corporation; or

(c) The conduct constituting the offense is engaged

in by an agent of the corporation while acting within the scope of his employment and in behalf of the corporation and (i) the offense is a misdemeanor or a violation, or (ii) the offense is one defined by a statute which clearly indicates a legislative intent to impose such criminal liability on a corporation."

§20.25 Criminal liability of an individual for corporate conduct.

[Essentially the same as MPC §2.07(6)(a), but applies only to corporations.]

(b) Illinois has substantially adopted §2.07(1)(4) (5) and (6).

(c) California Penal Code Revision Project (Tentative Draft No. 1, 1967)

§409. Criminal Liability of Corporations and Unincorporated Associations

(1) Except insofar as a statute other than this code provides to the contrary, a corporation may be convicted of the commission of an offense:

(a) If the offense is a crime which was authorized, requested, commanded, committed or recklessly tolerated by the board of director or by an officer or executive agent acting within the scope of his authority and in behalf of the corporation, or

(b) if the offense is an infraction which was committed by an agent of the corporation acting in behalf of the corporation and within the scope of his office and employment.

(2) An unincorporated association may be convicted of the commission of an offense:

(a) if the offense is defined by a statute other than this code which expressly provides for the criminal liability of an unincorporated association, and

(b) the offense was committed by an agent of the association acting in its behalf and within the scope of his office or [employment]

(3) As used in this section,

(a) 'Agent' means any director, officer, employer or other person authorized to act in behalf of the corporation or association.

(b) "Executive agent' means an officer or agent of a corporation who is invested with managerial authority and responsibility for the execution of corporate policy."

SECTION 2.08. INTOXICATION.

(1) Except as provided in Subsection (4) of this Section, intoxication of the actor is not a defense unless it negatives an element of the offense.

(2) When recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial.

(3) Intoxication does not, in itself, constitute mental disease within the meaning of Section 4.01.

(4) Intoxication which (a) is not self-induced or (b) is pathological is an affirmative defense if by reason of such intoxication the actor at the time of his conduct lacks substantial capacity either to appreciate its criminality [wrongfulness] or to conform his conduct to the requirement of law.

(5) Definitions. In this Section unless a different meaning plainly is required:

(a) "intoxication" means a disturbance of mental or physical capacities resulting from the introduction of substances into the body;

(b) "self-induced intoxication' means intoxication caused by substances which the actor knowingly introduces into his body, the tendency of which to cause intoxication he knows or ought to know, unless he introduces them pursuant to medical advice or under such circumstances as would afford a defense to a charge of crime;

(c) "pathological intoxication" means intoxication grossly excessive in degree, given the amount of the intoxicant, to which the actor does not know he is susceptible.

* * * *

1. Subsection (1) states the existing New Jersey law. The statement that "intoxication of the actor is not a defense unless it negatives an element of the offense" means that intoxication of the actor, at least when it is self-induced, is not, as such, a defense to a criminal charge. State v. Sinclair, 49 N.J. 525, 544 (1967) ("Our cases settle that the prostration of the mental faculties by voluntary intoxication from alcohol or drugs cannot lead to an acquittal...."); State v. Trantino, 44 N.J. 358, 369 (1965);

State v. White, 27 N.J. 158, 165-166 (1958); State v. Wolak, 26 N.J. 464, 477-478 (1958). This means that the law does no more than hold that it is not an excuse that the actor might not have committed the offense had he been sober--"and this upon the demands of public security". State v. Trantino, supra. See MPC Tentative Draft No. 9, p. 2 (1959).

2. Aside from being a complete defense, however, intoxication may either exculpate or mitigate guilt if the defendant's intoxication, in fact, prevents his having formed a mental state which is an element of the offense and if the law will recognize the proof of the lack of that mental state. The combinations of subsections (1) and (2) of §2.08 accomplish that result. It can be demonstrated that the rule stated in those two subsections of the Code express the existing New Jersey law on the subject: Intoxication, at present, is admissible when relevant to disprove a "specific intent" which is an element of the crime charged, but not to disprove a "general intent", when that is the required mental element. MPC Tentative Draft No. 9, p. 4 (1959). Thus, in State v. White, 27 N.J. 158 (1958) it was held that evidence of intoxication was admissible to disprove that defendant had the specific intent of killing wilfully, deliberately and premeditatedly, as required for first degree murder, but that the general criminal intent of "malice", required for second degree murder, could not be disproved by such evidence. Again, the specific intent necessary for the formation of a felony may be destroyed by intoxication making the defendant not guilty of felony murder. State v. Sinclair, 49 N.J. 525, 544 (1967); State v. White, supra, 27 N.J. at 165-166 (1958).

3. The same result, using different terminology, would be reached under the Code. That which the cases would describe as a

"specific intent" can be equated for this purpose, with that which the Code defines as "purposely" and "knowingly". See §2.02(2). A "general intent" can be equated with that which the Code defines as "recklessly" or "negligently". The statement, under existing law, that intoxication will not destroy a general intent, when that is sufficient for a given crime, can be restated as holding that recklessness is satisfied even though the defendant was unaware of a risk of which he would have been aware were he not intoxicated. (Recklessness, except in this situation, as defined by the Code, requires awareness or risk. §2.02(2)(c)). The Code specifically makes awareness unnecessary for recklessness in this situation. §2.08(2). Recklessness is sufficient to satisfy malice. State v. Gardner, 51 N.J. 444, 458 (1968). This explains why, under existing law, intoxication can destroy the wilfulness, deliberateness and premeditation necessary for first degree murder but cannot destroy the malice necessary for murder. See MPC Tentative Draft No. 9, p. 5 (1959).

4. Subsection (3) states the existing law that intoxication does not, in itself, constitute mental disease to satisfy the Code's position on responsibility. State v. White, 27 N.J. 158 (1958); State v. Wolak, 26 N.J. 464, 478 (1958) ("Thus, accepting the premise that insanity founded on a constitutional psychopathic personality was not established, but assuming that voluntary drunkenness was superimposed on that mental weakness to the extent that it produced for the time being an inability to distinguish between right and wrong, the crime would not be excused on the ground of insanity."); State v. Trantino, 44 N.J. 358, 368-369 (1965).

Note, however, that intoxication may be behavior associated

with mental disease and may be symptomatic of it. It would then be part of the total disease picture admissible to prove such a mental illness. State v. White, 27 N.J. 158, 165 (1958)), See MPC Tentative Draft No. 9, p. 9 (1959). It should be noted that there is, at present, a lack of agreement among medical authorities whether there is a form of psychosis giving rise to an uncontrollable urge to drink. The Code would leave this question to be determined factually in a given case through the application of the responsibility standard found in §4.01.

5. Non-self-induced intoxication. The Code in §2.08(4)(a) provides an affirmative defense in the case of non-self-induced intoxication in the event it is sufficient to meet the standard for lack of criminal responsibility. "Non-self-intoxication" is defined by exclusion under §2.08(5)(b). The New Jersey cases in discussing intoxication speak of "voluntary" intoxication as not excusing criminal conduct. State v. White, supra; State v. Sinclair, supra. No New Jersey case was found in which involuntary intoxication was actually successfully asserted and it has been said that none exist elsewhere. MPC Tentative Draft No. 9, p. 10 (1959). No New Jersey case was found establishing the degree of intoxication resulting from involuntary drinking. Saldiveri v. State, 217 Md. 412, 143 A2d 70 (1958) holds in accord with the Code that the involuntary intoxication must amount to insanity.

6. Pathological Intoxication. The Code treats pathological intoxication in the same manner it treats involuntary intoxication. See §2.08(4)(b). "Pathological intoxication" is defined in §2.08(5)(c) and is intended to cover the situation where an intoxicating substance is knowingly taken into the body and, due to bodily abnormality,

extreme and unusual intoxication results. See MPC Tentative Draft No. 9, pp. 11-12 (1959). No New Jersey case was found.

7. Definition of "intoxication". New Jersey law is in accord with the definition found in §2.08(5)(c) that intoxication is not limited to alcoholic intoxication. State v. Sinclair, 49 N.J. 525, 544 (1967); State v. White, 27 N.J. 158, 162-167 (1958); State v. Close, 106 N.J.L. 321 (E.&A. 1930).

When a narcotics addict commits a crime to obtain funds to prevent withdrawal, he is held accountable under existing law. State v. White, 27 N.J. 158 (1958). The usual effect of narcotic drugs is to make the addict less aggressive without a great impairment of mental capacities. Thus, it is only where the drug causes "intoxication" (as defined in §2.08(5)(a) and that intoxication negatives an element of the offense (under §2.08(1)) that it will have any effect upon a crime committed by an addict. See MPC Tentative Draft No. 9, pp. 12-13 (1959).

8. Other State Codes:

(a) New York Penal Law §15.25:

"Effect of intoxication upon liability

"Intoxication is not, as such, a defense to a criminal charge; but in any prosecution for an offense, evidence of intoxication of the defendant may be offered by the defendant whenever it is relevant to negative an element of the crime charged."

(b) Michigan Revised Criminal Code (Final Draft, 1967) §715:

(1) [Virtually identical to the New York provision quoted supra.]

(2) [Virtually identical to MPC §2.08(3)]

(3) [Based on MPC §2.08(4)] "A person is not criminally responsible for his conduct if by reason of intoxication that is not self-induced or that is pathological, at the time he acts, he lacks capacity to conform his conduct to the requirements of law."

[(4), (5) and (6) adopt that definitions of "intoxication", "self-induced intoxication" and "pathological intoxication" from paragraphs (a), (b) and (c) respectively of MPC §2.08(5).

(c) Connecticut Penal Code §8:

Effect of intoxication upon liability.

(1) is identical to N.Y. Penal Law §15.25

(2) is substantially identical to MPC §2.08(2)

(3) defines "intoxication" by adopting the definition in MPC §2.08(5)(a).

(d) California Penal Code Revision Project (Tentative Draft No. 1, 1967) §510:

(1) [Follows closely the provisions of New York Penal Law §15.25]

(2) "As used in this section, 'intoxication' means an impairment of mental or physical capacities resulting from the introduction of a alcoholic, narcotic or other substances into the body."

(e) Illinois Criminal Code §6--3:

"A person who is in an intoxicated or drugged condition is criminally responsible for conduct unless such condition either:

(a) Negatives the existence of a mental state which is an element of the offense; or

(b) Is involuntarily produced and deprives him of substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law."

SECTION 2.09. DURESS.

(1) It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist.

(2) The defense provided by this Section is unavailable if the actor recklessly placed himself in a situation in which it was probable that he would be subjected to duress. The defense is also unavailable if he was negligent in placing himself in such a situation, whenever negligence suffices to establish culpability for the offense charged.

(3) It is not a defense that a woman acted on the command of her husband, unless she acted under such coercion as would establish a defense under this Section. [The presumption that a woman, acting in the presence of her husband, is coerced is abolished.]

(4) When the conduct of the actor would otherwise be justifiable under Section 3.02, this Section does not preclude such defense.

* * * *

1. The Present Law. New Jersey does not have a statute concerning duress as a defense to a criminal act but there are two New Jersey cases which left open the question of whether duress is a defense. In State v. Palmieri, 93 N.J.L. 195, at 199-200 (E.&A. 1919), the issue was whether the trial court had erred in refusing to permit the defendant to prove that he shot the deceased while under duress:

> "The effect of duress as a defense in a prosecution for crime does not seem to have been considered in any reported case in this state, and there is considerable divergence of judicial opinion elsewhere concerning it....We are not called upon to decide the fundamental question, because even where duress is recognized as a defense, the rule is substantially uniform that the compulsion which will excuse a criminal act must be present, imminent and impending, and of such a nature as to induce a well-grounded apprehension of death or serious bodily harm if the act is not done." See also State v. Churchill, 105 N.J.L. 123 (E.&A. 1928).

About half of the States have legislation regarding the defense of duress. MPC Tentative Draft No. 10, p. 2 (1960). In

the absence of a statute the case law generally recognizes the defense. Id. at 4; Perkins, Criminal Law, p. 951 (2nd Ed. 1969). There is however, wide variation as to the limitations imposed upon the defense. These variations have centered around four basic questions: (a) To what crimes is the defense applicable? Many--or, perhaps, most--states limit the defense so as to make it inapplicable to the most serious offenses. Murder under duress is frequently excluded. MPC Tentative Draft No. 10 p. 2 (1960); Perkins, Criminal Law, p. 951 (2nd Ed. 1969). (b) What threats may establish the defense? Again, with substantial variation, the most frequent statement in the case law is that the compulsion must be "of such a nature as to induce a well-grounded apprehension of death or great bodily harm if the act is not done." Perkins, Criminal Law, p. 954 (2nd Ed. 1969). Most state statutes speak simply in terms of "reasonable grounds". MPC Tentative Draft No. 10, p. 2 (1960). (c) How immediate must the harm threatened be? Both the existing statutes and the case law require that the threat be "instant" or "imminent" or "immediate". Perkins, Criminal Law, p. 954 (2nd Ed. 1969); MPC Tentative Draft No. 10, pp. 3-4 (1960). (d) Is a reasonable belief that the threat exists sufficient to establish the defense or must the threat be actual? Most state statutes allow the defense if the actor had an honest and reasonable belief as to the necessity for his action. MPC Tentative Draft No. 10, p. 3 (1960). Cf., State v. Fair, 45 N.J. 77, 91-93 (1965) making it clear that as to defense of self and defense of other persons New Jersey applies the "reasonable mistake of fact" doctrine.

2. The Proper Scope of the Defense. In evaluating the Code's provision as to duress, two other provisions of the Code must

be described. First, there is a general justification provision found in §3.02 which provides a general defense where the actor believed his conduct necessary to avoid an evil to himself or to another and the evil sought to be avoided is greater than that sought to be prevented by the law defining the offense charged, with exceptions for the actor's recklessness or negligence. The provision under consideration gives this principle full application where the evil apprehended comes from another person rather than from the perils of the physical world by providing in §2.09(4) that any defense under §3.04 is not superseded by §2.09. See MPC Tentative Draft No. 10, pp. 5-6 (1960). The problem then is whether there are cases where the defendant cannot justify his conduct under §3.02, because his choice involves an equal or greater evil than that threatened but where he should still be excused. This leads to the second section of the Code to be examined. Section 2.01(1) provides that such cases do lead to an absence of liability where the actor is so far overwhelmed by force that his behavior is involuntary. Thus, where some other person moves the defendant's arm, there is no "act". The situation under consideration here differs in that defendant claims to be psychically incapable of not acting, and therefore excused, the same way the above person would be physically incapable. The Code's position is to equate the two. MPC Tentative Draft No. 10, pp. 5-6 (1960).

3. The Code rejects the view on this issue, expounded by some, that one should look to the actor's ability to withstand the coercion. Instead, it would only allow coercion which "a person of reasonable firmness in his situation would have been unable to resist". In this regard, the Code's position is similar to existing law on the provocation formula to reduce murder to manslaughter.

See State v. King, 37 N.J. 285 (1962); State v. McAllister, 41 N.J. 342 (1964). See MPC Tentative Draft No. 10, pp. 6-7 (1960);

> "...law is ineffective in the deepest sense, indeed it is hypocritical, if it imposes on the actor who has the misfortune to confront a dilemnatic choice, a standard that his judges are not prepared to affirm that they should and could comply with if their turn to face the problem should arise. Condemnation in such case is bound to be an ineffective threat; what is, however, more significant is that it is divorced from any moral base and is unjust."

Note that the standard established by the Code is not wholly external. It takes account of the defendant's "situation". This is intended to take account of stark, tangible factors which differentiate the actor from another such as his size or strength or age or health--but not to take account of matters of temperament. See discussion of §2.02(2)(d).

4. For this defense, the Code requires a threat to a person, either the actor or another. Threats to property are insufficient to excuse, although, in limited circumstances, they may justify under §3.02.

5. Beyond this, the Code rejects the limitations now found in many cases and statutes demanding that the threat be death or great bodily harm; that the threat be to the defendant rather than to another; or that the injury be immediate. All of these are simply to be given evidential weight in the application of the statutory standard. MPC Tentative Draft No. 10, pp. 7-8 (1960).

6. The limitation upon the defense where the defendant recklessly put himself into the situation is said to be in accord with the few cases on the subject. MPC Tentative Draft No. 10, p. 8 (1960). Notice that this provision is more stringent than the normal pattern of the Code which would only allow conviction for those crimes for which recklessness suffices as the mental element. (§3.09) The exceptional nature of the defense is said to justify

this. MPC Tentative Draft No. 10, p. 8 (1960). For negligence, the normal pattern is followed.

7. A claim of duress is an affirmative defense under §2.09(1). See §1.12(2).

8. Married Women and Coercion. At common law, a married woman was subject to two special rules: (a) A woman would not be convicted of a crime if she acted under the coercion of her husband except for murder, manslaughter, treason and offenses conducted by the intrigues of the female sex such as keeping a house of ill-fame. State v. Grossman, 95 N.J.L. 497 (E.&A. 1921); Perkins, Criminal Law p. 914 (2nd Ed. 1969). (b) There was a rebuttable presumption that criminal acts of the wife done in the presence of the husband are not voluntary but coercive. State v. Goldfarb, 96 N.J.L. 61 (Sup. Ct. 1921); State v. Martini, 80 N.J.L. 685 (Sup. Ct. 1910).

A New Jersey statute provides as follows:

> "The fact that an offense is committed by a married woman in the presence of her husband, or, though not in his presence, near enough to be under his immediate influence and control, shall not create a presumption that her offense was committed under coercion of her husband, or render him responsible for the commission of the offense." (N.J.S. 2A:85-3)

The effect of this statute is to destroy the presumption of coercion but, apparently, to retain the rule that if coercion is proved the wife is excused. State v. Grossman, supra.

The Code's position is that both the presumption of coercion and the underlying rule that coercion should excuse should be abolished. §2.09(3). The historical reason for the development of the rule is completely gone. See Perkins, Criminal Law pp. 911-913 (2nd Ed. 1969); MPC Tentative Draft No. 10, p. 9 (1960). While the duty of a wife to live with her husband gives rise to special problems

for the criminal law, that should not excuse the wife. No such rule applies in other situations where one person may dominate over another, such as employer-employee and parent-child. "The duty of a wife to obey her husband should not be reinforced by acquitting her of crimes committed at his command." MPC Tentative Draft No. 10, p. 11 (1960). The general "choice-of-evils" provision of §3.02 may, in specific situations be applicable.

New Jersey should include the bracketed second sentence of §2.09(3) in order to avoid the implication that the repeal of N.J.S. 2A:85-3 re-enacts the common law presumption.

9. Other State Codes:

New York has adopted §2.09 (1) and the first sentence of §2.09(2). (Penal Law 35.35) Connecticut and Michigan have copied this (Michigan Revised Criminal Code §635 (Final Draft 1967); Connecticut Penal Code (1969) §15.) Illinois states a more limited rule:

> §7-11. Compulsion.
>
> (a) A person is not guilty of an offense, other than an offense punishable with death, by reason of conduct which he performs under the compulsion of threat or menace of the imminent infliction of death or great bodily harm, if he reasonably believes death or great bodily harm will be inflicted upon him if he does not perform such conduct.
>
> (b) A married woman is not entitled, by reason of the presence of her husband, to any presumption of compulsion, or to any defense of compulsion except that stated in Subsection (a)."

Wisconsin does also:

> §939.46 Coercion.
>
> (1) A threat by a person other than the actor's co-conspirator which causes the actor reasonably to believe that his act is the only means of preventing imminent death or great bodily harm to himself or another and which causes him so to act is a defense to a prosecution for any crime based on that act except that if the prosecution is for murder the degree of the crime is reduced to

(2) It is no defense to a prosecution of a married woman that the alleged crime was committed by command of her husband nor is there any presumption of coercion when a crime is committed by a married woman in the presence of her husband. Married women shall be judged according to the standard set out in subsection (1)."

California's proposed provision is more similar to the Code:

§520. Duress; Compulsion.

In a prosecution for any offense:

(1) It is an affirmative defense that the defendant engaged in the conduct otherwise constituting the offense because he was coerced into doing so by the threatened use of unlawful force against his person or the person of another in circumstances where a person of reasonable firmness in his situation would not have done otherwise;

(2) It is an affirmative defense that the defendant engaged in the conduct otherwise constituting the offense in order to avoid death or great bodily harm to himself or another in circumstances where a person of reasonable firmness in his situation would not have done otherwise.

(3) The defenses defined in this section are not available [if the offense is murder, nor] to a person who placed himself intentionally, knowingly or recklessly in a situation in which it was probable that he would be subjected to duress or compulsion."

SECTION 2.10. MILITARY ORDERS.

It is an affirmative defense that the actor, in engaging in the conduct charged to constitute an offense, does no more than execute an order of his superior in the armed services which he does not know to be unlawful.

* * * *

§2.10 Commentary

1. The Code takes the view that military orders excuse when given by the actor's superior officer in the armed services and when the actor "does not know [it] to be unlawful". §2.10.

Army regulations limit the defense in military cases to those which the actor "did not know and could not reasonably be expected to know" were illegal. MPC Proposed Official Draft, p. 41 (1962) (Citing applicable authorities). Professor Perkins suggests that those cases which have been decided lead to the rule that the actor is "fully protected even if the order is unlawful if it is of a kind that might under any circumstances be lawful and he has no reason to believe it is not". Perkins, Criminal Law, p. 950 (2nd Ed. 1969). The Drafters of the Code took their position on the ground that it is preferable that when the question of reasonable belief is in issue it should be litigated in a military court, it being "unrealistic" to try that issue in a civil court. MPC Proposed Official Draft 41 (1962). See Proceedings, 39th Annual Meeting, American Law Institute, p. 82 (1962). It would seem, however, that there may be contexts in which the issue would have to be tried in a civil court in which case the law applied there should conform to military law. The Commission might, therefore, wish to incorporate a "reasonable grounds to believe" limitation upon the rule. No New Jersey cases were found.

2. The other state codes do not include this section. Seemingly, §3.03(1)(d) is thought to be sufficient.

SECTION 2.11. Consent.

(1) In General. The consent of the victim to conduct charged to constitute an offense or to the result thereof is a defense if such consent negatives an element of the offense or precludes the infliction of the harm or evil sought to be prevented by the law defining the offense.

(2) Consent to Bodily Harm. When conduct is charged to constitute an offense because it causes or threatens bodily harm, consent to such conduct or to the infliction of such harm is a defense if:

(a) the bodily harm consented to or threatened by the conduct consented to is not serious; or

(b) the conduct and the harm are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport; or

(c) the consent establishes a justification for the conduct under Article 3 of the Code.

(3) Ineffective Consent. Unless otherwise provided by the Code or by the law defining the offense, assent does not constitute consent if:

(a) it is given by a person who is legally incompetent to authorize the conduct charged to constitute the offense; or

(b) it is given by a person who by reason of youth, mental disease or defect or intoxication is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute an offense; or

(c) it is given by a person whose improvident consent is sought to be prevented by the law defining the offense; or

(d) it is induced by force duress or deception of a kind sought to be prevented by the law defining the offense.

* * * *

§2.11 Commentary

1. In General. The consent of the victim to conduct charged to constitute an offense or to the result thereof is a defense if such consent negatives an element of the offense. Statutes frequently define offenses in terms of the consent, or lack thereof, or will of victim. If so, proof of this element is an essential element of the prosecution's case. See e.g., Rape, N.J.S. 2A:138-1 ("forcibly

ıinst her will"); State v. Harris, 70 N.J. Super. 9 (App. Div. ;1); Abduction, N.J.S. 2A:86-1 ("against her will"); Kidnapping, [.S. 2A:118-1 ("forcibly takes away"). Additionally, however, there : situations where, in the definition of the crime, words expressly lressed to the victim's consent, or lack thereof, have not been :luded but where it is clear that the legislative conception of the :ense was to include this element. See, e.g., Burglary (N.J.S. 2A:94-1) :re consent to entry destroys the "breaking" (Clark and Marshall, .mes 1000 (7 Ed. 1967); Assault (N.J.S. 2A:90-1) where consent ;troys the apprehension required, State v. Cooper, 22 N.J.L. 52 ıp. Ct. 1849). See generally, Clark and Marshall, Crimes 351-357 Ed. 1967). Proceedings, 39th Meeting, American Law Institute 90-92)62).

2. Consent to Bodily Harm. Section (2) defines three ;tances in which consent to conduct charged to constitute an offense :ause it causes or threatens to cause bodily harm is a defense:) if the bodily harm consented to or threatened by the conduct ısented to is not "serious". This is in accord with existing law New Jersey and elsewhere. See State v. Cooper, 22 N.J.L. 52 (Sup. . 1849) (Indictment for assault in committing an abortion. Held, nan's assent purged the act of criminality and the act of aborting r is not an offense "of so high a nature" to preclude application of ls rule.); Clark and Marshall, Crimes 352 (7 Ed. 1967). (b) If the dily harm is part of the conduct or harm which are reasonably reseeable hazards of joint participation in a lawful athletic ntest or competitive sport. This provision of the Code is to be tended, in accordance with the wishes of the Institute to include y concerted activity of a kind not forbidden by law. A.L.I.,

Changes in Proposed Official Draft, MPC p. 1 (1962). No New Jersey cases exist but the Cooper case, supra, (allowing consent to an assault) would indicate that the rule will be followed. See, generally, Clark and Marshall, Crimes 353 (7 Ed. 1967). (c) If the consent establishes a justification under Article 3 of the Code. This is intended to incorporate the privilege given by consent to medical treatment. §3.05(4). Proceeding, 39th Meeting, American Law Institute 91 (1962).

3. Ineffective Consent. The Code, in Subsection (3), sets forth three times when, unless otherwise provided in the definition of the offense, assent does not constitute consent:

(a) If it is given by a person who is legally incompetent to authorize the conduct. Some statutes, now in force, make consent by a person below a particular age legally ineffective. N.J.S. 2:A138-1 (Carnal Abuse). See Cliver v. State, 45 N.J.L. 46 (Sup. Ct. 1883); Farrell v. State, 54 N.J.L. 416 (Sup. Ct. 1892).

(b) If it is given by a person who by reason of youth, mental disease or defect or intoxication is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense. This is in accord with New Jersey law. As to youth, see N.J.S. 2A:138-1, (Carnal Abuse) and Cliver v. State, supra, and Farrell v. State, supra. As to mental disease see N.J.S. 2A:138-2 (Carnal knowledge of female inmates of homes for feeble-minded or mentally ill.). As to intoxication see N.J.S. 2A:138-1 (Intercourse with a woman under the influence of a narcotic drug) and State v. Terry, 89 N.J. Super 445 (App. Div. 1965) "mentally able to resist".

(c) If it is given by a person whose improvident consent is sought to be prevented by the law defining the offense. See N.J.S. 2A:138-1 (Carnal Abuse) and Cliver v. State, supra and Farrell v. State, supra.

(d) If it is induced by force, duress or deception of a kind sought to be prevented by the law defining the offense. The rule as to force is in accord with the law in New Jersey and elsewhere. See State v. Terry, 89 N.J. Super. 445 (App. Div. 1965); State v. Harris, 70 N.J. Super. 9 (App. Div. 1961); Clark and Marshall, Crimes 359 (7 Ed. 1967). The same is true as to duress which is defined as coercion arising out of the threat to use unlawful force. See State v. Terry, supra; State v. Harris, supra. No New Jersey cases on deception were found. The decisions elsewhere are conflicting. Clark and Marshall, Crimes 358 (7 Ed. 1967); Perkins, Criminal Law 165 (2 Ed. 1969). The issue has arisen most frequently in connection with intercourse between a doctor (or a pretended doctor) and a patient as part of a treatment. The Code's position would be to find such a person guilty as assent here would not be consent because it was obtained by "deception of a kind sought to be prevented by the law defining the offense". People v. Don Moran, 25 Mich. 356, 12 Am. Rev. 283 (Sup. Ct. 1872).

4. The Code provisions on consent have been proposed for adoption in Michigan with only minor changes. Michigan, Revised Criminal Code §330 (Final Draft 1967). The other recent state codes have eliminated this provision and have relied upon (1) the definitions of the crimes themselves and (2) a general clause saving all common-law defenses not specifically provided for in the Code.

SECTION 2.12 DE MINIMIS INFRACTIONS.

The Court shall dismiss a prosecution if, having regard to the nature of the conduct charged to constitute an offense and the nature of the attendant circumstances, it finds that the defendant's conduct:

(1) was within a customary license or tolerance, neither expressly negatived by the person whose interest was infringed nor inconsistent with the purpose of the law defining the offense; or

(2) did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction; or

(3) presents such other extenuations that it cannot reasonably be regarded as envisaged by the legislature in forbidding the offense.

The Court shall not dismiss a prosecution under Subsection (3) of this Section without filing a written statement of its reasons.

* * * *

§2.12 Commentary

1. This Section of the Code introduces a new idea into the substantive criminal law. In criminal law enforcement, many agencies exercise discretion as to the appropriateness of prosecution in a particular case. It is clear that the police constantly must make decisions as to whether to arrest or, after arrest, whether to proceed with the case. Skolnick, Justice Without Trial (1966); Goldstein, Police Discretion Not to Invoke the Criminal Process, 69 Yale L.J. 543 (1960); LaFave, Arrest: The Decision to Take a Suspect into Custody (1965); Remington, Criminal Justice Administration 275-310 (1969). Thereafter, both the prosecutor and the Grand Jury are charged with the obligation of determining both the sufficiency of the evidence to proceed and the appropriateness of doing so. As to the prosecutor, see N.J.S. 2A:158-1, et. seq.; State v. Winne, 12 N.J. 152 (1953); Paulsen and Kadish, Criminal Law and its Processes 935-941, 959-980

(1962; 1967 Supp.); United States v. Cox, 342 F2d 157 (5 Cir. 1965); Remington, Criminal Justice Administration 422-474 (1969). As to the Grand Jury, see Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure 69 Yale L.J. 1149, 1166-72 (1960); Remington, Criminal Justice Administration 515-526 (1969). Further, at least as to the Municipal Courts, experience has shown that a judge will, on occasion, exercise his power to enter a finding of not guilty even in the face ofproven guilt because, under the circumstances, he considers a conviction to be inappropriate.

The Drafters of the Code summarize all of this as "a kind of unarticulated authority to mitigate the general provisions of the criminal law to prevent absurd applications". Proceedings, 39th Annual Meeting, American Law Institute 105 (1962).

In order to bring this exercise of discretion to the surface and to be sure that it is exercised uniformly throughout the judicial system, this section of the Code has been included. It should be noted that the Code uses the word "shall", meaning that if the Court makes the requisite findings, it must dismiss.

2. Subsection (1) requires a dismissal if the defendant's conduct was within a customary license or tolerance not expressly negatived by the victim nor inconsistent with the Law. The example given is that of trespassing upon land in an area where it has traditionally been permitted by the owners or picking up a newspaper from a stand when you do not have the money for it intending to pay the next day. Ibid.

3. Subsection (2) is the situation where the conduct literally comes within the section as drafted but only to an extent which is too trivial to warrant the condemnation of a conviction. "Some statutory

rape cases might come under this" according to the Drafters. Attributing common sense to the Legislature, it is said that they would not have intended the prosecution of every single instance even though there is a technical violation of the statute. Ibid.

4. Subsection (3) applies to a similar situation where there are, in the Drafters' words, "extraordinary and unanticipated mitigations" for the particular conduct. Id. at 106. This statute would allow the judiciary to use a rule of reason which, without a legislative recognition of such power, a court might feel that it would be precluded by the separation of powers doctrine. Id. at 108. As a safeguard and to bring to the surface the reasons for believing that no jury ought to convict in a particular situation, the Court is required to file a statement of its reasons for action taken under this subsection.

5. It should be made clear, either in the notes accompanying the legislation or in the legislation itself that this section is intended as an additional area of discretion in the administration of the criminal law by way of judicial participation and not as a replacement for traditional discretion exercise by the prosecutor, the grand jury and the police. The section would not be used by those agencies as an excuse for buck-passing.

6. None of the new state codes contain this provision.

ECTION 2.13. ENTRAPMENT.

(1) A public law enforcement official or a person acting n cooperation with such an official perpetrates an entrapment if or the purpose of obtaining evidence of the commission of an offense, e induces or encourages another person to engage in conduct constituting uch offense by either:

(a) making knowingly false representations designed o induce the belief that such conduct is not prohibited; or

(b) employing methods of persuasion or inducement which reate a substantial risk that such an offense will be committed by ersons other than those who are ready to commit it.

(2) Except as provided in Subsection (3) of this Section, person prosecuted for an offense shall be acquitted if he proves y a preponderance of evidence that his conduct occurred in response o an entrapment. The issue of entrapment shall be tried by the Court n the absence of the jury.

(3) The defense afforded by this Section is unavailable hen causing or threatening bodily injury is an element of the offense harged and the prosecution is based on conduct causing or threatening ch injury to a person other than the person perpetrating the entrapment.

* * * *

§2.13 Commentary

1. A defendant whose crime is a result of an entrapment neither less reprehensible or dangerous nor more reformable or terrable than another defendant who was not entrapped. It is an tempt to deter wrongful conduct on the part of the government, and re particularly, of the police, which justifies the defense of trapment, not the innocence of the defendant. When the police increase e risk of offending on the part of the innocent a great deal of harm done including the fact that the police are not then pursuing their oper task of apprehending those who offend without their encouragement d of causing the police to lose respect and to increase suspicion of em in the community. MPC Tentative Draft No. 9, pp. 14-15 (1959). e defense is almost universally recognized in the United States cluding New Jersey. Ibid. State v. Dolce, 41 N.J. 422 (1964);

State v. Dennis, 43 N.J. 418 (1964); State v. White, 86 N.J. Super. 410 (App. Div. 1965); State v. Johnson, 90 N.J. Super. 105, 116-117 (App. Div. 1965).

2. The Definition of Entrapment in the Present Law. The principal difficulty in defining the police conduct which gives rise to the defense lies in attempting to distinguish between those police tactics of deceits and persuations which are necessary to police work and ought not to be forbidden and those which should. Because in the enforcement of "crimes without victims", i.e., narcotics, vice, gambling, liquor violations, etc., there are no complaining witnesses, misrepresentation by a police officer or agent concerning his identity is a practical necessity. MPC Tentative Draft No. 9, p. 16 (1959).

In both of the leading decisions of the Supreme Court of the United States (Sorrells v. United States, 287 U.S. 435 (1932) and Sherman v. United States, 356 U.S. 369 (1958), the majority opinion has focused attention, in defining the defense, on the defendant's character as well as on the misconduct of the police. Thus, in Sorrells, Chief Justice Hughes said the defense is established "when the criminal design originates with the officials of the Government and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute". 287 U.S., at 442. Sherman applied this same test: inducement by the government and innocence of the defendant. See also Accardi v. United States, 257 F2d 168 (5 Cir. 1958). The Sorrells case based the defense upon being an implied exception to the broad legislative enactment. 287 U.S. at 448-449.

3. New Jersey has adopted the test of the majority opinions in Sherman and Sorrells. In State v. Dolce, supra, the Court

defined the defense as follows:

> "Entrapment exists when the criminal design originates with the police officials, and they implant in the mind of an innocent person the disposition to commit the offense and they induce it commission in order that they may prosecute. Sorrells v. United States....It occurs only when the criminal conduct was the product of the creative activity of law enforcement officials. Sherman v. United States, supra, ... In such situation although the violation of the criminal law is not denied...conviction of the defendant cannot be had because the methods employed by the enforcement officials are unconscionable and contrary to public policy. Sorrells ....The courts will not permit their process to be used in aid of a scheme for the actual creation of a crime by those whose duty it is to deter its commission. Chief Justice Warren, speaking....in Sherman, likened police methods which constitute entrapment to those which produce coerced confessions and unlawful searches...The defense is spoken of as establishing an estoppel against the government or as a bar to prosecution or as removing the case from the purview of the statute....
>
> Judicial abhorrence of entrapment does not mean that police officals cannot afford opportunities or facilities for the commission of criminal offenses. Artifice and stratagem, traps, decoys and deceptions may be used to obtain evidence of the commission of crime or to catch those engaged in criminal enterprises...According to Sherman, ... in determining whether entrapment existed, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminals....Or...., 'Is the defendant a strayed lamb or an ensnarled wolf?' The law will protect the innocent from being led to crime through the activities of law enforcement officers but it will not protect the guilty from the consequences of subjectively mistaking apparent for actual opportunity to commit crime safely." (41 N.J. at 430-432.)

See also, State v. Dennis, 43 N.J. 418 (1964); State v. Johnson, 90 N.J. Super. 105, 116-117 (App. Div. 1965); State v. Valazquez, 104 N.J. Super. 578 (App. Div. 1969).

4. In contrast to the majority of the Supreme Court in Sherman and Sorrells and the New Jersey formulation in Dolce, Mr. Justice Roberts, would center attention upon the conduct of the police. See his concurring opinion in Sherman v. United States, 287 U.S. at 454. He would not insist that the defendant be "innocent" and although not exactly attempting to draw the line

between proper and improper police conduct, he noted a difference between "articifice or deception", implied to be proper, and "trickery, persecution, or fraud", implied to be improper. Mr. Justice Frankfurter, concurring (with three other Justices) in Sherman would formulate the defense solely with reference to police behavior. 356 U.S. at 382. Under his test, the "innocence", i.e., the character of disposition of the defendant is irrelevant. See discussion in MPC Tentative Draft No. 9, pp. 17-18 (1959).

5. The Code's formulation adopts the views of Justice Roberts in Sorrells and Justice Frankfurter in Sherman. It would overrule those cases and the New Jersey cases which follow them. It speaks, in §2.13(1) only to the conduct of the police and is available to any defendant, irrespective of his character, provided the behavior of the prosecuting authorities has created a risk that those who presently would obey the law, might be drawn to crime. MPC Tentative Draft No. 9, p. 19 (1959). This view was adopted in lieu of an alternative proposal which would have retained Sherman and Sorrells and which read as follows:

> "(1) A public law enforcement official or a person acting in cooperation with such an official perpetrates an entrapment if for the purpose of obtaining evidence of the commission of an offense he solicits, encourages or otherwise induces another person to engage in conduct constituting such offense when he is not then otherwise disposed to do so." MPC Tentative Draft No. 9, p. 13 (1959).

This would take into account prior record and conduct of the defendant and is justified chiefly on the ground that the greatest vice inheres in that police behavior which leads the previously innocent to crime. "Predisposed defendants are largely the professionals, who constitute the greatest crime problem. Freeing them in order to discipline the police was thought too great a price." MPC Tentative Draft No. 9, p. 19 (1959). The chief justification for the Code formulation adopted is

that it gives "full deterrent effect" to the defense and the police conduct toward a defendant may be particularly objectionable even though he entertained a purpose to commit crime prior to any inducement by officials. "Law enforcement officers may feel free to employ forbidden methods if the 'innocent' are freed but the habitual offenders, in whom the police have the greater interest, will nevertheless be punished." Id. at 20. Further, investigation into the character and disposition of the defendant tends to obscure the task of judging the quality of police behavior. Ibid.

6. The Burden of Proof. The Code places the burden of proof upon the defendant because the defense does not negative an element of the offense and does not "truly seek to excuse or justify a criminal act. The defense is, in fact, a complaint by the accused against the State for employing a certain kind of unsavory enforcement. The accused is asking to be relieved of the consequences of his guilt by objecting to police tactics. He is plaintiff and should be required to come forward with the evidence and to establish the main elements of his claim by a preponderance of proof." MPC Tentative Draft No. 9, p.21 (1959). New Jersey law is not in accord with this. Under Dolce, entrapment is a "negative defense" meaning that the defendant has the burden of coming forward with some evidence to support the defense but, once having done so, the burden is upon the prosecution to prove, beyond a reasonable doubt, that he was not entrapped. 41 N.J. at 432.

7. Trial of the Entrapment Issue. Under the existing law, character of the defendant is in issue. This means that prior convictions, ready compliance with the inducement, evidence that a design to commit the crime was formed earlier, evidence of an "existing course"

"innocence". MPC Tentative Draft No. 9, p. 18, n. 11 and p. 21 (1959). State v. Dolce, supra, 41 N.J. at 433; State v. White, supra. This being the case, the Drafters of the Code strongly take the position that, under that rule, the issue should be tried to the court rather than to the jury. Under the Code's proposal, eliminating the need for defendant's innocence and, therefore, proof of character, the Drafters find less demand for trial to the court but that such is still the appropriate procedure. MPC Tentative Draft No. 9, pp. 21-22 (1959). This is based mainly on the supposed lack of jury sensitivity to the need to control police conduct. Ibid. The contrary argument is that a jury is peculiarly well suited to try the question of whether an ordinary person would be induced. New Jersey has left the question open for consideration by the Court through its rule-making power. State v. Dolce, supra, 41 N.J. at 437-438. The present practice is to try the issue to the jury.

8. Entrapment by Persons Without Official Position. The Code follows existing law in (1) not allowing the defense if the inducement comes from a private person without official connection (MPC Tentative Draft No. 9, p. 14, n. 1 and p. 22 (1959)) and (2) allowing the defense when the inducement is by a person who is employed by or acts as a part of law enforcement through the active or passive cooperation of officials. Id. at 23. This accords with our law. State v. Dougherty, 86 N.J.L. 525 (Sup. Ct. 1915) reversed on other grounds 88 N.J.L. 209 (E.&A. 1916) (Burns Detective Agency). Cf., State v. Scrotsky, 39 N.J. 410 (1963) (search and seizure).

9. Limitation of the Defense. The majority opinion in the Sorrells case recognizes that a particular offense may be such that [illegible] implied legislative exception because it is too

allows the defense where great physical damage has taken place. MPC Tentative Draft No. 9, p. 23 (1959). The Code places such a limitation on the defense. Here, the offender should be punished and the deterrant effect to the conniving police would be to prosecute them. Id. at 23-24.

10. Other States. New York has adopted the Code's view in rejecting the rule of Sorrells and Sherman. N.Y. Penal Law §40.05 (Attached). Michigan proposed Code would do so also. Michigan Revised Criminal Code (Final Draft, 1967) §640. Both alternatives of California's proposals do so. California Penal Code Revision Project (Tentative Draft No. 1, 1967) §550 (Attached). The Illinois Criminal Code (S.H.A. ch. 38, §7-12) also abandons the innocence requirement. The Connecticut Penal Code (1969), in §16, would retain the Sorrells and Sherman view. (Attached).

(a) New York Penal Law, §40.05:

> "In any prosecution for an offense, it is an affirmative defense that the defendant engaged in the proscribed conduct because he was induced or encouraged to do so by a public servant, or by a person acting in cooperation with a public servant, seeking to obtain evidence against him for the purpose of criminal prosecution, and when the methods used to obtain such evidence were such as to create a substantial risk that the offense would be committed by a person not otherwise disposed to commit it. Inducement or encouragement to commit an offense means active inducement or encouragement. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment."

(b) Connecticut Penal Code (1969) §16:

> "In any prosecution for an offense, it is a defense that the defendant engaged in the proscribed conduct because he was induced to do so by a public servant, or by a person acting in cooperation with a public servant, for the purpose of institution of criminal prosecution against the defendant, and that the defendant did not contemplate and would not otherwise have engaged in said conduct."

(c) California Penal Code Revision Project

"(1) A person may not be convicted of an offense if he has been entrapped to commit it. A person is entrapped to commit an offense if a public officer or a person acting in cooperation with a public officer induces or encourages him to engage in criminal conduct, when the methods of inducement are such as to create a substantial risk that the offense would be committed by persons other than those who are ready to commit it. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

[Alternate (1) A person may not be convicted of an offense if he has been entrapped to commit it. A person is entrapped to commit an offense if a public officer or a person acting in cooperation with a public officer induces or encourages him to engage in conduct constituting the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.]

(2) If, after the close of the prosecution's case, the court is satisfied that the defense of entrapment has been established, it shall grant a judgment of acquittal. Evidence of a defendant's prior convictions is inadmissible on the issue of entrapment."

ARTICLE 3. GENERAL PRINCIPLES OF JUSTIFICATION
INTRODUCTORY NOTE

1. This Article formulates the justification defenses for conduct which would otherwise constitute an offense. It has one section which states a principle applicable to all crimes (§3.02, Choice of Evils) and several specific formulations dealing with particular situations (§§3.03 through 3.10).

2. At the present time, all of the New Jersey statutory law in this area is found in NJS 2A:113-6:

> "Any person who kills another by misadventure, or in his or her own defense, or in the defense of his or her husband, wife, parent, child, brother, sister, master, mistress or servant, or who kills any person attempting to commit arson, burglary, kidnapping, murder, rape, robbery or sodomy, is guiltless and shall be totally acquitted."

The New Jersey Law as to the justification defenses is really found in the cases and, in fact, the words of the above statute are not followed any longer. For example, State v. Fair, 45 N.J. 77 at 90 (1965) held that the justification of killing to defend another can apply in the case of a stranger--notwithstanding the enumeration of relationships in N.J.S. 2A:113-6. Again, notwithstanding that the statute speaks only of homicide as being justified, the cases find the principles of justification as there stated and developed in the cases, to apply to non-homicide situations as well. State v. Abbott, 36 N.J. 63, at 73 (1961).

3. The approach of the Code is to abandon this case-by-case development in favor of a "fresh, integrated treatment of the subject." In doing this, the Code looks not to the crime with which the defendant has been charged but, rather, to the conduct which he seeks to justify. MPC, Tentative Draft No. 8, Pg. 3 (1958). This is now the approach of our law, the Code's approach having been described in State v. Abbott, 36 N.J. 63, 73 (1961) as "sound."

Another important point to be made in connection with the Code's approach in this area is that it carefully establishes standards both as to the right to use force and as to the amount of force which may be used. On several occasions, the Code distinguishes between the right to use "deadly force" and the right to use "moderate" (i.e. less than deadly) force. See MPC Tentative Draft No. 8, p. 1 and p. 3. While our Supreme Court has specifically adopted this approach (State v. Abbott, 36 N.J. 63, at 71-72 (1961)) for some purposes, distinctions of this sort can be more appropriately developed in a Code rather than in case law.

4. There are two basic decisions to be reached which are common to all of the justifications set forth in Article III. Rather than taking these up in connection with each of those provisions, these two problems have been singled out for the Commission's consideration at this point. If a decision can be reached on these basic questions, they can be applied generally to each of the Sections in the Article. These two problems are discussed below:

5. Reasonable and Honest Belief vs. Honest Belief. In New Jersey today, the justification defenses are only available to a defendant who has a belief in the need to use force which is both honest and "reasonable."* If the defendant forms an honest but unreasonable belief in the need to use force for some justifiable purpose and acts pursuant to that belief, killing another person, he is guilty of murder.** Thus, the lack of reasonableness in the

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*State v. Bess, 53 N.J. 10, 16 (1968) (self-defense and prevention of a felony); State v. Fair, 45 N.J. 77, at 92-93 (1965) (defense of another); State v. Hipplewith, 33 N.J. 300, at 316-317 (1960) (self-defense); State v. Brown, 46 N.J. 96, at 102 (1965) (same); State v. Montague, 101 N.J. Super 483, at 488-489 (App. Div. 1968) (defense of another when the other person is resisting arrest); State v. Williams, 29 N.J. 27, at 39 (1959) (use of force in law enforcement); Brown v. State, 62 N.J.L. 666, at 709 (E & A 1898).

**See next page for footnote.

in the formation of the need to act entirely destroys the defense. There is one exception to this rule. In State v. Williams, 29 N.J. 30, at 39-43 (1959), it was held that a police officer who wantonly uses an unreasonable amount of force to overcome resistance by a person he is arresting is guilty only of manslaughter. In that situation, the justification defense of law enforcement is only partially available to the defendant because of his use of excessive force. That partial defense, however, makes him guilty only of manslaughter, and not of murder, according to the decision of the Court on reasoning based upon a "parity of considerations" to the doctrine of provocation. Id. at 42-43. The reasoning leading to the Williams holding might well be applied to other situations. It could well be applied to defendants coming under defenses other than under the special powers granted police officers. It might also be applied to issues other than, as in Williams, the use of excessive force, e.g., the right to use any force, the ability to and necessity of retreating, etc. Generally speaking, these issues have not been litigated. Where they have, no reference has been made to Williams. See State v. Bess, 53 N.J. 10, 16 (1968).

The Code's treatment of this problem is (1) to make justification defenses available whenever the "defendant believes" in the need to act and not to require a finding of reasonableness in the formation of that belief but (2) to hold that the justification defenses found in those sections is not available in a prosecution for which either recklessness or negligence is a sufficient mens rea if the defendant was reckless or negligent, as the case may be, in forming such a belief or in acquiring or failing to acquire any

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**While the cases do not explicitly make this point, it is clear that this is the result which is anticipated by them. See State v. Bess, 53 N.J. 10, 16 (1968); State v. Bonfiglio, 67 N.J.L. 239 (E & A 1901); State v. Scott, 104 N.J.L. 544 (E & A 1928); State v. Abbott, supra; State v. Fair, supra (45 N.J. at 96); State v. Chiarello, 69 N.J. Super 479, 484-495 (App. Div. 1961); See MPC Tentative Draft No. 8, p. 14-15, particularly n. 3.

knowledge or belief which is material to the justifiability of his use of force. See §§ 3.02(2) and 3.09(2). MPC Tentative Draft No. 8, p. 14. See State v. Chiarello, 67 N.J. Super 479, at 487 (App. Div. 1961) which describes the Code system. These provisions are in accord with the Code's general rule of only holding a defendant responsible for the lowest offense for which the determinative kind of culpability is established for every material element of the offense, i.e., the least common denominator. §2.03(10). There is judicial authority in other states both accepting the existing New Jersey view and view which the Code suggests. See Paulsen and Kadish, Criminal Law and its Processes, 383-385 (1962) and MPC Tentative Draft No. 8, p. 15 (1959).

The Code's approach is simply to apply the principle of the Williams case to all elements of the offense and to all classes of defendants.

The Commission should decide whether (1) to follow the existing law in requiring that the defendant's belief be both honest and reasonable and, if the belief is found to be unreasonable finding the justification to disappear completely (except in the Williams situation) or (2) to follow the Code's system under which an unreasonable belief would lead to a conviction of a lesser offense. All of the recently enacted Codes of other states and all of the proposed new Codes for other states have included a retention of the "reasonableness" requirement. The provisions are collected in the appropriate Sections throughout the commentary to this Article, below.

6. The Imperfect Defense. The problem discussed above, the use of force under an unreasonable belief in the necessity to do so, may be viewed as one of a variety of different situations in which a justification defense is not completely available because the defendant acted recklessly or negligently as to one element of the offense. That situation was singled out for independent discussion because it is so deeply engrained in the law both in New Jersey and elsewhere. It is really, however, just a branch of a larger problem. These

are known as "imperfect defense" situations. They include cases where the defendant has a right to act but uses an excessive amount of force or where he he is reckless or negligent in evaluating his right to intervene on behalf of another person, or his ability to retreat, etc. The New Jersey result in these situations is, as in the unreasonable belief situation, if a death results, to find the defendant guilty of murder. State v. Abbott, supra, 36 N.J. at 68 (1961) ("If the force used was unnecessary in its intensity, the claim of self-defense may fall for that reason."); State v. Bess, 53 N.J. 10, 16 (1968); State v. Bonfiglio, 67 N.J.L. 239 (E & A 1901); State v. Scott, supra; State v. Fair, supra. But cf. State v. Williams, 29 N.J. 27 (1959), as discussed above, making the use of excessive force by a police officer in dealing with a person resisting arrest manslaughter on a theory of reasoning analogous to the provocation cases.

The Code's position on these matters is the same as on the unreasonable belief issue, i.e., it would allow conviction only for a crime for which recklessness or negligence is a sufficient mens rea. See 3.09(2) and §3.02(2). There is judicial authority for this position. In Queen v. Howe, 100 C.L.R. 448 (High Court of Australia 1958) it is justified on the basis that the only crime for which the defendant's culpability fits every element is one in which recklessness or negligence is sufficient. See §2.02(10).

As was stated above, if Williams is a special exception establishing a rule peculiar to law enforcement, then it does no more than say that New Jersey might adopt such a principle in a particular situation. The case might, however, be read as establishing the principle of guilt-reduction through partial (or imperfect) justification defenses as a general proposition. If that is the case, the Code view is, in essence, now the New Jersey law. But see State v. Bess, supra.

Again, the Commission should make a basic decision whether imperfect defenses should be recognized to reduce guilt or whether the justification defenses should be recognized only when all of their requirements are satisfied. The Commission could take an intermediate position, i.e., that an unreasonable belief in the need to use force will not mitigate, because (1) that view is now well engrained in our law and (2) the opposite view would allow (and, therefore, might encourage) the defendant to act where he otherwise could not--but allow mitigation where the defendant has a reasonable belief in the necessity to act but uses excessive force. This would mean adopting the Williams case by allowing mitigation for the use of excessive force as to all defendants.

The New York Code has no provision on these problems--it has enacted nothing like §2.02(10) or §3.09(2). The same is true of Illinois, Michigan, Wisconsin and Connecticut.

SECTION 3.01. JUSTIFICATION AN AFFIRMATIVE DEFENSE; CIVIL REMEDIES UNAFFECTED

(1) In any prosecution based on conduct which is justifiable under this Article, justification is an affirmative defense.

(2) The fact that conduct is justifiable under this Article does not abolish or impair any remedy for such conduct which is available in any civil action.

* * * *

§3.01 Commentary

1. Paragraph (1) provides that any claim of justification under this Article constitutes an affirmative defense. Under §1.12(2), this means that the prosecution has no evidential burden as to this defense unless and until evidence appears, either, in the State's case or in the defendant's to support the defense. Given such evidence, however, the defense must be negatived beyond a reasonable doubt.

This statement is now the law in New Jersey. In State v. Abbott, supra, 36 N.J. 63, 72 (1961) speaking of self-defense, the Court said:

> "...although the burden is upon a defendant to adduce evidence to support the defense, yet if such evidence appears either in the State's case or upon the defendant's case, the issue must be left to the jury with this instruction: that the burden is upon the State to prove beyond a reasonable doubt that the defense is untrue, and hence there must be an acquittal if there is a reasonable doubt as to whether defendant did act in self-defense..."

See also State v. Fair, 45 N.J. 77, at 90-91 (1965) (defense of another and self-defense); State v. Chiarello, 69 N.J. Super 479, at 498 (App. Div. 1961) (defense of another). The recent Codes in other states are in accord. See, e.g., N.Y. Penal Law §§25.00 and 35.00; Michigan Revised Criminal Code §645 (Final Draft 1967).

2. Paragraph (2) is to make clear that the Article is not designed to create privileges in the civil law. Although particular conduct may be privileged in the penal law, it may be that it should not be in the civil

law--the fact that conduct should not be criminal does not mean that the actor should not respond in damages. In the converse situation, where the civil law affords a privilege which the criminal law does not recognize, the Code is silent. The civil courts may want to fashion limitations upon tort privileges to take into consideration the new criminal provisions so as to create a remedy where none now exists. Whether or not this is to happen is, however, beyond the scope of the Code. MPC Tentative Draft No. 8, p. 4 (1958).

SECTION 3.02. JUSTIFICATION GENERALLY: CHOICE OF EVILS

(1) Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:

(a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and

(b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and

(c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

(2) When the actor was reckless or negligent in bringing about the situation requiring a choice of harm or evils or in appraising the necessity for his conduct, the justification afforded by this Section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

* * * *

§3.02 Commentary

1. "This Section accepts the view that a principle of necessity, properly conceived, affords a general justification for conduct that would otherwise constitute an offense; and that such a qualification, like the requirements of culpability, is essential to the rationality and justice of all penal prohibitions." MPC Tentative Draft No. 8, p. 5 (1958).

There are three limitations upon the principle set forth in the Code:

(a) §3.02(1)(a). The necessity must be avoidance of an evil greater than the evil sought to be avoided by the law defining the offense charged. This balancing is an issue for the trial, and is not simply left to the actor's private judgment. "What is involved may be described as an interpretation of the law of the offense, in light of the submission that the special situation calls for an exception to the prohibition that the legislature could not reasonably have intended to exclude, given the competing values to be weighed. MPC Tentative Draft No. 8, pp. 5-6 (1958).

(b) §3.02 (1)(b) and (c). The issue of competing values must not have been foreclosed by a deliberate legislative choice, as when the law has dealt explicitly with the specific situation that presents the choice of evils or a legislative purpose to exclude the justification claimed otherwise appears. Id. at 6.

(c) §3.02(2). If the crime charged can be committed with a culpability of recklessness or negligence, the defendant may be convicted even if he made a proper choice of values if he was reckless or negligent, as the case may be, in bringing about the situation requiring the choice or in appraising the necessity. He cannot, however, be convicted of a crime requiring a culpability of "purposely" or "knowingly." See discussion in the Introductory Note of the "Imperfect Defense."

2. There is no statute on the necessity problem in New Jersey and there have been no cases, dealing with the issue. The Drafters of the Code take the position that, "while the point has not been free from controversy, it seems clear that necessity has standing as a common-law defense; such issue as there is relates to its definition and scope." Your Secretary's opinion is that this may be an overstatement. Some cases seem to completely reject any defense of necessity. See authorities collected in Paulsen and Kadish, Criminal Law and its Processes 363 (1962). Several states have recently adopted or proposed statutes on this point and a selection follows:

(a) New York, Penal Law §35.05 (copied by Michigan Revised Criminal Code, Final Draft §605 (1967):

> "Unless inconsistent with the ensuing provisions of this article defining justifiable use of physical force, or with some other provision of law, conduct which would otherwise constitute an offense is justifiable and not criminal when:
>
> * * * *

"2. Such conduct is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no fault of the actor, and which is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding such injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue. The necessity and justifiability of such conduct may not rest upon considerations pertaining only to the morality and advisability of the statute, either in its general application or with respect to its application to a particular class of cases arising thereunder. Whenever evidence relating to the defense of justification under this subdivision is offered by the defendant, the court shall rule as a matter of law whether the claimed facts and circumstances would, if established, constitute a defense."

The revisers of the New York Code made changes from §3.02 of the Model Code to "tighten" the provision and "preclude extension beyond the narrow scope intended." Specifically, "emergency and urgency" were added as well as a provision to prevent the use of this Section by persons having moral objection to a particular statute.

(b) Illinois Statutes Annotated, Criminal Code §7-13 (1961):

The Illinois Drafters took an opposite position from New York and Michigan, intentionally not limiting the words of the statute defining the defense and leaving the precise limits to the courts.

"Conduct which would otherwise be an offense is justifiable by reason of necessity if the accused was without blame in occasioning or developing the situation and reasonably believed such conduct was necessary to avoid a public or private injury greater than the injury which might reasonably result from his own conduct."

(c) Wisconsin Criminal Code §939.47:

"Pressure of natural physical forces which causes the actor reasonably to believe that his act is the only means of preventing imminent public disaster, or imminent death or great bodily harm to himself or another and which causes him so to act, is a defense to a prosecution for any crime based on that act except that if the prosecution is for murder the degree of the crime is reduced to manslaughter."

3. It is the Code's position that the defense should not be limited

to situations where the evil sought to be avoided is death or bodily injury or any other specified harm. It is also the Code's position that there is no reason to exclude cases where the actor's conduct portends a particular evil, such as homicide. The principle, in their view, should be one of general validity. MPC Tentative Draft No. 8, p. 7 (1958).

It should be noted that the recent enactment in Wisconsin, quoted above, excludes homicide from the scope of the defense--instead reducing the charge from murder to manslaughter. This, according to the Drafters of the Code, is "particularly unfortunate" because "given the supreme place of the sanctity of life in our hierarchy of values, it is still true that conduct which results in taking life may well result in saving other lives." Id. at 8.

Note that the evil sought to be avoided must be greater than that sought to be protected by the law defining the offense. Where they are equal, other provisions may come into play--such as the justification of self-defense (§3.04) or the excuse of duress (§2.09). While the law may well be unable to influence an actor's conduct in a situation of equality in the choice of evils, to so draft the principle would go beyond the common law and beyond any of the recent statutes in this area. Id. at 9.

4. Note that all of the state statutes quoted above, except Illinois, attempt to state the principle with more precision, particularly as to the weighing of evils. The Drafters of the Code justify their formulation on the basis that, by its very nature, the scope of the possible situations is so wide and the extent of disagreement over some moral issues is so great that submitting the questions to adjudication in specific cases is entirely appropriate and is strategically wise. Ibid.

5. Notice that no requirement is stated that the belief be both honest and reasonable. See discussion of this issue in the Introductory Note, above. Questions as to the immediacy of action and of the availability of alternatives have a bearing on the honesty of the actor's belief or, when relevant, upon recklessness or negligence. Id. at 10.

Note that an actual necessity of which the defendant was unaware is insufficient unless the defendant knew of and acted on belief in the existence of necessity. In the self-defense area, there are some New Jersey cases which state that either an actual necessity or a reasonable belief suffice. State v. Bonofiglio, 67 N.J.L. 239, at 245 (E & A 1901); State v. Hipplewith, 33 N.J. 300, at 316-317 (1960); State v. Brown, 46 N.J. 96, 102 (1965). These cases, in an analogous area, are inconsistent with the Code's view.

SECTION 3.03. EXECUTION OF PUBLIC DUTY

(1) Except as provided in Subsection (2) of this Section, conduct is justifiable when it is required or authorized by:

(a) the law defining the duties or functions of a public officer or the assistance to be rendered to such officer in the performance of his duties; or

(b) the law governing the execution of legal process; or

(c) the judgment or order of a competent court or tribunal; or

(d) the law governing the armed services or the lawful conduct of war; or

(e) any other provision of law imposing a public duty.

(2) The other sections of this Article apply to:

(a) the use of force upon or toward the person of another for any of the purposes dealt with in such sections; and

(b) the use of deadly force for any purpose, unless the use of such force is otherwise expressly authorized by law or occurs in the lawful conduct of war.

(3) The justification afforded by Subsection (1) of this Section applies:

(a) when the actor believes his conduct to be required or authorized by the judgment or direction of a competent court or tribunal or in the lawful execution of legal process, notwithstanding lack of jurisdiction of the court or defect in the legal process; and

(b) when the actor believes his conduct to be required or authorized to assist a public officer in the performance of his duties, notwithstanding that the officer exceeded his legal authority.

* * * *

§3.03 Commentary

1. This Section accepts as justification for the purposes of the penal law, the law regulating the duties and functions of public officers, regulating the execution of legal process, governing the armed services and the conduct of war, or imposing other public duties. In a similar manner, it defers to the requirements of the judgment or order of a competent court or tribunal.

There is no comprehensive statement of the above principle found in either New Jersey cases or statutes. It is, however, clear that §3.03(1) reflects the existing New Jersey law. A few examples illustrate this: To establish the criminal liability of a police officer who makes an arrest, the courts look to the law establishing the duties and functions of the police officer as under §3.03(1)(a). See, e.g., State v. Williams, 29 N.J. 27 (1959); Davis v. Hellwig, 21 N.J. 412, 416 (1956); Brown v. State, 62 N.J.L. 666, 698 (E & A 1898). See also Perkins, Criminal Law 977 (2 Ed. 1969). To establish the right to act to execute legal process, reference is made to the law governing that area to determine any criminal responsibility. See Grove v. Van Dyne, 44 N.J.L. 654 (1882); Webb v. State, 51 N.J.L. 189 (1889); Nelson v. Eastern Air Lines, 128 N.J.L. 46, 51 (1942). See generally, Prosser, Torts §25, pp. 129-134 (3 Es. 1964).

2. Paragraph (2) sets forth the limits upon the extent to which the Code will defer to the other branches of the law for purposes of defining the justification of execution of public duty: (a) If any force is to be used toward or upon any person, then the other sections of this Article apply to establish limitations upon the right to use force. Thus, in the above-cited cases involving the criminal liability for the use of excessive force in making an arrest, §3.07 (Use of Force in Law Enforcement) and, perhaps, §3.04 (Use of Force in Self Protection) would, in fact, apply rather than this section. (b) Deadly force may never be justified under this section except in military situations or where specifically authorized by law.

3. Paragraph (3) extends the justification to cases where the actor acts in the belief that his conduct is required by a judgment or in the lawful execution of legal process or to assist a public officer in the performance of his duties. There is no limitation upon the reasonableness of the belief. See §3.09(2) and the discussion in the Introductory Note.

It should be noted that this paragraph (§3.03)(3) does not afford protection to an officer who exceeds his own legal authority as to his own duties. His belief in his duty to act, if erroneous and even if reasonable, is no defense. Davis v. Hellwig, 21 N.J. 412, at 416-417 (1956). He is bound to know his own limitations. Paragraph (3) applies only to protect an officer or a private citizen from errors made by others. The above provision would probably not work any change in New Jersey law. First, the lack of jurisdiction of the court or tribunal is, in §3.03(3)(a) limited to "competent" courts and tribunals. Thus, the cases holding that process issued by a court entirely without jurisdiction to do so affords no protection to the person executing the process will still be followed. Grove v. Van Duyn, 44 N.J.L. 654 (1882). However, competent courts committing errors or irregularities, even though they affect jurisdiction, will not make the officer liable. Jennings v. Thompson, 54 N.J.L. 55 (1891). Second, in an analogous situation, defense of another, the New Jersey Supreme Court has held that the "reasonable mistake of fact" doctrine applies so as to give protection to an intervenor according to the facts as they reasonably appear to him. State v. Fair, 45 N.J. 77, 92-93 (1965). Aside from the limitation as to reasonableness of the mistake, there is no reason to believe that the Court would distinguish between intervention on behalf of a third person and execution of legal process or a judgment thought to be valid or intervention by a private citizen to assist a police officer thought to be exercising his legal duties. Third, the doctrine of the Williams case (supra, 29 N.J. 27 (1959), would apply here. See discussion in the Introductory Note. Thus, in New Jersey at the present time, if an officer acted under a mistaken belief in the validity of legal process, notwithstanding its invalidity, he could, using the reasoning of the Williams case, be found guilty only of an offense for which recklessness

or negligence suffices. It is submitted that the same thing would be true, under Williams, of a person who assists an officer who is exceeding his authority. This would be true even if the Williams reasoning does not apply to all classes of defendants (see discussion above in the Introductory Note) because the rationale concerning the duties of police officers is directly applicable.

4. Several states have adopted simplified statements of the law found in §3.03. See, e.g., N.Y. Penal Law §35.05(1):

"An offense is justifiable and not criminal when...such conduct is required or authorized by a provision of law or by a judicial degree." The New York statute then continues to give as illustrations of such provisions and decrees the five items found in §3.03(1) of the Code.

The Commission may decide that this or a similar statement is sufficient to establish the principle, leaving the matters found in §3.03(2) and (3) to general principles found elsewhere in the Code, i.e., §3.07 for the limitations on the use of force and §§2.06 and 3.09 as to ignorance and mistakes.

SECTION 3.04. USE OF FORCE IN SELF-PROTECTION

(1) Use of Force Justifiable for Protection of the Person. Subject to the provisions of this Section and of Section 3.09, the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.

(2) Limitations on Justifying Necessity for Use of Force.

(a) The use of force is not justifiable under this Section:

(i) to resist an arrest which the actor knows is being made by a peace officer, although the arrest is unlawful; or

(ii) to resist force used by the occupier or possessor of property or by another person on his behalf, where the actor knows that the person using the force is doing so under a claim of right to protect the property, except that this limitation shall not apply if:

(1) the actor is a public officer acting in the performance of his duties or a person lawfully assisting him therein or a person making or assisting in a lawful arrest; or

(2) the actor has been unlawfully dispossessed of the property and is making a re-entry or recaption justified by Section 3.06; or

(3) the actor believes that such force is necessary to protect himself against death or serious bodily harm.

(b) The use of deadly force is not justifiable under this Section unless the actor believes that such force is necessary to protect himself against death, serious bodily harm, kidnapping or sexual intercourse compelled by force or threat; nor is it justifiable if:

(i) the actor, with the purpose of causing death or serious bodily harm, provoked the use of force against himself in the same encounter; or

(ii) the actor knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing to a person asserting a claim of right thereto or by complying with a demand that he abstain from any action which he has no duty to take, except that:

(1) the actor is not obliged to retreat from his dwelling or place of work, unless he was the initial aggressor or is assailed in his place of work by another person whose place of work the actor knows it to be; and

(2) a public officer justified in using force in the performance of his duties or a person justified in using force in his assistance or a person justified in using force in making an arrest or preventing an escape is not obliged to desist from efforts to perform such duty, effect such arrest or prevent such escape because of resistance or threatened resistance by or on behalf of the person against whom such action is directed.

(c) Except as required by paragraphs (a) and (b) of this Subsection, a person employing protective force may estimate the necessity thereof under the circumstances as he believes them to be when the force is used, without retreating, surrendering possession, doing any other act which he has no legal duty to do or abstaining from any lawful action.

(3) Use of Confinement as Protective Force. The justification afforded by this Section extends to the use of confinement as protective force only if the actor takes all reasonable measures to terminate the confinement as soon as he knows that he safely can, unless the person confined has been arrested on a charge of crime.

* * * *

§3.04 Commentary

1. The basic rule as to self-defense is found in Paragraph (1) which establishes the principle in terms of force which the actor uses against another person in the belief that it is immediately necessary for the purpose of protecting himself against the other's use of unlawful force on the present occasion. MPC Tentative Draft No. 8, p. 14 (1958).

At the present time, the law of self-defense in New Jersey is found in a statute applicable by its terms only to homicide, (N.J.S. 2A:113-6: "Any person who kills another...in his ... own defense ... is guiltless ...") and in extensive case law.

2. Necessity and Belief in Necessity. As discussed in the Introductory Note, the law in New Jersey presently demands a belief, by the actor, in the necessity of his defensive action and that the belief be a reasonable one. State v. Bess, 53 N.J. 10, 16 (1968) and cases cited in the Introductory Note. Under this view, the failure of the defense due to negligence of the defendant

in assessing the need to act leads to a conviction of murder. Ibid. As discussed in the Introductory Note, the Code's approach is to require for the defense only an honest belief but to allow conviction under §3.09(2) of a crime for which a culpability of negligence or recklessness, as the case may be, is sufficient if the defendant was so culpable in his action.

3. Under existing law, there is occasionally an overlap between the scope of justification defenses. At common law, there are instances where the scope of one justification defense may be broader than that of another. For instance, in State v. Bonofiglio, 67 N.J.L. 239 (E & A 1901), it was held that the requirement of retreat did not exist as to the defense of prevention of a robbery whereas for self-defense, necessity or apparent necessity must be found and without retreat no necessity exists. Bonofiglio was overruled in this regard by State v. Fair, 45 N.J. 77, at 92 (1965) bringing New Jersey law into accord with the modern authorities requiring retreat in both situations. But it is illustrative of the problems which can arise under a clumsily drafted statute such as N.J.S. 2A:113-6 and which can be avoided under a comprehensive Code. The law governing the use of force against felonious attack should be embodied in a single rule, not varied when the case is viewed as self-defense instead of crime prevention or the opposite. See State v. Bess, 53 N.J. 10, 16 (1968). This is done, under the Code, by §3.07(a)(i).

4. Under the Code, "accidental" necessity, i.e., a necessity to act of which the defendant was unaware, cannot give rise to a privilege. This would be contrary to statements in some New Jersey cases which are to the effect that either an actual necessity or a reasonable belief in necessity suffices. State v. Bonofiglio, 67 N.J.L. 239, at 245 (E & A 1901); State v.

Hipplewith, 30 N.J. 300, at 316-317 (1960); State v. Brown, 46 N.J. 96, 102-103 (1965). It should be noted that in none of the above cases was the question of accidental necessity directly presented and the statements might be considered dictum.

5. Imminence. The New Jersey cases speak of a limitation upon the right to use defensive force to those situations where the danger of unlawful violence to the person is "immediate" (Brown v. State, 62 N.J.L. 666 at 708 (E & A 1898) or "imminent" (State v. Fair, 45 N.J. 77, at 91 (1965). There has not been a case in New Jersey examining the exact meaning of this requirement. In many states, however, it means that the defendant must apprehend that the unlawful force he fears will be used against him at the exact time he acts. MPC Tentative Draft No. 8, p. 17 (1958). The Code eliminates this requirement in favor of one which requires that the actor believe that his defensive action in immediately necessary and the unlawful force of which he is apprehensive, and therefore, defending against, will be used "on the present occasion" but not necessarily immediately. Ibid.

6. The Code does not require that the force against which the actor defends himself to actually be unlawful; it is enough, subject to the limitations of §3.09(1) and (2), that he believes it to be so. The limitations of §3.09 are discussed in connection with that section. There do not appear to be any New Jersey cases on this point but the rejection of the "alter ego" rule in favor of the "reasonable mistake of fact" rule in the defense-of-another area leads strongly to the conclusion that the New Jersey Courts would reach the Code's position. State v. Fair, 45 N.J. 77, 92 (1965); State v. Chiarello, 69 N.J. Super 479, 494 (App. Div. 1961).

7. Excessive Force. The Code allows the actor to evaluate the amount of force necessary by stating the basic rule in terms of that which the actor "believes." §3.04(1). The New Jersey cases impose a rule of reasonableness both as to the need to use force and the amount of force. Thus, if a defendant uses more force than appears reasonably necessary and kills, he would be guilty of murder. State v. Abbott, 36 N.J. 63, at 68 (1961); State v. Scott, 104 N.J.L. 544, at 546 (1928). The Code would change this result to find the defendant guilty of manslaughter under §3.09(2). See discussion above in the Introductory Note.

8. Limitations upon the Justified Use of Force. The Code establishes limitations upon the use of any force (§3.04(2)(a) and, in other circumstances, upon the use of "deadly force" (§3.04(2)(b). Under subparagraph (c) of that section, these are the only limitations imposed other than the general principle that he may only use that force which he believes to be necessary to meet the force used against him. Thus, "except as required by paragraphs (a) and (b) ..., a person employing protective force may estimate the necessity thereof under the circumstances as he believes them to be when the force is used, without retreating, surrendering possession, doing any other act which he has no legal duty to do or abstaining from any lawful action." MPC Tentative Draft No. 8, p. 27 (1958).

9. Limitations upon the Use of Any Force.

(a) Use of Force to Resist Unlawful Arrest by Peace Officer: Paragraph (2)(a)(i) denies a justification for the use of force to resist a mere arrest which the actor know is being made by a peace officer, although the arrest is unlawful. This rule is contrary to the common law but is now the law in New Jersey. State v. Koonce, 89 N.J. Super 169 (App. Div. 1965); State v. Montague, 101 N.J. Super 483 (App. Div. 1968); State v. Mulvihill,

105 N.J. Super 458 (App. Div. 1969). Koonce differs slightly from the Code in that the Code requires the actor to know that the person making the arrest is a police officer whereas Koonce speaks in terms of "knows or has good reason to believe." 89 N.J. Super at 184. The Code does define knowledge to include "awareness of a high probability" (§2.02(7) so that, in fact, there is probably little difference between the two statements. Under the Code, if the defendant does not know the other person to be a police officer moderate force may be used to prevent "confinement" under the definition of "unlawful force" in §3.11 which is used in §3.04(1). See MPC Tentative Draft No. 8, p. 19 (1958).

The Drafters of the Code point out that §3.04(2)(a)(i) has no application when the actor apprehends bodily injury, as when the arresting officer unlawfully employs or threatens deadly force, unless the actor knows that he is in no peril greater than arrest if he submits to the assertion of authority. Koonce cites this with approval. 89 N.J. Super at 182. See also State v. Mulvihill, 105 N.J. Super 458 (App. Div. 1969) and State v. Chisone, - N.J. Super -, (App. Div. July 7, 1969).

Both Koonce (89 N.J. Super at 184) and Montague (101 N.J. Super at 488) indicate that resistance is proper if the defendant has reason to believe the officer is not acting in good faith in the performance of his duties. Cf. State v. Williams, 29 N.J. 27 (1959). The Code seems not to admit of such an exception. It might well be, however, that "in good faith" and "in the performance of his duties" have the same meaning.

(b) Use of Force to Resist Unlawful Force Used by Occupier Acting Under Claim of Right. Paragraph (2)(a)(ii) forbids the use of force in resistance of force used by an occupier or possessor property, although the occupier's use of force is unlawful or believed to be unlawful, where the actor knows that the occupier acts under a claim of right to protect the property and the actor is not a public officer in the [illegible]

duties or a person lawfully assisting him therein. MPC Tentative Draft No. 8, p. 19 (1958). The thought behind the provision is to force resort, in appropriate cases, to the use of courts to settle disputes. Id. at 18-19. The rule of paragraph (2)(a)(ii) is the law in New Jersey. State v. Rulus, 79 N.J. Super 219 (App. Div. 1963).

10. Limitations on the Use of Deadly Force. Paragraph (2)(b) imposes further limitations upon the use of force, this time upon the use of "deadly force." Deadly force is defined in §3.11 to mean "force which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily harm." Purposely firing a firearm in the direction of another person or at a vehicle in which one is believed to be is deadly force. The first part of the Code's definition of "deadly force" was specifically adopted by our Supreme Court in State v. Abbott, 36 N.J. 63, at 71 (1961).

There are three limitations upon the use of deadly force:

(a) Apprehension of Serious Injury. Deadly force is not justifiable unless the actor believes it to be necessary to protect himself against "death, serious bodily harm, kidnapping or sexual intercourse compelled by force or threat." §3.04(2)(b). It is well-established law that the amount of force used must bear a reasonable relationship to the magnitude of the harm which the actor seeks to avert. The Code's approach is to divide force into two categories: "deadly" and "moderate," the first being defined as stated above and the second being defined residually. Under §3.04(1), moderate force may be employed against any unlawful force, except for those limitations set forth in §3.04(2), but deadly force may only be used when "serious" injury is apprehended.

The New Jersey cases have not approached the issue in quite the same manner. But since the issue almost always arises in homicide cases, the results are in accord with the Code. The cases make it clear that there must be a reasonable relationship between the injury apprehended by the attack and the force used in defense. State v. Abbott, 36 N.J. 63, at 68-69 (1961). For the most part, that relationship is simply stated as there being a right to kill to preserve one's own life or to protect oneself from serious bodily harm. State v. Hipplewith, 33 N.J. 300, at 316 (1960); State v. Bonofiglio, 67 N.J.L. 239, 245 (E & A 1901); State v. Mellillo, 77 N.J.L. 505 (E & A 1908); State v. Wells, 1 N.J.L. 424 (Sup. Ct. 1790) ("his own destruction or some very great injury").

(b) Use of Protective Force by Initial Aggressor.

Paragraph (2)(b)(ii) denies justification for the use of deadly force if the actor, with the purpose of causing death or bodily harm, provoked the use of force against himself in the same encounter. This is a narrower forfeiture of the privilege of self-defense than under existing law, both in New Jersey and elsewhere, where justification may not be claimed by an initial aggressor or after a mutual agreement to fight. State v. Agnesi, 92 N.JL. 53 (Sup. Ct. 1918) affirmed o.b. 92 N.J.L. 638 (E & A 1918) ("the necessity must not be of the defendant's own creation"); State v. Jones, 71 N.J.L. 543 (E & A 1904); State v. Abbott, 36 N.J. 63, at 69 (1961); State v. Blair, 2 N.J.L.J. 346, at 347 (O & T, 1879) (provoker must abandon his unlawful purpose, retreat and put his adversary in the wrong before he may use self-defense). The Code's position is that the narrower forfeiture of the right of an aggressor to use force is justified by the general duty to retreat set forth in §3.04 (2)(b)(iii). As explained in the Drafters' comments, the retreat obligation

will cover almost all the cases now covered by the special rule for aggressors and provokers, except where the person goes into the fight with a positive purpose to seriously injure or kill the victim. Here, he must desist and retreat, even if he would not otherwise meet the obligations of the retreat rule. See MPC Tentative Draft pp. 21-23 (1958).

(c) The Duty to Retreat. Paragraph (2)(b)(iii) denies a justification for the use of deadly force if the actor knows that he can avoid the necessity of using such force with complete safety by retreating or surrendering possession of a thing to a person asserting a claim or right thereto or by complying with a demand that he abstain from some action which he has no duty to take. Retreat, the most frequent situation, is taken up first and surrendering things, and compliance with demands are taken up subsequently.

This retreat rule, as stated, is the law in New Jersey. State v. Abbott, 36 N.J. 63 (1961). Certain points as to the scope of the retreat rule should be made: First, it is only when "deadly" force is going to be used in defense that one must retreat if possible. Non-deadly, that is, moderate force may always be used without retreating. Id. at 70. MPC Tentative Draft No. 8, p. 23 (1958). Second, it is only when the actor "knows" that he may retreat "with complete safety" that he must. This makes the retreat rule of the Code a relatively limited one. State v. Abbott, supra at 72 (1961).

The Code states two exceptions to the retreat rule:

(a) A person is not required to retreat from his dwelling (as defined in §3.11(3) or place of work, unless he was the initial aggressor or is assailed in his place of work by another person whose place of work he knows it to be. This would somewhat change New Jersey law. New Jersey recognizes the dwelling exception to the retreat rule, but requires retreat

even in one's own dwelling from another who has an equal right to be there. State v. Pontery, 19 N.J. 457, 475 (1955); Cf. State v. Abbott, 36 N.J. 63, at 67 (1961) (common driveway). No New Jersey cases on places of work were found. If the Commission wants to bring the rule of §3.04(2)(b)(ii)(1) into accord with Pontery, the Section should be rewritten to read: "...or is assailed in his dwelling or place of work by another person whose dwelling or place of work (etc.)...". The Commission should also consider whether places of work are appropriately included in this rule. See MPC Tentative Draft No. 8, p. 25 (1958).

(b) The second exception to the retreat rule is for public officers or persons justified in making an arrest or in preventing an escape. Here, public policy requires that the function be performed and that if forcible resistance is encountered, it be overcome. Threatening death or serious injury to an officer attempting to execute a court order, for example, cannot be permitted to stultify it. New Jersey law is in accord. State v. Williams, 29 N.J. 27, at 39 (1959) ("Where, however, an offender offers physical resistance to arrest or to the maintenance of custody, the officer need not retreat but on the contrary may become the aggressor and use such force as is necessary to overcome that resistance,"); Bullock v. State, 65 N.J.L. 557, 572 (E & A 1900).

As was noted earlier, the Code applies the same rules as are applied to retreat to situations where the necessity of using deadly force can be avoided with complete safety by (a) surrendering possession of a thing to a person asserting a claim of right thereto, or (b) complying with a demand that he abstain from any action which he has no duty to take. §3.04(2)(b)(ii). As to the surrender of a thing, the considerations here when it is demanded

under a claim of right, are similar to the considerations leading to adoption of the retreat rule. State v. Abbott, supra at 69-71; Cf., State v. Rulus, 79 N.J. Super 221 (App. Div. 1963). When there is no claim of right--as in a robbery situation--it seems clear that surrender should not be required as a precondition to using deadly force. This is similar to not requiring retreat in one's own home. As to demands other than surrendering a thing, paragraph (iii) distinguishes between a demand to do something and a demand to refrain from doing something. As to refraining, the same considerations leading to the adoption of a retreat rule lead to the conclusion that one should abstain from conduct rather than using deadly force when to do so will not cause a violation of law or of a public duty. As to affirmative conduct, the Code's position is that the variety of situations makes legislative drafting impossible and leads to the conclusion that it should be entirely excluded. MPC Tentative Draft No. 8, p. 27 (1958). No New Jersey cases were found on either point.

11. Confinement as Protective Force. §3.04(3) makes it clear that the infliction of confinement as protective force may be justified. Because it is a continuing condition, the justification is made conditional upon the actor's taking reasonable measures to terminate it. MPC Tentative Draft No. 8, p. 27 (1958). No New Jersey cases were found.

12. Definition of Unlawful Force. It is only against unlawful force or force thought to be unlawful that protective force may be employed. The term is defined in §3.11(1) but it is important to discuss its meaning at this point. "The definition is designed to include in the force against which it is lawful to defend any use of force which (1) is employed without the consent of the party against whom it is directed and (2) is not affirmatively privileged under the Code or the law of torts." MPC Tentative Draft No. 8, p. 28 (1958). No New Jersey cases specifically discuss the fact that

the force giving rise to the use of self-protection must be unlawful--although that thought is implicit in the cases. There is, therefore, no case discussion of this point. In Brown v. State, 62 N.J.L. 666, 703 (E & A 1898) the point is made that there is no right whatever to resist lawful force which, in that case, was a lawful arrest.

13. Other States.

(a) New York and Michigan have enacted or proposed a somewhat simplified version of §3.04. (New York Penal Code §35.15):

> "1. Except as provided in subdivisions two and three of this section, a person is justified in using physical force upon another person in order to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by such other person, and he may use a degree of force which he reasonably believes to be necessary for such purpose; except that deadly physical force may not be used unless the actor reasonably believes that such other person is (a) using or about to use unlawful deadly physical force, or (b) using or about to use physical force against an occupant of a dwelling while committing or attempting to commit a burglary of such dwelling, or (c) committing or about to commit a kidnapping, robbery, forcible rape or forcible sodomy.
>
> "2. Notwithstanding the provisions of subdivision one of this section, a person is not justified in using deadly physical force upon another person if he knows that he can avoid the necessity of using such force with complete safety (a) by retreating, except that the actor is not required to retreat (i) if he is in his dwelling and was not the initial aggressor, or (ii) if he is a peace officer or a private person assisting him at his direction, and was acting pursuant to section 35.30, or (b) by surrendering possession of property to a person asserting a claim of right thereto, or (c) by complying with a demand that he abstain from performing an act which he is not obligated to perform.
>
> "3. Notwithstanding the provisions of subdivision one of this section, a person is not justified in using physical force if (a) with intent to cause physical injury or death to another person, he provoked the use of unlawful physical force by such other person, or (b) he was the initial aggressor, except that his use of physical force upon another person under such circumstances is justifiable if he withdraws from the encounter and effectively communicates to such other person his intent to do so, but the latter notwithstanding continues or threatens, the use of unlawful physical force, or (c) the physical force involved was the product of a combat by agreement not specifically authorized by law."

Connecticut is similar to New York except (1) it generalizes as to the force which may be defended against (i.e., "such other person is ... using ... unlawful deadly physical force, or ... inflicting or about to inflict great bodily harm") and (2) it forbids resisting arrest. Connecticut Penal Code §20 (1969).

(b) Illinois. This state employs a greatly simplified statute, relying upon judicial interpretation:

> " A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force. However, he is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another, or the commission of a forcible felony." Illinois Criminal Code §7-1 (1961).

Specific provisions are made for use of force by an aggressor (§7-4), the right to resist arrest (§7-7) and the right to use deadly force (§7-8).

(c) Wisconsin. (§939.48 of the Criminal Code of 1955):

> "(1) A person is privileged to threaten or intentionally use force against another for the purpose of preventing or terminating what he reasonably believes to be an unlawful interference with his person by such other person. The actor may intentionally use only such force or threat thereof as he reasonably believes is necessary to prevent or terminate the interference. He may not intentionally use force which is intended or likely to cause death or great bodily harm unless he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself.
>
> (2) Provocation affects the privilege of self-defense as follows:
>
> (a) A person who engages in unlawful conduct of a type likely to provoke others to attack him and thereby does provoke an attack is not entitled to claim the privilege of self-defense against such attack, except when the attack which ensues is of a type causing him to reasonably believe that he is in imminent danger of death or great bodily harm. In such a case, he is privileged to act in self-defense, but he is not privileged to resort to the use of force intended or likely to cause death to his assailant unless he reasonably believes he has exhausted every other reasonable means to escape from or otherwise avoid death or great bodily harm at the hands of his assailant.
>
> (b) The privilege lost by provocation may be regained if the actor in good faith withdraws from the fight and gives adequate notice thereof to his assailant.

(c) A person who provokes an attack, whether by lawful or unlawful conduct, with intent to use such an attack as an excuse to cause death or great bodily harm to his assailant is not entitled to claim the privilege of self-defense.

(3) The privilege of self-defense extends not only to the intentional infliction of harm upon a real or apparent wrongdoer, but also to the unintended infliction of harm upon a third person, except that if such unintended infliction of harm amounts to the crime of injury by conduct regardless of life, injury by negligent use of weapon, homicide by reckless conduct or homicide by negligent use of vehicle or weapon, the actor is liable for whichever one of those crimes is committed.

(4) A person is privileged to defend a third person from real or apparent unlawful interference by another under the same conditions and by the same means as those under and by which he is privileged to defend himself from real or apparent unlawful interference, provided that he reasonably believes that the facts are such that the third person would be privileged to act in self-defense and that his intervention is necessary for the protection of the third person.

(5) A person is privileged to use force against another if he reasonably believes that to use such force is necessary to prevent such person from committing suicide, but this privilege does not extend to the intentional use of force intended or likely to cause death.

(6) In this section "unlawful" means either tortious or expressly prohibited by criminal law or both."

SECTION 3.05. USE OF FORCE FOR THE PROTECTION OF OTHER PERSONS.

(1) Subject to the provisions of this Section and of Section 3.09, the use of force upon or toward the person of another is justifiable to protect a third person when:

(a) the actor would be justified under Section 3.04 in using such force to protect himself against the injury he believes to be threatened to the person whom he seeks to protect; and

(b) under the circumstances as the actor believes them to be, the person whom he seeks to protect would be justified in using such protective force; and

(c) the actor believes that his intervention is necessary for the protection of such other person.

(2) Notwithstanding Subsection (1) of this Section:

(a) when the actor would be obliged under Section 3.04 to retreat, to surrender the possession of a thing or to comply with a demand before using force in self-protection, he is not obliged to do so before using force for the protection of another person, unless he knows that he can thereby secure the complete safety of such other person; and

(b) when the person whom the actor seeks to protect would be obliged under Section 3.04 to retreat, to surrender the possession of a thing or to comply with a demand if he knew that he could obtain complete safety by so doing, the actor is obliged to try to cause him to do so before using force in his protection if the actor knows that he can obtain complete safety in that way; and

(c) neither the actor nor the person whom he seeks to protect is obliged to retreat when in the other's dwelling or place of work to any greater extent than in his own.

* * * *

§3.05 Commentary

1. The Code does not limit the persons who may act to protect to any classes of special relationships. The existing New Jersey statute sets forth a number of such relationships. (N.J.S. 2A:113-6) but the Supreme Court has not followed that limitation upon the defense. State v. Fair, 45 N.J. 77 (1965) (drinking partner--stranger). Thus, the Code, existing New Jersey law, and other modern authorities are in accord on this point. MPC Tentative Draft no. 8, p. 31 (1958). Further, while the existing statute is limited to

by its terms, to homicides, it has not been so limited in application. State v. Chiarello, 69 N.J. Super. 479 (App. Div. 1961).

2. The Code follows the "mens rea" or "reasonable mistake of fact" theory as opposed to the "alter ego" theory allowing intervention under the facts as the actor believes them to be. To be protected Section 3.05(1) sets forth three elements as to which this belief must exist:

(a) If the attack were upon the intervenor-defendant, he would have the right to act in his own defense under §3.04 and using only the amount of force permitted by §3.04;

(b) The person whom he is protecting could act in his own defense; and

(c) The necessity of his acting. This is in accord with New Jersey law on the subject which adopts the objective test (State v. Fair, 45 N.J. 77 at 92-93 (1965); State v. Chiarello, 69 N.J. Super. 479, at 495 (App. Div. 1961); State v. Montague, 101 N.J. Super. 483, 488 (App. Div. 1968)) so that the intervenor might well be protected even though the person on whose behalf he acts could not, in fact, use self-defense. State v. Montague, supra. MPC Tentative Draft No. 8, pp. 31-32 (1958). However, as is the case with other justification defenses, the New Jersey cases, cited immediately above require that the intervenor's belief in the necessity to act and the victim's right to act be both an honest (i.e., actual) belief and a reasonable one. See the Introductory Note for a discussion of this issue.

3. Subsection (2) places limitations upon the right to use force to protect another person which are coordinate with the limitations imposed by the "retreat" rule of §3.04(2)(b)(iii). Thus, where a defendant would be obliged to retreat before acting in self-defense,

he is obliged where possible to cause a person for whose benefit he acts to retreat. The same rules apply to compliance with demands and surrendering things. The right not to retreat in one's home or place of work is extended so that neither the intervenor nor the person protected need retreat in either's home or place of work to any greater extent than his own. MPC Tentative Draft No. 8, p. 32 (1958). New Jersey has not faced these problems. Presumably, the standards of the Fair and Abbott cases would be worked out in a case were they arise together along lines similar to the Code. Cf. State v. Montague, 101 N.J. Super. 483, at 488-489 (App. Div. 1968) where the Fair and Koonce cases were reconciled.

4. The recent Codes of most other states have combined defense of another with self-defense. See Statutes quoted in §3.04, supra.

SECTION 3.06. USE OF FORCE FOR THE PROTECTION OF PROPERTY.

(1) Use of Force Justifiable for Protection of Property. Subject to the provisions of this Section and of Section 3.09, the use of force upon or toward the person of another is justifiable when the actor believes that such force is immediately necessary:

(a) to prevent or terminate an unlawful entry or other trespass upon land or a trespass against or the unlawful carrying away of tangible, movable property, provided that such land or movable property is, or is believed by the actor to be, in his possession or in the possession of another person for whose protection he acts; or

(b) to effect an entry or re-entry upon land or to retake tangible movable property, provided that the actor believes that he or the person by whose authority he acts or a person from whom he or such other person derives title was unlawfully dispossessed of such land or movable property and is entitled to possession, and provided, further, that:

(i) the force is used immediately or on fresh pursuit after such dispossession; or

(ii) the actor believes that the person against whom he uses force has no claim of right to the possession of the property and, in the case of land, the circumstances, as the actor believes them to be, are of such urgency that it would be an exceptional hardship to postpone the entry or re-entry until a court order is obtained.

(2) Meaning of Possession. For the purposes of Subsection (1) of this Section:

(a) a person who has parted with the custody of property to another who refuses to restore it to him is no longer in possession, unless the property is movable and was and still is located on land in his possession;

(b) a person who has been dispossessed of land does not regain possession thereof merely by setting foot thereon;

(c) a person who has a license to use or occupy real property is deemed to be in possession thereof except against the licensor acting under claim of right.

(3) Limitations on Justifiable Use of Force.

(a) Request to Desist. The use of force is justifiable under this Section only if the actor first requests the person against whom such force is used to desist from his interference with the property, unless the actor believes that:

(i) such request would be useless; or

(ii) it would be dangerous to himself or another person to make the request; or

(iii) substantial harm will be done to the physical condition of the property which is sought to be protected before the request can effectively be made.

(b) Exclusion of Trespasser. The use of force to prevent or terminate a trespass is not justifiable under this Section if the actor knows that the exclusion of the trespasser will expose him to substantial danger of serious bodily harm.

(c) Resistance of Lawful Re-entry or Recaption. The use of force to prevent an entry or re-entry upon land or the recaption of movable property is not justifiable under this Section, although the actor believes that such re-entry or recaption is unlawful; if:

(i) the re-entry or recaption is made by or on behalf of a person who was actually dispossessed of the property; and

(ii) it is otherwise justifiable under paragraph (1)(b) of this Section.

(d) Use of Deadly Force. The use of deadly force is not justifiable under this Section unless the actor believes that:

(i) the person against whom the force is used is attempting to dispossess him of his dwelling otherwise than under a claim of right to its possession; or

(ii) the person against whom the force is used is attempting to commit or consummate arson, burglary, robbery or other felonious theft or property destruction and either:

(1) has employed or threatened deadly force against or in the presence of the actor; or

(2) the use of force other than deadly force to prevent the commission or the consummation of the crime would expose the actor or another in his presence to substantial danger of serious bodily harm.

(4) Use of Confinement as Protective Force. The justification afforded by this Section extends to the use of confinement as protective force only if the actor takes all reasonable measures to terminate the confinement as soon as he knows that he can do so with safety to the property, unless the person confined has been arrested on a charge of crime.

(5) Use of Device to Protect Property. The justification afforded by this Section extends to the use of a device for the purpose of protecting property only if:

(a) the device is not designed to cause or known to create a substantial risk of causing death or serious bodily harm; and

(b) the use of the particular device to protect the property from entry or trespass is reasonable under the circumstances, as the actor believes them to be; and

(c) the device is one customarily used for such a purpose or reasonable care is taken to make known to probable intruders the fact that it is used.

(6) Use of Force to Pass Wrongful Obstructor. The use of force to pass a person whom the actor believes to be purposely or knowingly and unjustifiably obstructing the actor from going to a place to which he may lawfully go is justifiable, provided that:

(a) the actor believes that the person against whom he uses force has no claim of right to obstruct the actor; and

(b) the actor is not being obstructed from entry or movement on land which he knows to be in the possession or custody of the person obstructing him, or in the possession or custody of another person by whose authority the obstructor acts, unless the circumstances, as the actor believes them to be, are of such urgency that it would not be reasonable to postpone the entry or movement on such land until a court order is obtained; and

(c) the force used is not greater than would be justifiable if the person obstructing the actor were using force against him to prevent his passage.

* * * *

§3.06 Commentary

1. This Section justifies in certain circumstances the use of force against the person to protect property. It should be distinguished from §3.10 which allows the use of force against property, i.e., the privilege to damage another's property, to protect one's own property.

2. The general principle established in Paragraph (1) is that moderate, but not deadly force may be employed for the protection of tangible property which is or is believed to be in the possession of the actor or of another for whose protection he acts, if the actor believes that such force is immediately necessary to prevent or terminate an unlawful entry or other trespass to the property or the unlawful carrying away of movables. MPC Tentative Draft No. 8, p. 36 (1958). There is very little New Jersey case law on this topic. The absence of authority is probably because the right to use deadly force to protect property is very limited and, therefore, most defendants attempt

to make out the broader defenses of self-protection and/or prevention of a crime (see, e.g., State v. Bonofiglio, 67 N.J.L. 239 (E.&A. 1901)).

The rules found in the New Jersey cases may be summarized as follows: (1) Deadly force may never be used for the defense of property as such and if it is so used the defendant is guilty of murder. State v. Zellers, 7 N.J.L. 265 (*220), at 293 (*243) (Sup. Ct. 1823); State v. Blair, supra. (2) Less than deadly force, including all reasonable and necessary force short of taking the intruder's life, may be used to remove a trespasser. State v. Blair, supra. (3) Deadly force may be used to protect one's dwelling place. State v. Blair, supra; State v. Zellers, supra. (4) One may not use any force to recover possession of property, real or personal, when it is in the possession of another who claims a right to possession. To use force, he must have actual, and not merely constructive, possession. Otherwise, he is left to his legal remedies. State v. Rullis, 79 N.J. Super. 219, 231 (App. Div. 1963)

3. The Code does not require that the property be in the defendant's possession but allows him to use force for the protection of property of another (any other) to the same extent as if it were in his possession. In this regard, it goes beyond the common law. Perkins, Criminal Law 1029 (2nd Ed. 1969). See MPC Tentative Draft No. 8, p. 37, (1958). In New Jersey it is clear, at least, that the property may not be in the possession of the person who claims a right in it against whom force is used. If it is, no force may be used. State v. Rullis, 79 N.J. Super. 221 (App. Div. 1963). Possession by a third person has not been litigated in this State. Further, existing law would not allow the defendant's belief to control on the issue of possession (as would §3.06(1)). State v. Rullis, supra.

4. The Code goes beyond the common law in allowing licensees

of property to use force to protect it except as against the licensor acting under a claim of right. Ibid. and §3.06(2)(c). No New Jersey cases were found.

5. Paragraph (1) limits the right to use force to cases where the actor believes the other party is acting unlawfully, whether under a claim of right or not.

6. The combination of §3.06(1)(b) and (2)(a) and (b) establish limited rights as to recaption of property when possession has been recently lost. This would substantially change New Jersey law which requires actual possession. State v. Rullis, supra; State v. Ruta, 112 N.J.L. 271 (E.&A. 1934). The Rullis case emphasizes the view that the defendant should use his legal remedies and not use force when he is out of possession.

7. The provisions of this section of the Code require only an honest belief in the need to act. See discussion above in the Introductory Note.

8. The Code in Section 3.06(3) establishes several limitations upon the use of force: (a) Request to Desist. There is some common law authority for this requirement which may be thought of as the property analog to the retreat rule. (b) Exclusion of Trespasser. The Code's Drafters state it to be "settled" that a trespasser may not be expelled in circumstances in which extreme harm is likely to befall him. MPC Tentative Draft No. 8, p. 42, (1958). See State v. Blair, supra. (c) Resistance of Lawful Re-entry of Recaption. This paragraph eliminates the use of force to prevent a retaking of possession as against one who was recently actually dispossessed.

9. The final limitation is upon the use of deadly force. Deadly force may only be used in two situations: (1) If the actor "believes" (not "reasonably believes", see §3.09(2)) the person he

attacks is attempting to dispossess him of his dwelling otherwise than under a claim of right. New Jersey law speaks simply of a dwelling without the limitations as to claim of right. State v. Zellers, supra; State v. Blair, supra. The Code uses the existance of a claim of right as an intermediate position without, of course, limiting the right of self-defense and of defense-of-another and of the right not to retreat in one's home. MPC Tentative Draft No. 8, pp. 38-40 (1958). (2) If the actor believes the person against whom force is used is attempting to commit certain serious and violent crimes and has either (a) used or threatened deadly force or (b) the use of less than deadly force would expose someone to substantial danger. §3.06(3)(d)(ii). See MPC Proposed Official Draft, p. 55 (1962). As to New Jersey, see State v. Fair, 45 N.J. 77 (1965).

10. Paragraph (4) concerning confinement is analogous to the provision in §3.04(3).

11. Section 3.06(5) limits the right to use devices to protect property to non-deadly devices. It is said to be necessary to have this provision in addition to the previous sections because setting the trap may be merely a "conditional intent" which would not allow conviction. MPC Tentative Draft No. 8, p. 47 (1958).

12. Paragraph (6) concerns situations where a person uses force to prevent his being wrongly obstructed by another person.

13. It is for the Commission to decide whether it is appropriate to create a complicated body of law, such as §3.06, in an area which has lead to very little litigation. Perhaps a more general statement would suffice leaving the fine points to the good judgment of the judiciary. The approach taken in most other states has been to enact two separate provisions, i.e., one for dwellings and another for other property:

(a) The Illinois statutes provide as follows:

§7--2 "A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to prevent or terminate such other's unlawful entry into or attack upon a dwelling. However, he is justified in the use of force which is intended or likely to cause death or great bodily harm only if:

(a) The entry is made or attempted in a violent, riotous, or tumultuous manner, and he reasonably believes that such force is necessary to prevent as assault upon, or offer of personal violence to, him or another then in the dwelling, or

(b) He reasonably believes that such force is necessary to prevent the commission of a forcible felony in the dwelling."

§7--3 "A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to prevent or terminate such other's trespass on or other tortious or criminal interference with either real property (other than a dwelling) or personal property, lawfully in his possession or in the possession of another who is a member of his immediate family or household or of a person whose property he has a legal duty to protect. However, he is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent the commission of a forcible felony."

(b) New York also has two provisions:

§35.20 "A person in possession or control of premises, as that term is defined in section 140.00, or a person who is licensed or privileged to be thereon, is justified in using physical force upon another person when and to the extent that he reasonably believes it necessary to prevent or terminate what he reasonably believes to be the commission or attempted commission of a criminal trespass by such other person in or upon such premises; but he may use deadly physical force under such circumstances only (a) in defense of a person as prescribed in section 35.15, or (b) when he reasonably believes it necessary to prevent what he reasonably believes to be an attempt by the trespasser to commit arson."

§35.25 "A person is justified in using physical force upon another person when and to the extent that he reasonably believes it necessary to prevent what he reasonably believes to be an attempt by such other person to commit larceny or criminal mischief involving property; but he may use deadly physical force under such circumstances only in defense of a person as prescribed in section 35.15."

(c) Wisconsin §939.49:

"(1) A person is privileged to threaten or intentionally use force against another for the purpose of preventing or terminating what he reasonably believes to be an unlawful interference with his property. Only such degree of force or threat thereof may intentionally be used as the actor reasonably believes is necessary to prevent or terminate the interference. It is not reasonable to intentionally use force intended or likely to cause death or great bodily harm for the sole purpose of defense of one's property.

(2) A person is privileged to defend a third person's property from real or apparent unlawful interference by another under the same conditions and by the same means as those under and by which he is privileged to defend his own property from real or apparent unlawful interference, provided that he reasonably believes that the facts are such as would give the third person the privilege to defend his own property, that his intervention is necessary for the protection of the third person's property, and that the third person whose property he is protecting is a member of his immediate family or household or a person whose property he has a legal duty to protect, or a merchant and the actor is the merchant's employe or agent.

(3) In this section "unlawful" means either tortious or expressly prohibited by criminal law or both."